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CALIFORNIA REPORTER

63 PACIFIC REPORTER

130 Cal. 607

PEOPLE ex rel. THISBY v. RECLAMATION DIST. NO. 556. (Sac. 606.)

(Supreme Court of California. Dec. 7, 1900. RECLAMATION DISTRICT—PRIOR ORGANIZATION—DISSOLUTION—DE FACTO EXISTENCE—COLLATERAL ATTACK—APPEAL—JURISDICTIONAL DEFECT.

1. Swamp-land district No. 8 was set apart by the state board of swamp-land commissioners in 1861. Thereafter Act April 2, 1866 (St. 1865-66, p. 799), was passed, providing that swamp lands should be turned over to the respective counties for reclamation purposes, and that the county supervisors should assume the duties of the swamp-land commissioners. Act March 28, 1868 (St. 1867-68, p. 507), substituted new methods of reclamation; and section 32 prescribed that, after any swamp-land district then formed had organized under the act, the county supervisors should turn over all matter relating to the district, provided that until such organization said districts now formed should proceed under the laws then in force. Section 71 repealed the act of 1866 and other acts. District No. 8 took no steps to reorganize. Thereafter the reclamation district, defendant herein, was formed under Pol. Code, § 3446, and included a portion of district No. 8. *Held*, in quo warranto proceedings to test validity of defendant's organization alleged to be void on the ground that district No. 8 still existed by virtue of section 32 of the act of 1868, that the proviso in the latter section did not apply to districts taking no steps to reorganize, and hence district No. 8 had no existence thereunder, and did not prevent defendant's organization.

2. The objection that the board of supervisors had no jurisdiction to grant a petition to form a reclamation district, because the description of the land therein was insufficient under Pol. Code, § 3446, could be first taken on appeal; it not appearing that the defect could have been cured by evidence in the lower court.

3. Plaintiff instituted quo warranto proceedings against a reclamation district, claiming that it included land within an earlier district, but failed to show that the latter had a de jure existence. Plaintiff then relied on a de facto organization. *Held*, that defendant was not precluded from controverting the de facto organ-

ization by the rule prohibiting collateral attacks.

4. An insufficient petition for the formation of a reclamation district was approved by the board of supervisors. No business was transacted by the district for 15 years. Thereafter the supervisors were requested to call an election for trustees, and trustees were chosen. They employed an engineer to make plans, and his report was approved. The supervisors later appointed persons to assess the land. No further business was transacted. The trustees joined with other persons, and formed the defendant district, embracing the same lands, and commenced reclamation. *Held*, on quo warranto proceedings setting up the prior district as a bar to defendant's organization, that a finding against the former's de facto existence was supported by the evidence.

In bank. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Quo warranto by the people, on the complaint of Rebecca Thisby, against reclamation district No. 556. From a judgment for defendant, plaintiff appeals. Affirmed.

W. F. Fitzgerald, Ex Atty. Gen., Johnson & Johnson, and Grove L. Johnson (Devlin & Devlin, of counsel), for appellant. A. L. Shinn, W. A. Gett, and Catlin, Shinn & Catlin, for respondent.

PER CURIAM. Quo warranto. The complaint alleges that defendant is illegally claiming to be and acting as a reclamation district, and that the organization of defendant was unlawful, and that it never became a reclamation district. A general demurrer was overruled, and defendant answered, alleging the regular formation of defendant as a reclamation district on the 8th day of September, 1893, under the provisions of the Political Code. Defendant had judgment that it "was a public corporation, to wit, a reclamation district, legally organized and existing under the laws of the state of California, and legally entitled to exercise corporate functions and powers." A motion for a new trial was denied, and plaintiff appeals from the order and from the judgment.

The court found that defendant was organized under section 3446 of the Political Code. Appellant does not dispute that on the face of the proceedings defendant was regularly organized. It is claimed by plaintiff that on July 13, 1861, the state board of swamp-land commissioners, pursuant to law, formed the entire body of land known as "Andrus Island," in Sacramento county, comprising about 7,624 acres, into a swamp-land district, designated as "Swamp-Land District No. 8," a portion of which was included within the boundaries of defendant district; that under the act of March 28, 1868 (St. 1867-68, p. 507), known as the "Green Act," the board of supervisors of said county, on April 7, 1869, organized reclamation district No. 75 out of part of the land included in district No. 8; that said board, on December 9, 1874, organized another reclamation district from the lands in said Andrus island, including part of the land in district No. 75, and known as "Rec-

lamation District No. 213"; that each of these districts includes lands embraced within the boundaries of defendant district; that if any one of them has a legal existence the defendant district cannot stand, since it was not organized under section 3481 of the Political Code relating to the formation of a district from lands already embraced within the boundaries of an organized district, but was formed under section 3446 of said Code, upon the assumption that no organized district stood in its way. The court found that neither district No. 8, nor district No. 75, nor district No. 213, has now, or ever has had, any legal existence as a swamp-land or reclamation district.

1. Appellant interposes the organization of swamp-land district No. 8 as an insuperable barrier to the valid organization of defendant district. District No. 8 was set apart as a swamp-land district under the act of 1861, *supra*. The scope, purpose, and effect of this act were concisely, yet comprehensively, set forth in *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016, which was a case similar to the one now presented. All the points made in support of district No. 8 in this case were made in the case cited, except that it is now claimed that section 32 of the act of March 28, 1868, was overlooked, and that the effect of this section was to leave district No. 8 in the control of the board of supervisors under the act of April 2, 1866. St. 1865-66, p. 799. The act of 1868 substituted a new scheme for the reclamation and sale of swamp and overflowed lands to take the place of the various schemes developed in preceding statutes. At the close of section 32 is found the following provision: "* * * After any district now formed shall organize under the provisions of this act, the supervisors of the county shall turn over to the trustees all the books and papers in their possession relating solely to that district: provided, that until such organization said districts now formed shall proceed under the laws now in force." Appellant calls attention to the plain language in this proviso, and claims that to give it effect, as must be done, there is no escape from his position, and therefore district No. 8 is still operating under the act of 1866. Section 71 of the act of 1868 expressly repeals the act of 1866, together with a number of other acts on the same subject, and we have no doubt that the later act was intended to take the place of the act of 1866, and not to leave the latter act in force as to all districts theretofore organized. It certainly was not intended that the two acts were to remain in force, else the act of 1866 would not have been in terms repealed, and some more explicit provision would have been placed in the act showing such intention. The later act contemplated a reorganization of the districts previously formed, but it very properly provided that such districts as intended to continue in existence should, during the period of transition, proceed under the

laws theretofore in force. The proviso applied to reorganized districts, but did not, and was not, in our opinion, intended to apply to a district, like No. 8, that took no steps to reorganize, and, so far as the record shows, transacted no business after May 5, 1869. At this last meeting the board of supervisors passed a resolution annulling all contracts for works of reclamation in the district, and directed the clerk to notify the controller of the state that all contractors have been fully paid for work contracted prior to March 28, 1868 (the date of the passage of the act of 1868), and requesting him to transfer to the supervisors of Sacramento county all books and papers in his possession relating to said district, and to draw his warrants for the cash balances, if any, standing to the credit of said district. This action was apparently in compliance with section 47 of the act of 1868, and is consistent with an intention to reorganize under the act, and we find nothing in any of the minutes offered in evidence to show that the district attempted or desired to continue its existence under the repealed act of 1866 or any other act. Respondent presents sundry requirements of the act of 1861 with which the district failed to comply, and which it is claimed were essential to the forming of a district, but we do not deem it necessary to go over this ground. We are satisfied that the court correctly held, in *People v. Reclamation Dist. No. 551*, that districts formed under the act of 1861 went out of existence when by the later acts the legislature changed its policy for their government and control; and, as appellant claims to be a district under the act of 1861, we must hold that it no longer exists.

2. Appellant makes a feeble claim that district No. 75 was legal, and stood in the way of forming the defendant district. All that is said in support of the claim is that the petition was in due form, properly published, and duly approved by the board of supervisors. It does not appear that it ever after assumed to act, or that any business was transacted in its name. The court, however, found that none of the lands included within the boundaries of this district fell within the boundaries of defendant district, and this finding is not attacked. There is, then, no conflict here.

3. But appellant contends, if there be doubt as to the existence of district No. 75, because formed under the act of 1868, there can be no doubt that district No. 213 was legally organized under the Political Code as it stood when it was organized December 9, 1874. Section 3446 of that Code required the petition, among other things, to set forth "a description of the lands by legal subdivisions or other boundaries." The petition described the various bodies of land as "tract all of swamp land survey Nos. 329 and 330," and similarly as to all the tracts of the several petitioners. The same method of description was held jurisdictional and insuff-

ficient in *Ralston v. Board*, 51 Cal. 592, and also in *Ferran v. Board*, Id. 307. *Ralston v. Board* has never been overruled or questioned, so far as we are advised, and we see no reason why it should be. Appellant does not dispute the correctness of these decisions, but meets them by claiming (1) that the decision of the board of supervisors on the question is final; (2) that their decision cannot be collaterally attacked; (3) that a corporation cannot be attacked collaterally; and (4) that at the trial defendant did not make the objection, and it is too late to raise the question now. Defendant did not at the trial make the specific objection that the land was not described in the petition. The objection upon the offer of the petition was that it was irrelevant, immaterial, and incompetent, and some specific objections were stated, but none directly reaching the point in question. Appellant cites numerous cases to show that an objection cannot be first raised in the supreme court, especially one which could have been cured in the lower court, and two cases are cited, to wit, *Howard v. Harman*, 5 Cal. 78, and *Shay v. Superior Court*, 57 Cal. 541, to the point "that an objection as to jurisdiction must be raised first in the court below." In the first of these cases the objection was that no appeal bond had been filed in the justice's court when the appeal was taken to the county court. The objection was not made in the court below, and it was held too late to make it here, because if it had been made in the county court, it would have been its duty to hear the excuse for the failure, and if sufficient to allow the bond then to be filed. In the other case there were some defects in the proceedings to appeal the case from the justice's court to the superior court as to which no objection was raised until the case came here, where it was urged that the superior court had no jurisdiction to try the case. It was held that, as no objection was made to the regularity of the proceedings in the court below, it was too late to take advantage of the insufficiency of the notice of appeal or of the undertaking. The many cases cited by appellant relate to questions of incompetent evidence, admitted without objection, to the regularity of proceedings, or to objections which, if presented in time, might have been obviated. In the case now here there is no dispute but that the petition as shown in the record is the petition as presented to the board of supervisors. It is not suggested that any evidence would have cured the defect in the description, or that it could have been cured. The objection here goes to the jurisdiction of the board to act upon the petition. It does not depend upon their adjudicating certain facts upon the existence of which their jurisdiction depended. Their jurisdiction depended upon the presentation of a petition setting forth the jurisdictional facts, failing in which the petition conferred no juris-

diction, and the objection could have been taken at any stage of the proceedings, and can be taken for the first time here. In *re Grove Street*, 61 Cal. 438.

Appellant contends, conceding that the steps taken were not legally sufficient to form district 213, that it was a de facto corporation, and cannot be attacked collaterally nor otherwise, except in a suit by the state; citing *Dean v. Davis*, 51 Cal. 406, and *People v. La Rue*, 67 Cal. 526, 8 Pac. 84, and some other cases. In the present instance it does not appear to be necessary to consider whether and to what extent defendant is attacking district No. 213 collaterally. Defendant answered the challenge of the state by showing a charter grounded upon strict compliance with the law. The form and regularity of the proceedings by which it was called into existence are not questioned. But plaintiff interposes what it claims is a legally organized district, which embraces all of the land included in defendant district, and therefore it is claimed that defendant was not legally formed. Plaintiff, as we have seen, failed to show compliance with the law, and proof of its de jure existence failed. Plaintiff then relied on a de facto organization, and certain evidence was submitted in support thereof. Its de facto existence became an issuable fact, as much as did the fact of its de jure existence. The rule invoked by plaintiff does not preclude defendant from controverting the de facto existence of the district asserting it. *Oroville & V. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354; *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368. What are the facts? An insufficient petition was filed December 9, 1874, with the board of supervisors, and was on that day approved. Nothing further was done until July 8, 1890, when one of the original petitioners filed a petition asking an order of the board to call an election for trustees, which was done by the board; it appearing that by-laws had been previously adopted, although at what date does not appear. On October 3, 1890, the result of the election was reported to the supervisors, showing the election of Sol. Runyon, G. A. Knott, and P. Crew as the trustees chosen. On February 6, 1891, the trustees reported to the board of supervisors that they had "employed an engineer to survey, plan, locate, and estimate the cost of the works necessary for such reclamation," etc.; that he had made a report in writing which they had approved January 14, 1891, and inclosed with their report to the board a copy of the engineer's report. The trustees requested the board of supervisors to appoint three disinterested persons to view and assess upon the lands a charge proportionate to the whole expense of \$40,000 (the estimated cost of the work), etc., and on February 6, 1891, the board appointed three persons as prayed for by the trustees. No further action has been taken by the district. On August 7, 1893, 2½ years

after the last action of district 213, petition for the organization of defendant was filed, and was signed by Runyon, Knott, and Crew, who were trustees of district 213, and by the owners of more than half of the land included in district 213, and defendant district included all the lands within the boundaries of district 213. The court found that the prior districts never had any legal existence, and the finding rests upon the lack of any legal organization such as made them corporations de jure, and upon the evidence tending to show that they were not claiming in good faith to be districts, nor doing business as such, and were not corporations de facto. Just how much business must be done by a corporation assuming de facto powers, or what facts showing good faith are necessary to constitute the corporation a de facto organization, can be determined by no fixed rule. In this case it appears that nothing was attempted to be done after the petition was filed for over 15 years. The supervisors were then asked to call an election for trustees of the district, and this was done, and trustees were chosen. They employed an engineer to make a plan, and he reported and the report was approved. The supervisors were asked to appoint persons to assess the lands, and this the board did in 1891, since which time nothing further has been done. The trustees appointed for district 213 united with other of the original petitioners, and formed a new organization, embracing all the lands included within district 213, and were going forward with the work of reclamation, when this action was begun. None of the petitioners for district 213 are complaining, and there is no evidence that any person interested desires that the district should be kept upon its feet. It has no legal existence, and its right to continue because a de facto concern is interposed now rather to defeat what appears to be an effort, after many years of inaction, to do something towards keeping faith with the general government, and for the benefit of the landowners, than to enable it to go forward itself to do the work contemplated in its creation. It would seem to be an effort to prevent reclamation rather than to promote it, and we cannot, therefore, say that the finding of the court is unsupported by the evidence. The judgment and order are affirmed.

BEATTY, C. J. I concur in the judgment, but I dissent from so much of the opinion as rests upon the proposition decided in *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016, that swamp-land districts formed under the act of 1861 ceased to exist after the passage of the Green act in 1868. I think all districts which had been "formed" in the sense of section 32 of the latter act (St. 1867-68, p. 515) were by that section kept in existence, and that for the purposes of such districts, until reorganized under

the new law, the original act of 1861 and the amendatory act of 1866 remained in force notwithstanding their repeal for all other purposes. If, therefore, district No. 8 was ever "formed," within the meaning of the Green act, I should be forced to conclude that it was still in existence when the proceedings were had for the organization of the defendant, and that those proceedings, under section 3446 of the Political Code, were ineffectual.

But the superior court has found, upon evidence which I think sustains the finding, that district No. 8 never had a legal existence. It seems to have acquired the designation of "Swamp-Land District No. 8" solely by reason of the petition for its formation and the order of the commissioners for a preliminary survey. From that time forward, it was called "Swamp-Land District No. 8" in reports of engineers and state officers and acts of the legislature. But it clearly was not constituted a swamp-land district by a mere order of the commissioners for a preliminary survey, the only result of which might be to demonstrate the fact that no reclamation could be effected. And yet, for the purpose of that order, and for the purpose of designating the fund out of which the expenses of the preliminary survey were to be paid, it might be, as in fact it was, conveniently designated as "Swamp-Land District No. 8." The result of the preliminary survey, made under the order of the commissioners, was to show the reclamation could not be effected with the funds available, and no plan of reclamation seems to have been adopted, no contract was let, and all proceedings ended with the payment of the expenses of the survey. This was not, in my opinion, a formation of the district in the sense of section 32 of the act of 1868. It was not within the reason of that proviso. Such, indeed, seems to have been the view of the matter upon which the board of supervisors, and all others concerned, have acted during a period of nearly 40 years prior to the proceedings for the formation of the defendant. Upon the grounds thus briefly indicated, I hold that swamp-land district No. 8 was no obstacle to the formation of defendant, and as to the other districts I concur in the principal opinion.

130 Cal. 630

MIZE v. HEARST. (S. F. 1,595.)

(Supreme Court of California. Dec. 11, 1900.)

APPEAL—VERDICT—AMOUNT—WHEN SET ASIDE.

Where the verdict in an action for libel was not so large as to show passion, prejudice, or corruption, it will not be set aside on appeal as excessive.

Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by E. J. Mize against W. R. Hearst,

From a judgment in favor of plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

W. H. L. Barnes, for appellant. J. C. Bates, for respondent.

PER CURIAM. Action to recover damages for the publication of a libel by defendant in his newspaper the Examiner. The jury returned a verdict for plaintiff in the sum of \$2,650, for which amount judgment was rendered. Defendant appeals from the judgment and from an order denying his motion for a new trial.

No exception is taken to any ruling of the court below at the trial, nor is any alleged error of law presented; and the sole point made here for the reversal is that the amount of the damages found by the jury is excessive. But, on well-settled principles, an appellate court is not warranted in setting aside the verdict of a jury on this ground unless the amount of damages assessed is so unreasonably large and extravagant as to show that the jury were actuated by passion, prejudice, or corruption; and it is sufficient to say that the record here does not show such a case. The judgment and order appealed from are affirmed.

120 Cal. 616

RAUER v. MERANI et al. (S. F. 1,383.)

(Supreme Court of California. Dec. 10, 1900.)

ASSUMPSIT—GOODS SOLD—TIME OF PAYMENT—EVIDENCE—CONSTRUCTION.

In an action for the price of goods, plaintiff's evidence tended to show a sale in August, on Saturday, payment to be part on Monday following, part the following week, and the balance the following week. Defendant's evidence was that the terms of payment were 30, 60, and 90 days, in accordance with notes payable September 15th, October 15th, and November 15th. The action was commenced August 28th, and there was judgment for the whole price in favor of plaintiff. *Held*, that the judgment was not supported by the evidence, since, in the absence of other proof as to the date in August on which the sale was made, it was inferable from defendant's 30-day note that it was on August 15th; and as, under plaintiff's evidence, there was a credit of 14 and 21 days for the second and third payments, the whole purchase price was not due on August 28th, when suit was begun.

In bank. On rehearing. Reversed.

For opinion in department, see 61 Pac. 76.

BEATTY, C. J. This is a suit to recover the price of goods sold. Plaintiff had judgment, and defendants appeal from the judgment and from an order denying a new trial. The claim on the part of appellants is that the action was commenced before payment was due, and their evidence is to the effect that the goods were sold on 30, 60, and 90 days' time, as evidenced by three promissory notes executed and delivered by them, payable September 15th, October 15th, and November 15th. The complaint was filed August 28th. The assignors of plaintiff, who

sold the goods, testified that, although the notes referred to were executed and tendered by defendants, they were not accepted, and that the sale was not upon the time specified therein. As to the real terms of the sale the testimony of one of the vendors was quite indefinite, but not inconsistent, with that of his co-partner, who stated that the goods were sold on Saturday, and were to be paid for \$100 on the following Monday, \$100 the following week, and the balance the week following. As the whole of the second and third weeks, respectively, were allowed for the second and third payments, there was a credit of 14 and 21 days given according to the only evidence introduced by the plaintiff. The goods were sold in August, but the evidence does not show at what date, and, consequently, it does not appear that more than \$100 was due at the time the action was commenced. If the sale took place on the 15th, as may be inferred from the evidence of defendants that their first (or 30-day) note was made payable on September 15th, the final payment, even according to plaintiff's evidence, was not due on August 28th, when the complaint was filed. This being so, the judgment, which was for the whole price of the goods, is unsupported by the evidence. The judgment and order appealed from are reversed, and cause remanded.

We concur: TEMPLE, J.; VAN DYKE, J.; GAROUTTE, J.; McFARLAND, J.

130 Cal. 621

In re KRUGER'S ESTATE. (Sac. 757.)

(Supreme Court of California. Dec. 11, 1900.)

ATTORNEY AND CLIENT—NEGLIGENCE—COMPENSATION

1. A finding by a probate court that services rendered by an attorney for an estate in an action against it were rendered in connection with the administration of the estate cannot be questioned by the executors or attorney on appeal by heirs from an order fixing the compensation of the attorney for services rendered the estate.

2. The fact that an attorney for an estate did not ask for compensation for services rendered in an action against it will not prevent the consideration of the question of the attorney's negligence in that action in fixing his compensation as attorney for the estate.

3. Where an attorney for an estate, in an action against it, failed to explain his delay in having a statement and amendments, on a motion for a new trial, presented for settlement, embodied in the statement, and evidence of such fact was given in fixing his compensation for services to the estate, an argument thereon may be made for the first time on appeal from the order fixing the compensation.

4. Where an attorney for an estate in an action against it appointed a day too late for presentation for settlement of a statement and amendments on a motion for a new trial, and failed to explain the delay, so that an appeal based thereon was dismissed, and judgment rendered against the estate, such facts constituted negligence, and should be considered in fixing the attorney's compensation for services to the estate.

Department 2. Appeal from superior court, Nevada county; F. T. Nilon, Judge.

On the settlement of the account of the executors of the estate of W. H. Kruger, deceased, a fee was allowed the attorney for the estate, and from the decree fixing the amount certain heirs and legatees appeal. Reversed.

Fred T. Searls and Geo. T. Wright, for appellants. P. F. Simonds, for respondent.

TEMPLE, J. This is an appeal from a decree settling the sixth account of the executors, and the appellants seek to reverse the order or decree as to the allowance of the sum of \$6,000 for legal services rendered the executors. The attorney was employed in 1891, with the understanding that he should render such services as the executors might require, and that he should receive such compensation for his services as the court should deem reasonable,—meaning, no doubt, such sum as the court would allow to the executors. Upon the settlement of the fifth annual account, one of the executors asked the court to fix the value of the legal services rendered, which the court then did. From that order the present appellants appealed to this court, and the order was reversed on the ground that the claim for an allowance of an attorney's fee was not contained in the account as filed, and those interested in the estate had no notice that such allowance would be made. 123 Cal. 391, 55 Pac. 1056. After filing the remittitur from this court on that appeal, the sixth account was filed, in which the statement was contained that the attorney was entitled to be paid a reasonable fee for valuable services rendered by him, such fee to be fixed by the court on that settlement. Upon the day for such settlement the appellants, who claim to be the heirs and legatees of the decedent, objected to the allowance of any attorney's fee, on the ground, substantially, that the estate had been injured by the negligent performance of duty by the attorney in a sum far exceeding the claim made on behalf of the attorney. The court allowed as an attorney's fee \$6,000, which ruling the appellants claim is not sustained by the evidence.

There was testimony to the effect that the services were worth \$10,000, and this testimony was not directly controverted. Indeed, it may be said the contestants admit that the fee allowed would be reasonable but for the fact that through the negligence of the attorney in a certain law suit brought against the estate it incurred a loss of a large amount of property, and was compelled to pay \$17,000, besides costs, which would have been saved to the estate if the attorney had properly discharged his duty. It was contended on behalf of the attorney that his employment and the service he rendered in the action alluded to was separate and distinct from his employment as attorney for the executors in the administration of the estate, but the court found against him on this point,

and neither he nor the executor can question the ruling. We are bound to regard the service rendered in the suit as part of the service rendered in pursuance of his employment to aid the executors generally, and the fact that he did not ask for any compensation for service rendered in that case will not prevent the question of such alleged negligence from being considered in fixing his compensation as attorney for the executors.

The suit in question was brought by one P. Henry against the executors of W. H. Kruger, deceased, and also against the executors of E. J. Brickell, deceased, said Brickell having been a partner in business with Kruger, deceased, to obtain an account in regard to certain property alleged to have been held in trust by Kruger and Brickell, for judgment in the sum of \$62,000, and to compel the conveyance of certain property. The defendants answered, denying the alleged rights and equities, and all indebtedness; the said attorney representing the estate of Kruger in pursuance of said employment. Judgment went against said executors for a reconveyance of the property, and for \$28,000 found to be due said plaintiff on the accounting, and for costs. The executors, by their said attorney, in due time took the proper steps to move for a new trial, and said attorney duly prepared and served a statement on said motion November 21, 1893. The plaintiff in that action served his proposed amendments to said statement, November 28, 1893. On the 2d day of December, 1893, said attorney notified plaintiff's attorney in that action that the proposed amendments would not be accepted, and that the statement and proposed amendments would be presented to the judge for settlement, December 11, 1893, which was three days too late. At the time of settlement the plaintiff in that case objected to the settlement on that ground, and, when his objection was overruled, caused his objection to be certified in the statement, and, although there was an apparent failure to present the statement for settlement in time, the moving party did not cause to be inserted any saving explanation. Afterwards the supreme court, on motion of the respondent in that case, dismissed the appeal, solely for this defect. *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599. The reasoning upon this point is tersely stated in the syllabus: "Where the record shows that the proposed statement on motion for a new trial, and the proposed amendments thereto, were presented to the judge upon notice after the expiration of the ten days prescribed by law, and that the settlement was objected to by the other party, and no excuse appears in the record for the delay, the delay is fatal," etc. The court said: "Here no excuse for the delay is shown, and it can make no difference whether it was for three days, or fourteen days, or seven months." It will be seen that the charge of negligence is, first, in failing to present the proposed statement and proposed amendments to the judge

for settlement within the period provided, to wit, within 10 days after receiving the proposed amendments; or, in case there was a valid excuse for the delay, in failing to have the facts constituting such excuse incorporated into the statement.

Confessedly, the statement and proposed amendments were not presented to the judge within 10 days; and confessedly, also, when they were so presented the settlement was objected to on the ground that the court had lost jurisdiction of the case, and could not then settle the statement because of such delay, and, the objection being overruled, were incorporated into the statement, which did not disclose any excuse for the delay. And it must be admitted that for one of these reasons the order for a new trial which was made, based upon such statement, was reversed.

The respondent here contends that such excuse did exist; that he handed the proposed statement and amendments to the judge in the presence of Mr. Ford, who represented the plaintiff in the action of Henry v. Merguire et al., and the judge then appointed the day for settlement, and notice was given of such appointment. This, it is contended, is equivalent to the method provided in section 650, Code Civ. Proc., which authorized him to hand the papers to the clerk for the judge, who then must appoint a day for settlement, of which the clerk must give notice. It is also contended that since the opposing attorney was present notice to him was not necessary, and this was itself a presentation to the judge for settlement. The notice actually given of the day when it would be presented for settlement is inconsistent with each contention, and when the documents were handed to the judge admittedly no notice had been served on Mr. Ford, and the attorney then testified that Mr. Ford then made objection to the proceeding, though he did not remember what specific objection it was. Certainly, then, the law was not complied with, and Mr. Ford did not consent to the day appointed.

But, if these facts constituted an excuse, they should have been stated in the statement when it was settled. The objection was made that the court had no power to settle and certify the statement because of the lapse of time, and without explanation no one could have doubted that the objection was good. The court overruled the objection, and Mr. Ford had his exceptions duly certified. Then it was plainly incumbent upon the moving party to cause the justification for the delay to be certified in the statement. This construction of the statute had been declared by this court. *Higgins v. Mahoney*, 50 Cal. 444; *Tregambo v. Mining Co.*, 57 Cal. 504; *Connor v. Road Co.*, 101 Cal. 429, 35 Pac. 431.

Counsel for appellant say the point that the excuse was not incorporated in the statement was not made in the probate court. The fact was proven, and when the attorney for the

executors was testifying his attention was called to it. He said: "These facts were not incorporated in the statement on motion for a new trial. Counsel did not then believe * * * that seven days was invalid when five should be required." Of course, no such objection that seven days' notice was given was ever made, but the remark shows that the point was made. But there is no such rule that points not made at the trial cannot be made here, but that certain objections to evidence or the procedure cannot be made for the first time in the appellate court. This is not an objection in this case, but an argument from the evidence that counsel was negligent. It was not necessary to show that the same argument was made below, and surely the bill of exceptions would not show this, and it may be added that appellants now assert that it was presented and fully argued in the lower court.

The degree of learning and skill, as also the degree of diligence, for which an attorney is responsible was discussed in *Gambert v. Hart*, 44 Cal. 552. It is said: "The true rule of liability undoubtedly is that an attorney is liable for a want of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise." The facts in that case have a close analogy in essential matters to the facts of this case, and upon the principles there declared it cannot be doubted that actionable negligence was shown here.

But even if the negligence was not of such a nature as to be actionable, as stated on the last appeal, it should still have been considered in determining the value of the services. If because of the unskillful or negligent manner in which the service was performed it was a detriment, and not an advantage, no compensation should have been allowed. The order or decree settling the account of the executors is reversed.

We concur: BEATTY, C. J.; McFARLAND, J.

130 Cal. 627

MAY v. HATCHER. (S. F. 1,579.)

(Supreme Court of California. Dec. 11, 1900.)

MORTGAGES—FINDINGS—NECESSITY—AMENDED COMPLAINT—SERVICE—JUDGMENT—VALIDITY—COMMISSIONS—AFFIDAVIT—FILING—NECESSITY—NOTICE—PUBLICATION—INADEQUACY OF PRICE—SETTING ASIDE SALE.

1. Where the record did not show that findings were not waived, the fact that sufficient findings were irregularly put in the judgment, instead of in a separate document called "Findings," did not entitle a purchaser of the mortgagor's interest after foreclosure sale, and who was not a party to the record, to vacate the judgment on motion, since it was not void, and the error could be reviewed only on appeal.

2. The fact that a default judgment was entered one day too soon in foreclosure proceedings did not entitle a purchaser of a mortgagor's interest after foreclosure sale, and who was not a party to the record, to vacate the judgment on motion, since it was not void, but simply erroneous.

3. Under Code Civ. Proc. § 729, providing that a commissioner in foreclosure proceedings must be sworn to faithfully perform his duties, the fact that no written affidavit of the commissioner was on file in the clerk's office, and that the clerk's register of actions did not show that such an affidavit had been filed, was not conclusive evidence that the commissioner was not sworn, and hence did not exclude other evidence that he was sworn, since there is no provision that the affidavit must be filed, or that it should be in writing.

4. The fact that a commissioner in foreclosure proceedings made a sale which was set aside for insufficiency of notice did not invalidate a subsequent sale of which due notice was given.

5. The fact that one publication of a sale by a commissioner under foreclosure had the date June 16th, instead of June 7th, did not vitiate the sale, where sufficient publications were made after the date was changed to June 7th.

6. Inadequacy of price alone is not sufficient to justify setting aside a sale under foreclosure on motion of the purchaser of the mortgagor's interest, after the foreclosure sale, and who was not a party to the record.

Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Action by Sophia May against Michael Ryan and others. Judgment for plaintiff. From an order denying a motion to vacate the judgment and sale, Sewell Hatcher appeals. Affirmed.

N. E. Wretman and Nicholas Bowden, for appellant. J. C. Black, for respondent.

McFARLAND, J. This is an action to foreclose a mortgage executed to plaintiff by the defendant Michael Ryan. Other persons were made defendants, as claiming some interest in the property. Judgment of foreclosure was entered March 1, 1897, and the mortgaged premises were sold by a commissioner appointed for that purpose on June 7, 1897, to plaintiff. On December 4, 1897, —nine months after the entry of the judgment, and three days less than six months after the sale,—Sewell Hatcher, claiming to have purchased the interest of the mortgagor and his wife about five months after the sale, moved the court to vacate the judgment, and also to vacate the sale. The court denied the motions, and from the order denying them Hatcher appeals.

We really observe nothing in the record which would entitle the appellant to have the judgment vacated, even if the motion had been made in time; but the motion was too late, for a judgment, unless void on its face, cannot be vacated on a mere motion unless it be made at least within six months after the entry of the judgment. In the case at bar the judgment was clearly not void on its face. The main contentions of appellant on this point are: First, that the judgment is void because there were no findings; and, second, because after a certain amendment to the complaint had been served on the defendant J. H. Lyndon, who is alleged to have been the assignee in the insolvency of the defendant Michael Kane, and on the defendant Mary Kane, who is alleged to

have been a subsequent judgment creditor of Michael Kane, default was entered against them by the clerk one day too soon. Lyndon and Kane had been brought into court by service of the summons and original complaint. As to the first contention, as a matter of fact there are sufficient findings, although they are irregularly put in the judgment itself, instead of being in a separate document called "Findings." But, if they cannot be considered as findings, it is sufficient to say—First, that the judgment record does not show that findings were not waived, and therefore, under any view, the judgment would not be void on its face for the reason assigned; and, second, the absence of findings would not make the judgment void, but at most would only be error reviewable on appeal.

2. Appellant is not concerned with the supposed rights of Lyndon and Kane. They did not ask to have the default set aside, nor did they make any effort to be allowed to answer the amendment; and, even as to them, what happened after the service of the summons and the original complaint, at most, "rendered the judgment erroneous, simply, not void." In re Newman's Estate, 75 Cal. 220, 16 Pac. 887.

The court did not err in denying the motion to vacate the sale. The point mostly argued by appellant for the reversal of this order is that the commissioner was not sworn to perform his duties. We need not discuss the question here whether his failure to be sworn, if such failure had been shown, would have vitiated the sale, for there was ample proof that he was sworn. Appellant's position is that the facts that no written affidavit of the commissioner was on file in the clerk's office, and that the clerk's register of actions did not show that such affidavit had been filed, are conclusive proof that no oath was taken, and that no other evidence was admissible on the subject. But this position is not tenable. The statutory provision touching the matter is merely that "the commissioner, before entering upon his duties, must be sworn to perform them faithfully." Code Civ. Proc. § 729. There is no provision that he must make a written affidavit, or that an affidavit must be filed anywhere; and there is abundant evidence in the record not only that he was sworn, but that he made a written affidavit. The fact that the commissioner made an invalid sale on May 10, 1897, which the court on plaintiff's motion set aside for insufficiency of notice, etc., did not invalidate the sale afterwards on June 7th. Nor was the latter sale vitiated by the fact that there was one publication of a notice of sale having the date June 16th, instead of June 7th, there being a sufficient publication after it was amended. Something is said in the appellant's brief about inadequacy of price, but that is not one of the grounds of the motion. The evidence introduced on the subject is

exceedingly meager, and simple inadequacy of price, even if shown, is not itself sufficient ground to sustain a motion like the one here in question. There are no other points in appellant's briefs which call for special notice.

The notice of appeal from the orders contains also a notice of appeal from the judgment, but the transcript does not contain the record of that appeal, and, as we understand counsel, that appeal is not before us. Therefore this decision will not be construed as in any way affecting the appeal from the judgment. The orders appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

6 Cal. Unrep. 595

CITY AND COUNTY OF SAN FRANCISCO
v. CENTER et al. (S. F. 1,512.)

(Supreme Court of California, Dec. 10, 1900.)

FORMER ACTION—DECREE—REFERENCE TO
OPINION—CONSTRUCTION.

In a former action brought by defendants against plaintiff to quiet title, the judgment quieted title in defendants, with a proviso that nothing in the decree should impair the rights reserved in the Van Ness ordinance to the plaintiff, over lands that had "then been occupied or set apart" for public use. The opinion of the supreme court deciding that case held that all the rights which the plaintiff had, and which could be conveyed by said ordinance, had passed to defendant's grantor at a time shortly after the passage of such ordinance. *Held*, that the expression "then occupied or set apart," as used in the judgment, had reference to the date of the passage of the ordinance, and not to the date of the commencement of the action to quiet title, or the decree therein.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by the city and county of San Francisco against John Center and others. From a judgment in favor of plaintiff, and an order denying a new trial, defendants Leroy appeal.

Platt & Bayne and E. S. Pillsbury, for appellants. James L. Gallagher, for respondent.

CHIPMAN, C. Ejectment. Plaintiff filed its complaint in this action November 29, 1886, to recover possession of a strip of land extending from Ninth to Eighteenth street, in the city and county of San Francisco, and which was formerly Mission creek. Among the defendants, of whom there is a large number, were Eugene and Georges Leroy, who claimed ownership in and possession of a portion of the land in question, to wit, the northerly and westerly half of Mission creek, extending from Eleventh street (known as "Wood Street" on the Van Ness map) westerly and southerly to a point distant about 26 feet $4\frac{3}{4}$ inches southerly from the southerly line of Alameda street extended westerly through this land. The Leroy land embraces quite a

large tract, but only the part within the creek is in question. Judgment was given in favor of plaintiff against the Leroy, except as to a small, four-sided tract of land, about 25 feet square, situate at the southwest corner of Alameda and Columbia streets, as to which the Leroy had judgment. From that portion of the judgment in favor of plaintiff the Leroy have appealed, and bring the record here by bill of exceptions. No other defendants appeal.

Plaintiff claimed to be seised in fee in trust for the use of the state and for the people of the city and county of San Francisco, and it based its claim of title upon a patent issued by the United States government June 20, 1884, to plaintiff for its pueblo lands; the decree of the United States circuit court in the case of *City of San Francisco v. U. S.*, entered May 18, 1865, confirming the claim of the city to its pueblo lands; and the act of congress approved March 8, 1866, also confirming said claim. The decree and the act of congress are printed in full in 138 U. S. 663, and Municipal Reports San Francisco, 1886-87, Append. 155. The Leroy claimed under decree of the circuit court of the United States, quieting their title against the city and county, and adjudging that they were on, and have been since, October 26, 1883, the owners in fee of the land now claimed by them. On appeal to the supreme court of the United States this decree was affirmed (*City and County of San Francisco v. Leroy*, 138 U. S. 656, 11 Sup. Ct. 364, 34 L. Ed. 1096), with the following modification, as shown by the certified copy of the decree: "* * * By adding the declaration that nothing therein shall be deemed to impair in any respect the rights reserved in the Van Ness ordinance to the city of San Francisco, or to its successor, the city and county of San Francisco, over lands that had then been occupied or set apart for streets, squares, and public buildings of the city, and as thus modified be affirmed." This decree is dated March 2, 1891, and was filed in the United States circuit court at San Francisco December 1, 1891.

Appellants first devote much attention to the proposition that the burden of proof was upon plaintiff to show that there were rights reserved to it under the Van Ness ordinance that would be impaired by the decree pleaded by appellants; they claim, second, that, if the burden was upon defendants, then they, with the assistance of plaintiff, made the proof; and, third and lastly, if any rights in the land covered by Channel street and Mission creek were reserved to the city under the Van Ness ordinance, these rights ceased to exist, because this street and the creek were abandoned by the city.

It becomes necessary to determine at the outset to what period of time the modification of the Leroy decree by the United States supreme court related. Plaintiff contends that it had reference to the date of the decree as entered in the United States circuit court, which

was June 14, 1887. Defendants claim that the modification had reference to the situation as it existed when the Van Ness map was made, showing the reservations then made by the city for streets, etc., under the Van Ness ordinance. The importance of the question lies in the fact that there were other maps made and adopted by the city, subsequent to the Van Ness map, which show that reservations additional to those indicated by that map were made before the decree was entered in favor of the Leroy, and which changed the relation of certain streets to Mission creek, and changed somewhat, apparently, the course and width of Channel street. The opinion of the supreme court was written by Mr. Justice Field, and to this opinion we may look to aid us in arriving at the meaning of the formal decree as subsequently entered by the clerk of the court. It appears from the opinion that in the action brought by the Leroy, they deraigned title through William J. Shaw, who derived title through Kissling, Thorne, and Center, and one Stewart, whose several titles the court held had been fully established under the Van Ness ordinance, running back to a date contemporaneous with that ordinance; that "the title to the lands thus claimed by Kissling and by Thorne and Center, and by Stewart as a purchaser from them of four and a half acres, became, by operation of that ordinance and the confirmatory legislation mentioned, vested in those parties, and by their conveyance passed to William J. Shaw, and was by him conveyed to Eugene L. Sullivan, and thence to the plaintiffs [Leroys] in this suit." The opinion further reads: "All the right, title, and interest which the city held, and which could be conveyed under the Van Ness ordinance, had, therefore, passed to Shaw when the suit to quiet his title was commenced and carried to judgment in the district court of the Twelfth judicial district of the state, and whatever benefit Shaw had acquired by that decree in his favor inured to the benefit of his grantees; the public rights reserved by the Van Ness ordinance being necessarily excepted." The suit here referred to was begun by Shaw on March 28, 1861, and a decree was entered in his favor February 5, 1862, from which no appeal was ever taken. The opinion proceeds: "One of these [i. e. "public rights"] was a reservation, notwithstanding its grant, of lands then occupied or set apart for public squares, streets, and sites for school houses, city hall, and other buildings belonging to the corporation; and the decree in this case should have excepted from its operation lands thus reserved." After discussing the claim of Shaw in the suit above referred to, arising from a deed to him of the tide-land commissioners, the opinion continues: "There was therefore nothing in the deed of the tide-land commissioners which could by any possibility impair the right of the city to exercise the power reserved in the Van Ness ordinance over such portions of the

lands conveyed to occupants under that ordinance as had been occupied or set apart for streets, squares, and public buildings of the city. Such a reservation should have been embodied in the decree in this case." The opinion concludes as follows: "The decree should therefore be modified by adding the declaration that nothing therein shall be deemed to impair in any respect the rights reserved in the Van Ness ordinance to the city of San Francisco or its successor, the city and county of San Francisco, over lands that had then been occupied or set apart for streets, squares, and public buildings of the city, and as thus modified be affirmed; and it is so ordered." We have quoted in an earlier part of this opinion the language of the decree as modified, which modification is identical with that in the concluding paragraph of the opinion of Judge Field. Having in view the facts stated by Judge Field relative to the Shaw title, which is the origin of the Leroy title, it seems quite clear to us that the modification of the Leroy decree relating to the reserved rights of the city had reference to those rights as they existed at a date certainly no later than the Van Ness map, which set forth the reservations then claimed by the city under the Van Ness ordinance. In making subsequent maps and passing subsequent ordinances the city could not destroy any rights that had attached in favor of settlers or occupants of land confirmed to them by the Van Ness ordinance and by the acts of the legislature ratifying the action taken by the city under that ordinance.

The Leroy, brought their action to quiet their title October 26, 1883, and it was still pending on appeal to the supreme court and undecided when, on November 29, 1886, the city brought this present action. If the Leroy decree had not been modified it would have been conclusively determinative of the rights of the Leroy to at least some portion of the disputed land; and being modified in the particular already noticed, and being in all other respects affirmed, the only question is as to what, if any, reservations of the land in controversy did the city make by the Van Ness map. The other maps introduced in evidence—the engineer's map, so called (adopted 1866), and the Humphreys map (adopted 1870)—are of dates subsequent to the Van Ness map, and subsequent to the inception of Shaw's title, as we understand the facts in the Leroy suit against the city. The Van Ness map must therefore govern in determining what reservations were made by the city that in any way conflict with the Leroy lands. The subsequent maps and ordinances may possibly throw some light on the Van Ness map, and aid in arriving at its meaning; but they cannot take the place of that map in the sense that by them, and not by the Van Ness map, are the rights of the present parties to be determined. The trial court evidently took into consideration not only the Van Ness map, but also the

engineer's map and the Humphreys map (which latter, it is agreed, is identical with the engineer's map so far as the land in controversy is concerned), and also other facts, such as that the city had fenced the lands it now claims; that Mission creek had been filled by the city; and other facts occurring since the Van Ness ordinance was passed, and that appeared in evidence. It is also manifest that the trial court regarded the modification of the Leroy decree as relating to its date or to the beginning of their action, and that the findings of the court were more or less influenced by these later maps, and by evidence as to reservations made by the city in some degree, at least, different from those indicated by the Van Ness map. The location of Mission creek with reference to Channel, Alameda, and Columbia streets is different on the Van Ness map from its location on the Humphreys map. On the Van Ness map Mission creek is shown to run west of Columbia street, while on the Humphreys map the creek and that street are nearly coincident at and north of Alameda street for some distance. Channel street on the Humphreys map seems to occupy a different relation to the other streets named and to Mission creek from the Channel street delineated on the Van Ness map. Whether or not the city should be concluded by the Van Ness map as to the exact location thereon given of Mission creek, we at this time express no opinion. Under the view we have taken, however, as to the modification of the Leroy decree, we do not think this court should, in the present state of the evidence in this case, undertake to point out the respective rights of the plaintiff and appellants to any particular lands in controversy, or to pass upon any other questions now before the court. The judgment and order should be reversed, and a new trial ordered as to appellants, to be had upon the evidence already taken and such other evidence as plaintiff or appellants, or either of them, may wish to offer, and as to all other defendants the judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed and a new trial ordered as to appellants, to be had upon the evidence already taken and such other evidence as plaintiff or appellants, or either of them, may wish to offer, and as to all other defendants the judgment is affirmed.

131 Cal. 6

GIBSON v. HENLEY. (S. F. 1,707.)

(Supreme Court of California. Dec. 18, 1900.)
STATUTE OF LIMITATIONS—MONEY HAD AND
RECEIVED—PARTNERSHIP.

A member of a law partnership embezzled money belonging to a client in February, 1893, the partner not knowing of or participating in the fraud; and the client brought action

against the partner to recover the sum so embezzled in February, 1896. *Held*, that the action came within Code Civ. Proc. § 339, as being for money had and received, and, since it was not brought within two years from the time the right of action accrued, recovery was barred.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by Thomas Gibson against Barclay Henley. From a judgment in favor of the plaintiff, defendant appeals. Reversed.

Henley & Costello (Crittenden Thornton, of counsel), for appellant. Samuel Knight, for respondent.

SMITH, C. The appellant, Henley, was sued as a member of the law firm of Henley & McSherry, doing business in San Francisco during the years 1892-93, and judgment recovered against him for \$602.50 and costs. McSherry was made party to the complaint, but was not served. The suit was commenced February 4, 1896,—within three years, but not within two years, of the accrual of the cause of action. The defendant pleaded the two-years statute (Code Civ. Proc. § 339). The sole question involved in this appeal is as to the bar of the statute pleaded, and this again turns upon the question whether the action is to be regarded as an action for relief on the ground of fraud, or merely as an action on contract, or for money had and received. If the latter, the action is barred; otherwise not. The facts on which the question turns are as follows: Henley & McSherry and one Hart of New York were attorneys for the plaintiff in the matter of an estate in process of settlement in Brooklyn, N. Y., in which plaintiff was interested. Hart, on or about February 8, 1893, having collected the money coming to the plaintiff, transmitted to Henley & McSherry, by mail, a check for \$445, payable to the order of the plaintiff. This check was received by McSherry, who, it is found, obtained and embezzled the money. The plaintiff did not learn the fact of the embezzlement of the money until June 2, 1893,—within three years, but not within two years, of the commencement of the suit, which occurred February 4, 1896. There is no allegation that the defendant, Henley, participated in or knew of, or received the benefit of, the money embezzled; indeed, it is expressly found that he did not know of it until on or about November 25, 1893. On this state of facts it is very clear that there is no cause of action for fraud against the defendant, Henley. The complaint shows a fraud committed by his partner, McSherry, but it is not pretended that Henley was in any way connected with it, otherwise than by the existence of the partnership relation. By force of this relation he became responsible for the money received by McSherry, and also for the damages caused by the fraud, if any; but he did not become guilty of the fraud, nor could he be sued di-

rectly for it. There are certain cases where all the members of a firm become participes criminis in a tort, and may be jointly sued. But this is not the case where the only liability for the tort arises out of the partnership relation. In such cases they are responsible only on the principle of agency. 1 Lindl. Partn. 147, 149, 150, et seq.; 1 Bates, Partn. §§ 467, 468, 474-478; Civ. Code, §§ 2330, 2431, 2443. Thus, e. g., where a trespass has been committed by one of the partners in the conduct of the firm business, the offending partner may be sued in trespass, or all the partners jointly in case, but not in trespass. *Moreton v. Hardern*, 4 Barn. & C. 223. So, in the present case, the plaintiff might have sued McSherry for the fraud, but could not have joined Henley; or he might sue both on the firm obligation,—as he has in fact done. It follows that the action was barred by the statute, and, as this appears from the specific facts found, a new trial will be unnecessary. I advise that the judgment be reversed, and the cause remanded, with directions to the lower court to enter judgment on the findings for the defendant.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the lower court to enter judgment on the findings for the defendant.

130 Cal. 618

WHEELER v. KARNES. (S. F. 1,649.)

(Supreme Court of California. Dec. 11, 1900.)
MORTGAGES—FORECLOSURE—APPEAL—BOND
—SURETIES—SUFFICIENCY—EXCEPTIONS—STAY OF SALE.

1. Code Civ. Proc. § 948, authorizes the appellee, on appeal from a judgment directing the sale of real estate, to except to the sufficiency of the sureties on the bond required by section 945 to be given by the appellant in order to stay proceedings, at any time within 30 days after the filing of the bond, and declares that, unless within 20 days after the appellant has been served with notice of such exceptions the sureties justify, the judgment appealed from shall be no longer stayed. *Held*, that where a decree of foreclosure of a real-estate mortgage was appealed from, and on June 2d appellant filed a sufficient stay bond, but a mortgage sale was had June 3d, and 13 days after the sale appellee excepted to the sureties, who failed to justify, the sale should have been vacated, as the bond operated as a stay until the expiration of the period allowed for justification.

2. That some of the sureties on a bond given under Code Civ. Proc. § 945, requiring that, in order to stay proceedings on appeal from a decree foreclosing a real-estate mortgage, appellant must give an undertaking as therein prescribed, were on the bond twice, for different sums, did not vitiate it.

3. Code Civ. Proc. § 945, requires that, on appeal from a decree foreclosing a real-estate mortgage, proceedings cannot be stayed unless appellant execute a bond conditioned that during the possession of the property by him he will not commit waste; that, if the decree be affirmed and the appeal dismissed, he will pay

the value of the occupation of the premises until delivery thereof, and pay any deficiency arising on mortgage sale. *Held*, that it was not necessary that the court's order for the bond to stay proceedings on appeal from a decree of foreclosure should name the separate amounts for waste, occupation, and deficiency.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Suit by C. O. Wheeler against Mary Ellen Karnes and others to foreclose a mortgage. From an order refusing to set aside a sale of mortgaged premises under the decree of foreclosure, defendant Karnes appeals. Reversed.

W. P. Thompson and C. C. Merriam (Lloyd & Wood, of counsel), for appellant. Horace Hawes and H. H. Welch, for respondent.

McFARLAND, J. Judgment in the foreclosure action was entered November 19, 1896, against the appellant, Karnes, and others. On April 8, 1897, the appellant took an appeal to this court from the judgment, by giving and serving notice of appeal and filing a \$300 undertaking, which appeal is still pending. 57 Pac. 893. Afterwards the commissioner appointed to sell the mortgaged premises gave notice of a sale thereof to take place June 3, 1897. On May 29, 1897, the judge of the court below made an order fixing the amount of a bond to stay proceedings, under the provisions of section 945 of the Code of Civil Procedure, at \$3,050; and on June 2d appellant filed a stay bond in that amount, and notified the attorneys for plaintiff that such bond had been filed; and on June 3, 1897, before any attempted sale, she notified the commissioner of the filing of such bond, and that no exception to the sureties thereon had been made, and objected to and protested against any sale being made. Nevertheless the commissioner proceeded on said June 3d and made the sale. On June 16th, 13 days after the sale, plaintiff excepted to the sureties, and they failed to justify. Afterwards, in May, 1898, appellant, on due notice, moved the court to vacate the sale as void because made under the circumstances above stated, and on May 27, 1898, the motion was regularly heard and denied. From the order denying the motion this present appeal is taken.

We think that it was error to refuse to set aside the sale. The fact that after the sale there was an exception to the sureties, and they failed to justify, did not make the bond inoperative at the time the sale was made. The whole matter is one of statutory regulation, and the statute governs irrespective of equitable considerations. The provision of the statute on the subject (section 948, Code Civ. Proc.) is that the adverse party may except to the sureties at any time within 30 days after the filing of the undertaking, and that unless the sureties, or other sureties, justify within 20 days thereafter, "execution of the judgment, order or decree appealed from is no longer stayed." But the

execution is stayed until the expiration of the time allowed for the justification, and therefore in the case at bar, as the stay was operative when the sale was made, the latter was unauthorized and invalid. Of course, some injustice might be done a judgment creditor by the filing of a stay bond with sureties not having sufficient pecuniary ability, but the legislature has not made provision for such contingency. See *Duncan v. Times-Mirror Co.*, 109 Cal. 605, 42 Pac. 147. At the worst the judgment creditor would only suffer some delay through the necessity of postponing the sale until the time had arrived for the justification of the sureties.

The stay bond was sufficient in form and amount. The fact that some of the sureties are on it twice, for different sums, does not vitiate it, and the affidavits accompanying the undertaking were clearly sufficient.

The order of the judge fixing the amount of the stay bond was proper and sufficient in form. *Boob v. Hall*, 105 Cal. 413, 38 Pac. 977. It was not necessary for the judge to name in the order separate amounts for waste, occupation, and deficiency. It was sufficient to name the whole amount which in his judgment would be necessary to meet the requirements of section 495, although the undertaking itself must contain covenants for each of the matters covered by that section. The order appealed from is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

130 Cal. 666

NICOLL v. WELDON et al. (L. A. 779.)

(Supreme Court of California. Dec. 15, 1900.)

JUDGMENT BY DEFAULT—SETTING ASIDE DEFAULT—TERMS OF DEFAULT—INJUNCTION.

1. An order setting aside a default for excusable negligence and inadvertence, as authorized by Code Civ. Proc. § 473, will not be reversed on appeal unless the trial court is clearly shown to have abused its discretion.

2. The delay of a party in making application to have a default set aside for inadvertence and excusable neglect is to be considered by the trial court in determining whether the default shall be set aside.

3. Where the sum which the court requires the defendant to pay to the plaintiff, as terms on which a default will be set aside, is not shown to be inadequate, it will be sustained on appeal.

4. Where an interlocutory injunction granted in a suit to obtain a perpetual injunction is made perpetual by a decree entered by default, the interlocutory injunction will remain in full force on the default being set aside.

Department 1. Appeal from superior court, Kern county; J. W. Mahon, Judge.

Suit by one Nicoll against one Weldon and others. From an order setting aside a judgment by default, plaintiff appeals. Affirmed.

B. Brundage, for appellant. Alvin Fay, for respondents.

HARRISON, J. After judgment had been entered against the respondents in this ac-

tion upon their default, they made application to the court to have the judgment set aside and leave granted them to answer, upon the ground that their default and the judgment entered thereon was taken against them through inadvertence and excusable neglect, and in support of their motion presented affidavits setting forth the facts upon which they relied. At the hearing of the motion no counter affidavits were filed, and the court granted their motion upon the condition that they pay into court for the use of the plaintiff the sum of \$25. From this order the plaintiff has appealed.

The granting or denying a motion to set aside the default of a defendant is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, this court declines to set aside its order. Especially are we indisposed to review its action when it has set aside the default, and it does not appear that the plaintiff has sustained any prejudice thereby. This discretion of the court is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties. Section 473, Code Civ. Proc., is a remedial provision, and is to be liberally construed, so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. *Buell v. Emerich*, 85 Cal. 116, 24 Pac. 644; *Harbaugh v. Water Co.*, 109 Cal. 70, 41 Pac. 792; *Melde v. Reynolds* (Cal.) 52 Pac. 491. It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but, if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court will impose as the condition of granting the motion.

In the present case the court was satisfied from the evidence presented to it that the neglect of the defendants was excusable, and we see no reason for questioning its conclusion in that respect. When this fact had been determined by the court, it was its duty to grant the motion upon such terms as it should deem to be just. The delay in making the application after the judgment had been rendered was a matter to be considered by that court in determining whether to grant the relief, and the terms which it imposed as a condition of granting the motion must, in the absence of any contrary showing, be held to be ample compensation to the plaintiff. It does not appear in the present case

that the plaintiff will be materially, if at all, injured by the delay. He seeks by the action an injunction against the defendants for doing certain acts, and at the commencement of the action obtained a preliminary injunction against them. The judgment obtained by him, and the writ of injunction issued thereon, had the effect merely to make permanent the previous restraining order; and the preliminary injunction is not impaired, nor are the defendants released from its effect, by setting aside the final judgment. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

130 Cal. 654

HAWK v. BARTON. (Sac. 736.)

(Supreme Court of California. Dec. 14, 1900.)

LIMITATIONS OF ACTIONS—ACTION ON AGREEMENT TO PAY JUDGMENT.

1. An action in 1896, on an agreement in 1893 to pay a certain judgment recovered in 1890, is not barred by the five-years limitations prescribed by Code Civ. Proc. § 336, providing that action on a judgment must be commenced within five years, since such action rests on the agreement, and not on the judgment.

2. Where a third person has agreed with a judgment debtor to pay the judgment, and the creditor holds both the judgment and the agreement, he is not bound to proceed first against the judgment debtor, but may sue on the agreement, as the latter is not merely a contract of indemnity.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by E. L. Hawk against O. L. Barton. From a judgment for defendant, plaintiff appeals. Reversed.

White & Seymour, for appellant. A. J. Bruner, for respondent.

CHIPMAN, C. Action on a contract. Defendant demurred to the complaint for insufficiency of facts, and also for the reason that the action is barred by section 336, Code Civ. Proc. Defendant had judgment, from which plaintiff appeals. The complaint alleges that on May 12, 1890, one Matthew Lennox obtained a deficiency judgment for the sum of \$628.66, arising out of a foreclosure suit, against one W. P. Harlow, and that the said judgment is unsatisfied, unpaid, and unreleased; that on May 16, 1893, defendant herein entered into a written contract with Harlow, which recites that defendant on December 12, 1892, had agreed to purchase a certain mine known as the "Harlow Mine," situated in Placer county, for the consideration of \$15,000, and that since said contract of purchase, to wit, on said May 16, 1893, Harlow had delivered to defendant a deed to said mine, duly executed and acknowledged. The contract then reads: "Now, as part of the consideration for said deed, the undersigned

agrees and binds himself as follows to the said W. P. Harlow: First, to pay and satisfy a certain judgment in favor of Matthew Lennox against W. P. Harlow for the sum of six hundred and twenty-eight dollars and sixty-six cents, said judgment in superior court of El Dorado county, dated May 12, 1890." The contract then sets forth certain other payments agreed to be made by defendant, not necessary to be stated here. The contract is signed, "O. L. Barton." Harlow assigned this contract to plaintiff, December 12, 1895. The complaint also avers that Lennox assigned his interest in the judgment to plaintiff on July 7, 1896, and it is alleged that no part of the judgment has been paid, but the whole thereof is due and unpaid; that defendant was notified by plaintiff of said assignments before this action was commenced and demand made upon him to pay and satisfy said judgment, but that defendant refused, and still refuses, to pay the same or any part thereof. There is no brief for respondent, and we are not advised as to the grounds on which the demurrer was sustained. The complaint was filed October 12, 1896, less than four years from the date of the agreement of defendant to pay the judgment. The five-years statute (section 336) relates to judgments, and we suppose defendant's notion was that the action rested on the judgment, and not on the contract. In this we think he erred. The action was founded on a written contract, and was not barred. Code Civ. Proc. § 337. We can only surmise the remaining ground upon which the demurrer was sustained, namely, that the contract was merely one of indemnity. But by its terms it was plainly an agreement to pay and satisfy a certain judgment for a certain sum of money, the full consideration for which defendant had received. Plaintiff is the owner and holder of both the judgment against Harlow and the agreement of Barton to pay it. Plaintiff may look to defendant, whose performance would have the effect to discharge the judgment. He is not bound to look first or at all to Harlow, the judgment debtor; for he holds Barton's written agreement, executed for a good and valuable consideration, to pay this judgment. Whether Barton can by proper plea show that he is discharged from liability on his contract for the reason that the judgment against Harlow was barred when assigned to plaintiff is a question not raised by the demurrer, since the action is on Barton's contract, and not on the Lennox-Harlow judgment, and the only statute pleaded is that relating to judgments. We advise that the judgment be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

CURL v. CURL. (L. A. 808.)¹

(Supreme Court of California. Dec. 14, 1900.)

DIVORCE—CRUELTY—MENTAL SUFFERING—
APPEAL—PRESUMPTIONS.

1. Whether conduct alleged in the complaint causes such grievous mental anguish as to constitute a ground for divorce is a question of fact to be determined by the trial court from the testimony.

2. Where the evidence before the court below is not in the record, and there are no findings of fact, it must be assumed, in support of a judgment for divorce, that the evidence was sufficient to support the allegations of the complaint.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Bill for divorce by W. T. Curl against Ellen J. Curl. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Walter Bordwell, for appellant. Diehl & Chambers, for respondent.

HARRISON, J. The plaintiff brought this action against the defendant for a divorce, and set forth in his complaint certain conduct by her which he alleged had caused him great suffering and grievous mental anguish. The conduct with which the defendant was thus charged was that she had at a certain date clandestinely visited the house and home of another man during the absence of his family, and had secretly remained there with him for more than one hour, and had at divers other times secretly and clandestinely met him, and in company with him gone to places unknown to the plaintiff, and had remained away for several hours, and that he had at divers times visited the home of the plaintiff and defendant during the absence of the plaintiff, and while the defendant was alone, and upon each of said occasions had remained in said house in company with the defendant alone for several hours. The defendant made no answer to the complaint, but suffered default, and, after hearing proofs of the matters alleged, the court granted the divorce. The present appeal is taken from this judgment, without any bill of exceptions.

Whether the conduct of the defendant, as above set forth in the complaint, caused the plaintiff grievous mental anguish, was a question of fact to be determined by the court from the testimony before it at the hearing. *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; *Fleming v. Fleming*, 95 Cal. 430, 30 Pac. 566; *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298. The evidence before the trial court is not before us, and, as there are no findings of fact, it must be assumed in support of the judgment that the evidence was sufficient to support the allegations of the complaint, and that the court found therefrom that the conduct of the defendant had caused the plaintiff grievous mental anguish. If so, she was guilty

¹ Rehearing denied January 10, 1901.

of extreme cruelty, and the judgment was correct. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(130 Cal. 639)

NAPHTALY et al. v. ROVEGNO et al. (S. F. 1,654.)¹

(Supreme Court of California. Dec. 14, 1900.)

JURY—COURT RULES—COMPLIANCE.

Where a party fails to comply with a rule of the trial court requiring a party demanding a jury to deposit the fees necessary therefor before the commencement of the trial, the denial of a jury trial is not error.

Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by Joseph Naphtaly and another against Stefano Rovegno and others. Judgment for plaintiffs, and from an order denying a motion for a new trial certain defendants appeal. Affirmed.

James A. Devoto, for appellants. Naphtaly, Freidenrich & Ackerman, for respondents.

McFARLAND, J. This is an action for a partition of certain described land. The defendants Rosa Rovegno and Giacomo Rovegno appeal from an order denying their motions for a new trial. The only point which they insist on for a reversal of the order is that the court below erred in denying their demand for a jury. Whether or not certain issues in the case were of such a character as to give to appellants the general right to have them tried before a jury is a question not necessary to be here determined; for we think that the court, for specific reasons hereinafter mentioned, did not err in refusing the demand. The case was tried on the 20th of October, 1896, but it had been on the trial calendar several weeks prior to that time, marked as a "court" case, as distinguished from a "jury" case, in accordance with the custom of the court. This fact was well known to the parties, and appellants never asked to have it changed from "court" to "jury," and had not demanded a jury until the said 30th of October. On the latter day, when the case came on regularly to be tried, one of the defendants (Stefano Rovegno) moved for a continuance, and, the motion having been denied, demanded a jury, and the demand was denied. Then these appellants, who had not joined in the motion for a continuance, also demanded a jury, and their demand was refused. On September 20th the case had been called for trial, and appellants had answered "Ready" without any intimation that they desired a jury; but, owing to the number of cases before it on the calendar, it was not reached until October 20th, at which time there was no jury in attendance. The record at this stage merely shows the naked

facts that appellants made a demand for a jury, and that the court denied it. Nothing further appears. But in another part of the record it is shown that there was a rule of court providing that "a party demanding a jury shall before the commencement of the trial deposit with the clerk of the court the fees necessary therefor,"—specifying the amount; and appellants did not make nor offer to make such deposit. In *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488, it was held that such a rule is reasonable, and must be complied with. Under these circumstances it does not appear that the court erred in denying the demand for a jury, and such denial does not, therefore, warrant a new trial. The order appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(6 Cal. Unrep. 600)

PEOPLE v. MACHIADO. (Cr. 609.)

(Supreme Court of California. Dec. 18, 1900.)

LARCENY—INDICTMENT—EVIDENCE—HEARSAY—IMPEACHMENT—INSTRUCTION.

1. An indictment sufficiently describes the stolen property as "one cow, the same being the property then and there of H."

2. In a criminal case, refusal to charge that the jury have a right to consider that innocent men have been convicted, and to consider the danger of convicting an innocent man in weighing the evidence whether there is reasonable doubt as to his guilt, is proper.

3. In a prosecution for larceny of a cow a witness had testified to finding on the premises of accused a "slunk" calf,—that is, one that had been taken from its mother,—and that it had been taken from the stolen cow, to which no objection nor motion to strike out was made. Held, that a question asking for the appearance of the calf as to when it had been taken from its mother, and his answer giving the facts on which his conclusion was based, were not objectionable as assuming that the calf had been taken from "a" cow; not "the" cow,—that is, from the stolen cow.

4. Where a witness, in a prosecution for the larceny of a cow, had testified in reference to a hide found on the premises of accused, but had not testified that any part of a brand on it was indistinguishable, a question, on cross-examination, asking what part of the brand was indistinguishable, was properly excluded.

5. A question to a witness, "Now, when you went to the butcher shop or slaughter house for the first time, you didn't go in?" was properly excluded for uncertainty, as it could not be understood whether it referred to the butcher shop or the slaughter house.

6. Where, in a prosecution for the larceny of a cow, a witness testified, without objection, to the finding of the carcasses of two calves in a certain locality, a question calling for their condition, and the answer to the effect that they were very much decomposed, which was favorable to accused as showing that they could not have come from the stolen cow, were properly admitted.

7. Admission of testimony as to statements of a third person to one accused of a crime, though not accompanied with proof of the conduct of accused, was not error, where accused did not move to strike it out.

8. In a larceny prosecution, a witness testifying that the stolen property belonged to one person cannot be impeached by showing that in another case he had testified that it belonged to another.

¹ For opinion on rehearing, see 63 Pac. 621.

9. In a criminal case, a question of one witness as to declarations of another, who was not himself questioned in relation thereto, was properly stricken out.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

John Machado was convicted of grand larceny, and he appeals. Affirmed.

Grave & Graves, for appellant. Atty. Gen. Ford, for respondent.

SMITH, C. The defendant was indicted with another for the crime of grand larceny. The property stolen is described as "one cow, the same being the property then and there of Hathaway and Branch," etc. The indictment was demurred to on the ground of the insufficiency of this description. The description, I think, was sufficiently certain. 12 Enc. Pl. & Prac. pp. 977, 983, et seq.; People v. Littlefield, 5 Cal. 355, affirmed in People v. Ah Woo, 28 Cal. 211; People v. Stanford, 64 Cal. 27, 28 Pac. 106.

It is claimed the court erred in refusing to give the following instruction: "The jury have a right to consider that innocent men have been convicted, and to consider the danger of convicting an innocent man in weighing the evidence to determine whether there is reasonable doubt as to defendant's guilt." The instruction is substantially similar to an instruction refused in People v. Durrant, 116 Cal. 185, 222, 48 Pac. 75, and comes within the ruling in that case.

Objections are made to numerous rulings of the court on the evidence, but none of them are well taken. The witness Avila had testified, without objection, as to finding on the premises of defendant what he called "a 'slunk' calf,—that is, a calf that had been taken from the cow,"—and was asked, "What was the appearance of the calf, when you saw it, as to when it had been taken from the cow?" The question, and also the answer, which simply gave the facts on which the witness' conclusion was based, were proper. It may be added that the objection was that the question assumed that the calf "had been taken from 'a' cow"; not "taken from 'the' cow,"—i. e. from "the stolen cow," as stated in the brief. The witness had testified some time before that the calf was taken from the stolen cow, giving his reasons; but no objection was made, nor was there any motion to strike out. The question to Avila, referring to the brand on the hide found on defendant's premises, and asking, in effect, which part of it was indistinguishable, was properly excluded. The witness had not testified that any part of it was indistinguishable. So, also, the question, "Now, when you went to the butcher shop or slaughter house for the first time, you didn't go in?" was properly excluded for uncertainty; i. e. because it could not be understood whether it referred to the butcher shop or the slaughter house. The rulings of the court with reference to the testimony of

the witness Cook were also unobjectionable. There was no objection to his testimony that he had found the carcasses of two calves in the creek south of the slaughter house. That evidence had been given without objection. The objection was to the question, "What was the condition of those two carcasses?" and the answer, which was that "they were very much decomposed," was favorable to the defendant as showing that they could not have come from the stolen cow. Nor was it error to allow the question as to what was said by Martinez to the defendant on the occasion referred to in the question. The rule is that such evidence is proper, but must be accompanied with proof of the conduct of the accused, in default of which it may be stricken out. People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; People v. Mallon, 103 Cal. 513, 37 Pac. 512. The prosecution did not offer the additional proof, but there was no motion to strike out. Indeed, the answer could not have had any influence on the minds of the jury, and, if erroneous, would have been harmless. The questions asked this witness with a view of impeaching him were inadmissible. Most of them seem to have been designed to bring out the fact that in a criminal complaint made by the witness against one Espinoza he had sworn that the cow in question was the property of Avila. But the witness had not testified otherwise in this case. The evidence was clearly inadmissible. The court did not err in striking out the testimony of Silvers as to declarations of Avila. Avila had not been questioned as to such declaration. The same statement was afterwards repeated by the witness without objection on the part of the prosecution. The question of the prosecution to the same witness, objected to by defendant, was not improper in cross-examination, and the answer could not possibly have affected the result one way or the other. I advise that the judgment be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

131 Cal. 8
PACIFIC INV. CO. v. ROSS. (S. F. 1,538.)
(Supreme Court of California. Dec. 19, 1900.)

HARMLESS ERROR—SUSTAINING DEMURRER TO CROSS COMPLAINT — CHATTEL MORTGAGES—FORECLOSURE — DECREE — SALE — ORDER FOR IMMEDIATE POSSESSION.

1. As by Code Civ. Proc. § 462, new matter contained in the answer is deemed controverted by plaintiff, it presents an issue substantially the same as would be presented by an answer to a cross complaint alleging the same matter; and in such a case, where findings were waived in a trial to the court, the presumption being that it found on all matters of fact in issue necessary to support the judgment for plaintiff, and hence found against defendant as to the new matter alleged in the answer, error, if any, in sustaining a demurrer to the cross

complaint alleging such new matter, was harmless.

2. A decree on foreclosure of a chattel mortgage properly ordered the commissioner appointed by consent of counsel to execute the same to take immediate possession of the incumbered property for the purpose of the sale, since that is made necessary by Code Civ. Proc. § 698, providing that, "the officer making the sale must deliver the property to the purchaser."

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by the Pacific Investment Company, a corporation, against Anna Ross. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank Shay, for appellant. J. H. Long, for respondent.

VAN DYKE, J. The action is one to foreclose a chattel mortgage. Judgment went for the plaintiff, from which the defendant appeals upon the judgment roll. The complaint is in the usual form. The answer admits the execution of the note and mortgage, but avers that at the time of its execution it was agreed and understood that the plaintiff would not seek to foreclose so long as defendant paid the interest; that defendant had tendered the interest to plaintiff, who had refused to receive it. By way of cross complaint the defendant set up the same matter of the parol agreement made at the time of giving the note and mortgage, as stated in the answer, and asks that said note and mortgage be reformed according to said parol agreement. The demurrer to the cross complaint was sustained, and this is urged as one of the errors on appeal. The new matter contained in the answer in reference to the parol agreement between the parties at the time of the execution of the note and mortgage is deemed in law controverted by the opposite party. Code Civ. Proc. § 462. An issue was therefore presented substantially the same as would have been presented by an answer to the cross complaint, had the same been allowed to stand. At the trial findings were waived, but it will be presumed that the court found upon all the matters of fact in issue necessary to support the judgment, and therefore found against the defendant as to the alleged parol agreement. *Blanc v. Mining Co.*, 95 Cal. 524, 30 Pac. 765; *Bank v. Kowalsky*, 105 Cal. 42, 38 Pac. 517. Assuming, therefore, that the court erred in sustaining the demurrer to the cross complaint,—which, however, it is not necessary to decide,—the error would be altogether harmless, and hence no ground for reversal. *Blakely v. Blakely*, 89 Cal. 325, 26 Pac. 1072; *Duffy v. Duffy*, 104 Cal. 602, 38 Pac. 443.

In the decree of foreclosure one Kerrigan, by consent of counsel, was appointed a commissioner for the purpose of carrying out and executing said decree. And it was further ordered that said commissioner take imme-

diately possession of the incumbered property, and proceed to sell the same, or so much thereof as may be necessary, to satisfy the judgment and costs. The appellant attacks this portion of the decree directing the commissioner to take possession of the property as being without authority of law. There is nothing in this contention. The commissioner is simply a substitute for the sheriff, and was appointed by the consent of the appellant; and he must make the sale in like manner as the sheriff would be required to do. The property here must be taken into possession, for, being capable of manual delivery, "the officer making the sale must deliver to the purchaser the property." Code Civ. Proc. § 698. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(6 Cal. Unrep. 604)

BANK OF UKIAH v. REED et al. (S. F. 1,542.)¹

(Supreme Court of California. Dec. 14, 1900.)
APPEAL AND ERROR—CONFLICT OF EVIDENCE
—BURDEN OF PROOF.

1. Where there is a conflict of evidence submitted on a motion to set aside a default, the determination of the court denying the motion will not be reviewed on appeal.

2. Where a written memorandum of an agreement between the parties to a suit is executed, in which is expressed the consent of defendants that their defaults be entered, and an agreement on the part of plaintiff not to take judgment until a certain time, the burden of proof is on defendants to show that they were entitled to a further notice, and to additional time beyond the date expressed in the memorandum, before judgment could properly be entered against them by default.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by the Bank of Ukiah against John S. Reed and others. From an order denying a motion to vacate and set aside their default and the judgment thereon, defendants appeal. Affirmed.

Heller & Powers, for appellants. J. A. Cooper, for respondent.

HARRISON, J. After judgment had been entered against the appellants upon their default, they moved the court to vacate and set aside their default and the judgment thereon, and from the order refusing their motion the present appeal has been taken. The complaint was filed January 21, 1896, and, service of the summons issued thereon having been had upon the defendant, John S. Reed, a demurrer to the complaint was filed on his behalf February 1, 1896. Service was made upon the defendant Anna M. Reed March 11, 1896. On that day, at the request of the defendants, an interview was had between them and the directors of the plaintiff, at the banking house of the latter, at which it was agreed on the part of the

¹ Rehearing denied January 12, 1901.

defendants that the demurrer of the defendant John S. Reed should be withdrawn, and that Mrs. Reed should make default in the suit, and that upon payment by the defendants of \$600, on or before July 15, 1896, the plaintiff would not take judgment until January 2, 1897. Mrs. Reed thereupon appeared in the action, and filed her consent that default be taken against her. A stipulation was also filed by John S. Reed consenting that his demurrer be withdrawn and his default entered. April 27, 1896, the plaintiff caused the defaults of the defendants to be entered. The defendants did not pay the \$600, and on September 18, 1897, judgment was entered in the action for the foreclosure and sale of the mortgaged property. September 29, 1897, the defendants moved to set aside and vacate the default and judgment, upon the ground that they were entered through mistake and inadvertence on their part, and presented evidence in support of their motion. The court, after hearing the same, denied the motion, and the present appeal is taken from that order.

In the affidavits presented by the defendants in support of their motion they set forth, as the grounds upon which they claim the relief, that at the time they agreed to withdraw the demurrer, and consented that default might be entered against them, the attorney for the plaintiff agreed with them that no further action should be taken in the case without giving them previous notice thereof; and, further, that after said agreement had been made the president of the plaintiff agreed with them, in substance, that no judgment should be taken against them until after the year 1897, and that they might have the whole of that year in which to pay their indebtedness, and that their failure to appear or take any steps in the suit had been by reason of their reliance upon these agreements. At the hearing upon the motion there was presented on behalf of the plaintiff a written memorandum, in which was expressed the consent of the defendants that their defaults be entered, and the agreement on the part of the plaintiff not to take judgment until January 2, 1897. It was also shown that at the interview between the defendants and the directors, at which the agreement was made, its terms were openly stated and discussed, and that, after the memorandum had been prepared, it was read to the defendants, and its terms assented to by them, and that a copy of it was taken by Mrs. Reed. Affidavits by directors who were present at the meeting were also presented, in which they stated that no agreement was made of any extensions of time, except as stated in said memorandum, and that nothing was said at the meeting about giving further notice of any steps to take judgment. The attorney for the plaintiff was also present at that interview, and testified at the hearing of this motion that neither at that time, nor

at any other time, did he agree to any extension of time beyond the 2d day of January, 1897, or to give to the defendants any notice of any further steps to be taken in the suit. The president of the bank testified that he never told the defendants, or either of them, that they could have all of the year 1897 in which to pay their indebtedness, or agreed with them, or either of them, to give to them any time beyond that expressed in the memorandum. Upon the conflict of evidence thus presented, it must be assumed that in denying the defendants' motion the superior court determined in favor of the plaintiff. In the face of the evidence contained in the written memorandum the burden was upon the defendants to show that they were entitled to any further notice before the entry of judgment, as well as to additional time beyond the 2d day of January, 1897, before judgment should be entered against them. We cannot say, from an examination of the evidence presented to the superior court, that its determination was erroneous, or that it abused its discretion in denying the motion of the defendants. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

131 Cal. 11

McINTYRE v. HAUSER. (L. A. 757.)

(Supreme Court of California. Dec. 19, 1900.)

CHATTEL MORTGAGES — SALE — ASSENT OF MORTGAGEE — ASSIGNMENT OF PRICE — PLEADING — AMBIGUITY — CONSTRUCTION — DEBT — EQUITABLE ASSIGNMENT — ESSENTIALS — GARNISHMENT.

1. In an action by a judgment creditor of B. to recover the amount of his debt, for which defendant had been garnished, the complaint alleged that B., by written instrument, had sold defendant certain cattle on which there was a chattel mortgage to others; that the mortgagees, by written statement attached to the contract of sale, consented thereto on condition that the proceeds of the sale be paid to them; and that defendant, in spite of plaintiff's garnishment, paid the money to the mortgagees. *Held*, that a demurrer to the complaint was properly sustained, since the complaint must be construed to allege a contract requiring the money arising from the sale to be paid to the mortgagees by defendant, in which case it was not subject to garnishment by a creditor of B.

2. Where the owner of cattle subject to a chattel mortgage sold them by written contract, and the mortgagees, by written instrument attached thereto, consented to the sale on condition that the purchaser pay the money arising from the sale to them, though the purchaser knew nothing of the conditional assent, the transaction was an equitable assignment to the mortgagees of the vendor's claim to the purchase money.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Allen McIntyre against Julius Hauser to recover the amount of a debt owed to plaintiff by James Brown, for which defendant had been garnished. From a judg-

ment for defendant on demurrer to the complaint, plaintiff appeals. Affirmed.

Leonard & Morris (H. Goodcell, of counsel), for appellant. Isidore B. Dockweiler, for respondent.

GAROUTTE, J. In this action a general and special demurrer was sustained to the complaint, and, the plaintiff declining to amend, judgment went against him, and this appeal is taken therefrom. The sufficiency of the complaint is the question before the court. In passing upon this question all ambiguities and uncertainties found in the pleading will be construed against the pleader. The facts are these: James Brown owned a herd of cattle upon which third parties held a chattel mortgage. Brown sold these cattle to the defendant, the sale being evidenced by a contract in writing. To this contract was appended a written statement to the effect that the cattle were mortgaged to these third parties (naming them) to secure the payment of an indebtedness owing to them by Brown, and it was further stated by the complaint that "they approved and consented to such sale to said defendant, provided the money derived therefrom was paid to them; which said statement was signed by them." In view of what has been said relating to the construction which should be given ambiguities appearing upon the face of the complaint, the last allegation of the pleading quoted will be construed to the effect that the mortgagees consented to the sale provided the money derived therefrom was paid to them by Hauser, the purchaser of the cattle. Especially must this construction of the pleading be maintained when we find that a special demurrer was directly pointed to this ambiguity. The further facts, as disclosed by the complaint, are these: Before the purchase price was paid, this plaintiff, a judgment creditor of Brown, garnished the money in the hands of Hauser. Hauser, regardless of the garnishment, paid the money to the mortgagees, and he is now sued by the judgment creditor for the amount. Upon the foregoing state of facts the question is presented, to whom did Hauser owe the money at the date of the garnishment? If he owed it to Brown, then he is liable in this action. If he owed it to the mortgagees, he is not liable. There can be but one answer to this question. If the contract of sale, taken in connection with the consent to the sale by the mortgagees, be construed as a tripartite agreement,—which construction the allegation of the pleading would fairly justify,—then it is manifest the money was owing to the mortgagees; and a direct promise upon the part of Hauser to pay it to them formed a part of the contract. This character of transaction would constitute a novation pure and simple. But, even eliminating from the agreement any question of Hauser's promise to pay to the mortgagees the proceeds derived from the sale of the cat-

tle, still by every fair construction of the pleading the fact remains that the understanding between Brown and the mortgagees was that the money should be paid by Hauser to them. Certainly there was ample consideration for such an agreement, and that agreement constituted an equitable assignment by Brown to them of the money due from Hauser. The fact that this plaintiff knew nothing of the transaction is immaterial, and likewise it is immaterial if Hauser knew nothing of it. If the mortgagees could have sued Hauser for the money, and recovered, then he owed Brown nothing, and this plaintiff secured no rights by his garnishment. The moment the sale was made of the cattle, the amount due from Hauser became a chose in action, and, of course, was assignable by Brown. It is elementary that an assignment of a chose in action takes precedence over a subsequent garnishment (*Walling v. Miller*, 15 Cal. 38), and as to the particular facts which constitute an equitable assignment it is only necessary to refer to the early case of *Pope v. Huth*, 14 Cal. 403.

There is no question in this case as to the lien of the mortgages attaching to the proceeds of the sale of the cattle. Neither is the conclusion to which we have arrived opposed to the decision in *Maier v. Freeman*, 112 Cal. 8, 44 Pac. 357. The facts of the two cases are widely variant. In that case the sheep had not been sold at the time the agreement between the mortgagor and mortgagee was made; and, in addition to that important fact, there the mortgagor was to receive the proceeds of the sale of the sheep. Here neither of these controlling circumstances is presented. In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If, from the entire transaction, it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place. There is no question of fraud involved, and the intention of the parties to clothe the mortgagees with title to the claim against Hauser is made out from the pleading. For the foregoing reasons, the judgment is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

130 Cal. 649

PORTLAND CRACKER CO. v. MURPHY.
(S. F. 1,637.)

(Supreme Court of California. Dec. 14, 1900.)
JUDGMENTS—CONFORMITY TO VERDICT—VERDICT—DISREGARD OF INSTRUCTIONS.

1. The complaint in an action for the recovery of money alleged that the money was embezzled by defendant while acting as plaintiff's agent, and demanded judgment for the imprisonment of defendant until the money judgment demanded should be paid. The jury found a general verdict for plaintiff on the issue of the money demand, but found for defendant on a special issue submitting the question of embezzlement. *Held*, that the special and

general verdicts were consistent. It was, therefore, proper to enter a money judgment in favor of plaintiff on the general verdict.

2. In an action for the recovery of money alleged to have been embezzled by defendant while acting as plaintiff's agent, the court charged, in effect, that, if plaintiff failed to prove the fraudulent appropriation, the verdict should be for defendant on that issue. *Held*, that a verdict for plaintiff on the money demand and for defendant on the issue as to fraudulent appropriation was not contrary to the instructions.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Trout, Judge.

Action by the Portland Cracker Company against A. H. Murphy. From a judgment for plaintiff, defendant appeals. Affirmed.

Grove L. Johnson, John H. Hansen, and Garret W. McEnerney, for appellant. Charles H. Jackson, J. F. Riley, and Thornton & Merzbach, for respondent.

VAN DYKE, J. The complaint alleges that the defendant embezzled and fraudulently misapplied and converted to his own use the sum of \$1,271.94, which had come into his hands in the course of his employment as the agent and clerk of the plaintiff, and the complaint prays that judgment against the defendant may be had in said sum, and for costs of suit, and that the defendant be arrested and held to bail; that judgment may be entered against the person of said defendant that he be imprisoned until the payment of said sum; and for further relief. Upon the issuance of the summons plaintiff applied for and obtained an order for the arrest of the defendant under section 479, subd. 2, Code Civ. Proc. The necessary affidavit and undertaking being furnished, the order for arrest was made, and the defendant was thereupon arrested, but was released on the same day upon giving an undertaking as required by section 487, Id. The answer denies that the defendant embezzled, fraudulently or otherwise misapplied, or converted to his own use, the sum of \$1,271.94, or any other sum, which had come into his hands in the course of his employment as the agent or clerk of the plaintiff, or at all. Upon the issues presented the case was tried by a jury, and a general verdict rendered in favor of the plaintiff for the sum of \$750, and also found on the special issue submitted, to wit: "Did the defendant fraudulently appropriate the money of the plaintiff, as alleged in the complaint? Answer. No." Upon the coming in of the verdict the defendant moved the court to enter judgment in his favor upon the ground that the special issue controlled, and that the defendant was entitled to a judgment thereon. The court denied defendant's motion, and entered a money judgment in favor of the plaintiff upon the general verdict.

The defendant appeals from the judgment so entered upon a bill of exceptions, and relies for a reversal upon two alleged errors: (1) That upon the verdict the judgment

should have been for the defendant; (2) that the verdict is contrary to law, in this: that it is contrary to the instructions of the court. The theory of the defendant is that, inasmuch as the plaintiff alleged that the money had been embezzled and fraudulently appropriated, he cannot recover at all, unless the issue upon such allegation is found in its favor. In this appellant is clearly mistaken. The action is for the recovery of money in the hands of the defendant belonging to the plaintiff, and whether that money had been embezzled or fraudulently appropriated would not defeat the recovery of a simple money judgment for the amount of money in the hands of the defendant due the plaintiff; but, unless the issue in reference to embezzlement or fraudulent appropriation were found in favor of the plaintiff, it could not recover a judgment for the imprisonment of the defendant until the money found due should be paid, as in this state no person can be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud. *Payne v. Elliot*, 54 Cal. 339, was an action for the fraudulent conversion of mining stock. The plaintiff had judgment for the amount of the mining stock so converted, and a further judgment that the plaintiff was entitled to an order of arrest against the defendant until the same should be paid. On appeal it was held "that the court below did not err in overruling the demurrer to the complaint, or in rendering judgment for the plaintiff for the value of the stock and interest thereon from the time of the conversion until the time of the trial, but that the judgment for fraud exceeded the relief to which the plaintiff was entitled by his complaint"; that the averments thereof were not sufficient to support that portion of the judgment. The court below was therefore directed to strike from the judgment the portion in reference to the arrest of the defendant, and, thus modified, the judgment was affirmed. In *Kullmann v. Grenebaum*, 84 Cal. 98, 24 Pac. 49, the plaintiff had a money judgment in the court below, and appealed for the purpose of having the judgment modified by directing the court below to enter judgment in accordance with the facts found by the jury adjudging the defendants guilty of fraud, and directing process to issue against the person according to law. The court says: "This we decline to do, for the reason that the complaint sets up no fraud by defendants of which plaintiff can complain. * * * It may be conceded that the court was bound to enter judgment on the verdict of the jury, but, under the state of facts above pointed out, the court did not err in disregarding the verdict of the jury in respect of fraud;" and affirmed the judgment. *Obersteller v. Assurance Co.*, 96 Cal. 645, 31 Pac. 587, is an appeal from a judgment recovered by the plaintiff against the defendant, in an action upon a policy of insurance. The answer of the defendant charged fraud on the part of the plaintiff in procuring the policy.

In that case there was a general verdict in favor of the plaintiff for the sum of \$500, and also a special verdict, and upon the entry of the general and special verdicts defendant moved the court for a judgment for the defendant on the ground that the verdict found fraud upon the part of the plaintiff, which motion was denied; and the court, in its opinion, says: "The Code provides, 'Where a special finding of facts is inconsistent with the general verdict the former controls the latter, and the court must give judgment accordingly.' Code Civ. Proc. § 625. This proceeding is not authorized in any other case, and the general and special verdicts in this case are entirely consistent. The special verdict finds the total value of the property insured and destroyed to be the sum of five hundred dollars, and the general verdict is for that sum. If, in their special verdict, the jury had found the value of the property to be less than five hundred dollars, and had rendered a general verdict for that or a greater sum, it would as clearly be within the provision above quoted as it now as clearly is not. All that can now be said is that the jury found that plaintiff's loss was not so great as he represented it to be. That was favorable to the defendant. We think that finding was not conclusively a finding of fraud on the part of the plaintiff. Standing alone, it shows that he overestimated his property. Whether or not that vitiated the policy of insurance was a question not involved in the motion for judgment for the defendant upon the verdict. That motion, as we have before stated, could not be granted on any other ground than the one specified in the Code, viz. inconsistency between the general and special verdicts. The motion was properly denied." In this case the special verdict was not inconsistent with the general verdict. The complaint set forth a cause of action for a money demand, and also set forth facts which, if proven, would have justified a judgment for the arrest and detention of the defendant until the money judgment should be paid. The jury found in favor of the plaintiff on the issue of the money demand, although not to the amount claimed, and found in favor of the defendant on the issue of the embezzlement and fraudulent appropriation of the money. Clearly, when the defendant had money in his hands belonging to the plaintiff, the plaintiff was entitled to a money judgment, although the defendant may not have been guilty of embezzlement or fraudulent appropriation. And such was the judgment entered in this case.

The appellant contends that the verdict is contrary to law, in that it is contrary to the following instruction: "The plaintiff has the burden of proving the fraudulent appropriation of the money by the defendant while acting as its agent, and the defendant is not required to prove that he did not make such appropriation. If the plaintiff has proved by a preponderance of the evidence that the defendant did make such fraudulent appropri-

tion, then your verdict must be for the plaintiff, not exceeding the amount claimed by it in its complaint. On the other hand, if the plaintiff has failed to do this, your verdict must be for the defendant." But, when this instruction is taken in connection with the other instructions, it will be manifest that the meaning of the court was that, if the plaintiff failed to prove the fraudulent appropriation, the verdict should be for the defendant on that issue. In the other instructions the court says: "Should you find a verdict for the plaintiff, you must ascertain the amount of money which the defendant has fraudulently appropriated, and on this amount the plaintiff is entitled to interest at the rate of seven per cent. per annum from the time of the conversion fixed in the complaint, to wit, February 12, 1896, up to the present time. Should you find a verdict for the plaintiff, you are requested to answer the following interrogatory: 'Did the defendant fraudulently appropriate the money of the plaintiff, as alleged in the complaint?' This interrogatory need not be answered should you find a verdict for the defendant." In other words, in order to find a verdict for the defendant, they would have to find that he had no money in his hands, either fraudulently or otherwise, belonging to the plaintiff; but they could find for the plaintiff on the money demand, and also find for the defendant that the money had not been fraudulently appropriated,—that is to say, simply a finding for the plaintiff as on a demand for money had and received by defendant to the use of the plaintiff. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(130 Cal. 669)

LAKE SHORE CATTLE CO. v. MODOC
LAND & LIVE-STOCK CO.

(Sac. 644.)¹

(Supreme Court of California. Dec. 15, 1900.)
SALES—AGENCY—EVIDENCE—INSTRUCTIONS—
APPEAL—JUDGMENT.

1. Where the issue was whether certain cattle purchased by defendant's superintendent had been purchased for defendant or by the superintendent individually, and the evidence was conflicting, and it could not be said that there was not substantial evidence to sustain a verdict in favor of plaintiff finding that the purchase was for defendant, the judgment based thereon would not be disturbed on appeal.

2. On an issue whether cattle purchased by the superintendent of a corporation had been purchased for the corporation or by him individually, that a note in part payment was signed by the superintendent individually was not conclusive as showing the sale to have been to him.

3. On an issue whether cattle purchased by the superintendent of a corporation had been purchased by him individually or for the corporation, evidence that the superintendent had made a similar purchase from other persons on behalf of the corporation was admissible.

4. On an issue whether cattle purchased by the superintendent of a corporation had been purchased for the corporation or by the super-

¹ Rehearing denied January 12, 1901.

intendent for himself, if it was error to allow the seller of the cattle to read in evidence entries from a book kept by the superintendent, consisting of entries of account between himself and the corporation, the same was not prejudicial, the items of any significance being included in reports sent by the superintendent to the corporation.

5. Where the court charged that, if the jury found for plaintiff in any amount, they should add interest at the rate of 7 per cent. per annum, and the verdict was for a certain sum, with interest at ".07 per cent.," a judgment entered for the principal sum and interest at 7 per cent. was not erroneous on the ground that ".07" did not mean 7 per cent., since it was clearly a clerical error.

Department 2. Appeal from superior court, Modoc county; J. W. Harrington, Judge.

Action by the Lake Shore Cattle Company against the Modoc Land & Live-Stock Company. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Spencer & Raker and Clarence A. Raker, for appellant. G. F. Harris, H. L. Sprague, J. T. Richards, and E. C. Bonner, for respondent.

McFARLAND, J. This action was brought to recover \$4,800 and interest, balance due on an alleged sale of cattle by plaintiff to defendant, made November 6, 1892. The jury returned a verdict for plaintiff for the amount claimed, and judgment was rendered accordingly. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The transcript presents a dreary mass of matter covering over 800 printed pages, and should not have occupied more than one-fourth of that amount of space. It might be somewhat justly characterized by the comparison of "two grains of wheat hid in two bushels of chaff," which Bassanio uses to illustrate the "reasons" of Gratiano. A good deal of the testimony of witnesses is given at length by question and answer. Many questions substantially the same are asked over and over again; and a very large part of the transcript is taken up with objections of counsel, the same objections being repeated many times. Under the head of "Errors of Law Occurring at the Trial" there are 499 separate specifications covering 126 pages; to the points that the evidence is insufficient to justify the verdict, and that it is against law, there are many other specifications; and there are, in addition, about 40 exceptions to the giving and refusing of instructions. Most, although not quite all, of these exceptions and specifications are mentioned in appellant's briefs, the briefs themselves covering over 200 printed pages. It is, therefore, entirely impracticable to undertake to notice appellant's points in detail. The respondent and appellant are corporations. It is averred in the complaint that the appellant, acting by and through its agent, W. H. Nelson, bought the cattle in

question of respondent; and it is not disputed that one C. E. Crowder, superintendent of respondent, sold the cattle at the time mentioned in the complaint to said Nelson, who was then superintendent of the appellant. The number of cattle sold, the price, and the facts that about one-third of the purchase price was paid at the time, and that \$4,800 was the balance remaining unpaid, are all admitted, or proved beyond question. The real merits of the case are involved in the question whether or not the purchase was made by Nelson as agent of and for the corporation appellant. Appellant contends that Nelson made the purchase entirely for himself individually; that he was not either the actual or ostensible agent of appellant for the purpose of making such purchase; and that, therefore, appellant was not bound by the transaction. Respondent contends that he was appellant's actual agent; and, moreover, that, whatever may have been the private understanding between him and appellant, the latter, by its acts, clothed him with ostensible authority upon which respondent had the right to rely. As to this question the evidence was conflicting. The headquarters of appellant was in the city of San Francisco, while its main business was carried on in Modoc county, several hundred miles distant from said city. Its business is described in its charter as "the dealing in, buying and selling, management and disposition of land and live stock, and everything pertaining thereto in all respects." It was incorporated in 1886, and a few months afterwards Nelson, as the minute book of the directors shows, was elected vice president and superintendent, and as such he was "authorized to sign checks, and make and sign contracts necessary for the proper performance of the business of the corporation." He was the only member of the corporation who lived in Modoc county; and from December, 1886, to April, 1893, during which period the sale here involved occurred, he was superintendent, and attended to all the business of appellant in that county. The appellant had a large tract of land in Modoc county, and raised and bought and sold cattle there, and the business was done entirely by and through Nelson, who was the only agent or representative of the appellant in that region of the country. These general facts were themselves strong evidence to the point that appellant had intrusted Nelson with all business in that remote country, and clothed him with authority to do all acts necessary to its transaction. We will not undertake to here review the evidence. It was "conflicting" within the rule so often stated, and it cannot be said that there was no substantial evidence to sustain the verdict. The fact so much relied on by appellant, that Nelson signed his individual name to the note given for the balance of the purchase price, is merely a circumstance more or less favorable to appellant's contention.

It is not by any means conclusive of the issue.

Many of appellant's objections were to evidence introduced by respondent to show that Nelson had made similar purchases of other persons, and we think that such evidence was entirely proper. There were also many objections to the testimony of Nelson upon the ground that he should not be allowed to testify as to his agency and his acts in purchasing the cattle for appellant. These objections were apparently on the theory that his declarations as to agency were not admissible; but he was present on the witness stand, testifying to the matters objected to, and we see no ground for rejecting his testimony. We see no point in the objections made to the introduction of the books of the appellant. They were produced in court by appellant as appellant's books in response to a demand made for their production. We have no doubt that appellant's objections to evidence introduced by respondent were properly overruled, except, perhaps, in one instance. Nelson himself kept a book in which he, as superintendent, made entries of items of account between him and appellant; and respondent was allowed, over appellant's objections, to read certain entries from that book. The point that this was error is not very strongly urged by appellant in the briefs; still it is made. Whether or not the entries in this book were strictly admissible under the general law as to books of account is a somewhat doubtful question; but we do not deem it necessary to definitely determine it, because most of the items of any considerable significance which were introduced in evidence were included in reports sent by Nelson, as superintendent, to the appellant, and the others were of too little importance to be prejudicial, or to warrant a reversal.

We see no error in the instructions given at the request of respondent. As to the instructions asked by appellant, the court gave the first 25 instructions asked, many of which are quite elaborate; and gave also 3 others with slight modifications. It would seem that these numerous instructions ought to include all that counsel could reasonably ask on one side of the case; and we think that they do. The instructions given presented the law of the case fairly and correctly to the jury, and sufficiently include whatever was correct in the instructions refused; and we do not think that any error was committed in the matter of giving and refusing instructions.

The court instructed the jury that, if they found for plaintiff in any amount, they should add to such amount interest from the time it became due until the date of the verdict "at the rate of seven per cent. per annum, simple interest"; and the verdict was for \$4,800, "with interest at .07 per cent. per annum from November 6, 1892," until the date of the verdict. Judgment was entered

for \$4,800, with interest at 7 per cent. per annum, and counsel for appellant strenuously contend that this was error, because ".07 per cent." does not mean "seven per cent." It is sufficient to say that the expression ".07" was clearly a clerical error, and must be construed as an intended compliance with the instructions of the court.

We have noticed the prominent facts of the case, and we deem it enough to say in conclusion that the record presents no ground for reversal of the judgment or of the order denying a new trial. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.

(6 Cal. Unrep. 606)

RICHARDSON et al. v. CHICAGO PACKING & PROVISION CO. et al.

(S. F. 1,689.)

(Supreme Court of California. Dec. 19, 1900.)

CORPORATIONS — CREDITORS AS STOCKHOLDERS — UNPAID SUBSCRIPTIONS — CONTRIBUTION — STIPULATION — ESTOPPEL — APPEAL.

1. A judgment creditor of a corporation sued to enforce unpaid balances on stock subscriptions of 15 stockholders. One of the defendants was also a judgment creditor of the corporation, but the action was dismissed as to him, and he became plaintiff by the court's order. The corporation owed no other debts. The original plaintiff's claim was paid by the 14 remaining defendants, under a stipulation in which none of the other plaintiff's rights were relinquished, and the court gave the 14 defendants a several judgment against such plaintiff by way of contribution, ignoring the fact that he was also a creditor of the corporation. *Held*, that such plaintiff was entitled to have the amount of his proportionate liability to the corporation on both claims deducted from his own claim, and the balance due him apportioned against the 14 defendants.

2. Where a creditor has the right to be subrogated to the rights of a corporation to claim unpaid balances due on shares, he does not lose that right by reason of the fact that he is a stockholder.

3. Where plaintiff's attorney entered into a stipulation with defendants solely on behalf of a co-plaintiff, reserving all plaintiff's rights, the fact that the attorney was also attorney for plaintiff did not render the agreement binding on plaintiff.

4. Where a subscriber for corporate stock sought to enforce subscriptions made under the same circumstances as his own, he could not repudiate his liability thereon under Civ. Code, § 359, providing that no corporation shall issue stock except for money paid, labor done, or property received.

5. Where stockholders agreed that shares should be deemed fully paid by payment of a stated amount less than the par value, a creditor, who was also a stockholder, could not compel the payment of the par value of shares owned by other stockholders, the creditor being a party to the agreement.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Thomas Richardson and V. L. Fortin against the Chicago Packing & Provision Company and others. From a judgment for defendants, and from an order denying

a new trial, plaintiff Fortin appeals. Reversed.

Wm. H. Jordan (H. M. Barstow, of counsel), for appellant. Edw. C. Robinson, B. McFadden, and Fitzgerald & Abbott, for respondents.

PER CURIAM. Action to recover from the stockholders of defendant corporation the unpaid balance of their subscriptions. Defendants had judgment, from which, and from an order denying his motion for new trial, plaintiff V. L. Fortin appeals.

The action was originally brought by plaintiff Richardson, as a judgment creditor of defendant corporation, against 17 defendants, among them Fortin; but the action was dismissed as to him, and he became, by order of the court, a co-plaintiff. Judgment was afterwards entered by stipulation in favor of Richardson against the defendants severally excepting Lieb and Buttenbach (as to whom the action had been dismissed), and Fortin became the sole plaintiff, whose complaint was similar to that of Richardson. After Fortin had filed his complaint as co-plaintiff, the defendants obtained leave of court to file and did file a cross bill with the object of bringing in some 41 parties as co-defendants, who, it was alleged, were subscribers to the capital stock of defendant corporation, but had not been made defendants at the commencement of the action. The prayer of this cross complaint was that the persons named therein as co-defendants "be compelled to pay to these defendants filing this cross complaint, by way of contribution, such proportion of any judgment or judgments in favor of said Thomas Richardson or said V. L. Fortin which have been or may be recovered in this action as may be just and equitable in the action," and for further relief, etc. This cross complaint was served on 30-odd of such new parties, 3 of whom defaulted; the others answered severally. Fortin's complaint was answered by the original defendants, but the cross bill of the 14 defendants was not served on Fortin, nor was it answered by him.

The court found the number of shares subscribed by each of the 14 original defendants (the action having been dismissed as to defendants Fortin, Lieb, and Buttenbach); that said defendants had subscribed to the stock with the agreement among all the said original 17, including Fortin, with the corporation, that each of them should be liable to pay \$50 per share, and no more, on shares of the par value of \$100, and that said subscribed shares should be deemed fully paid up when said \$50 per share had been paid thereon; that said agreement was well known to Fortin at the time he became a creditor of the corporation for the goods and merchandise and labor, the subject of his action, and that Fortin was himself a subscriber to 50 shares of said stock under said

agreement; that there were 7 original corporators and promoters of the corporation, who are among the said 14 defendants, and were the directors and the only subscribers at that time; and "it was then unanimously agreed between and among themselves that it was for the best interests of the corporation to sell and dispose of the first half of the capital stock, to wit, 2,500 shares, at the price of \$50 per share, for the purpose of raising working capital to start and carry on the business of the corporation"; and it was likewise so agreed that the said 7 original corporators should be required to pay \$50 per share on their subscribed stock, and no more, and that, such payment being made, their shares should be deemed fully paid up, "and that all persons who should thereafter subscribe for said capital stock, until one-half thereof should be taken, should be required to pay the same price, to wit, \$50 per share, and no more"; and it is found that Fortin had knowledge of this agreement when he became creditor of the corporation; that subscription books were opened by the said 7 directors (they being then the only subscribers), in which books such limitation of liability was stated, and all subscriptions to stock thereafter made by said 14 defendants and all others "were made in said books upon said terms"; that "said agreement among and by said directors was not evidenced by any formal resolution of the board of directors or the stockholders theretofore or at that time passed or entered in the records of the corporation, but was unanimously agreed to by said 7 directors and only stockholders, and on March 26, 1888, was ratified by resolution duly passed by the board of directors and entered upon the minutes of said board of directors"; that Fortin subscribed to 50 shares of said stock on February 9, 1888, upon the same terms as did the defendants; that all these agreements and the said subscriptions of stock thereunder "were each and all made openly and in good faith, and for the purpose of raising money to fairly launch a new and struggling enterprise, and not for the purpose of defrauding the corporation or its stockholders or creditors"; that \$50 per share was the full value of said stock, and all that the subscribers were willing to subscribe therefor or become liable thereon; that all the subscribers to stock, of whom there were many besides the said 14 defendants and said plaintiff Fortin, received their stock under this agreement, and said Fortin "had full notice and knowledge of that fact before he sold and delivered, or agreed to sell or deliver, any part of the goods * * * for which he is seeking to recover in this action." The court then finds the sums subscribed by each of the 14 defendants and the amount each has paid thereon, and that Fortin has paid nothing on the 50 shares subscribed for by him; that the last meeting of the board was held April 4, 1888, since which time "it has ceased to meet and has not dis-

charged any of the duties of a board of directors of said corporation; that on or about the — day of May, 1888, the defendant corporation ceased to exercise its corporate franchise, and then or thereabouts abandoned its corporate franchise, and ever since has failed and ceased to act as a corporation; that said corporation has no property or assets save and except its equitable asset represented by the unpaid subscriptions of the various subscribers to its capital stock, and has and had, at the time this action was commenced, no creditors save and except Thomas Richardson and V. L. Fortin, the plaintiffs herein." The court found that the judgment entered in favor of plaintiff Richardson was for \$6,074.60, in pursuance of a stipulation entered into by said 14 defendants, and each was to pay and did pay his pro rata share thereof; and that said 14 defendants were indebted to the corporation for subscriptions to its stock the sum of \$7,250, and no more; that they paid upon their subscriptions \$7,275, including said Richardson judgment, in paying which some subscribers paid slightly more than their proportion, and others paid slightly less, the total overpayments being \$100, and the underpayments \$75.40, and that said defendants are indebted to the corporation for this latter amount, and no more. The court found that Fortin was indebted to the corporation for the unpaid subscription for 50 shares of stock, or \$2,500, and that the judgment held by him against the corporation for which he sued was \$6,514, entered on September 24, 1888, with interest at 7 per cent. from that date; that he realized thereon, through an execution duly issued, and sale of certain property of the corporation, a certain sum, leaving still due a deficiency of \$4,992.50, which was docketed November 28, 1888, and is still unsatisfied.

As conclusions of law the court found, in effect: That the said 14 defendants were liable to the corporation only for any unpaid balance of \$50 on each share subscribed for by them respectively; that, as Fortin had knowledge of the agreements herein stated before he sold or delivered the goods sued for, he has no greater rights against said defendants than against the corporation itself, and that Fortin is equally bound by said \$50 per share agreements, and can exact no more than \$50 per share on defendant's subscriptions; that the unpaid balance thereof is \$75.40, and no more; that Fortin, "being an unpaid subscriber at the time these 14 defendants paid the Richardson judgment, is liable to said 14 defendants, by way of contribution, for his just proportion of said Richardson judgment, * * * and his proportion is \$1,482, with interest * * *; making * * * \$1,793.82." Decree was accordingly entered in favor of the 14 defendants severally against Fortin in sums varying according to their respective payments on the Richardson judgment. The stipulation to pay Richardson

was signed by counsel for the 14 defendants, and at the time the attorney of Richardson was the attorney of Fortin, and it was stipulated that the Richardson "judgment shall in no respect affect the right of plaintiff V. L. Fortin to judgment, and shall not be an adjudication of any point or matter either against or in favor of said V. L. Fortin." The court made no findings as to the 30-odd new defendants, who were made parties to the action by the cross complaint of the 14 original defendants. Appellant contends that the decision is against law in the following particulars: (1) In failing to determine the issues arising upon the cross complaint of the 14 original defendants, and the answers thereto; (2) in adjudging Fortin indebted to these 14 defendants by virtue of his stock subscription; (3) in failing to adjudge Fortin entitled to recover the sum found due him on his judgment against the corporation; and (4) in deciding that the sum of \$50 per share constituted the entire subscription liability of each defendant.

1. Assuming the validity of the agreement under which the stock was issued, and that it was binding on the stockholders who received shares under it, as between themselves, and that upon payment of 50 per cent. by a stockholder his liability to the corporation was fully discharged, did the payment to Richardson have the effect found by the court? Richardson and Fortin were both creditors, the latter being also a stockholder. The findings show that the total indebtedness of the corporation was made up of the two judgments held by Richardson and Fortin, respectively; the total debt was the sum of these two judgments; the 14 defendants and plaintiff Fortin, as stockholders, were respectively liable to the corporation to the extent of any unpaid balance of their stock, and the creditors were entitled to be subrogated to the rights of the corporation. But the court treated the payment of Richardson's judgment by the 14 defendants not only as discharging them from liability to Fortin as a creditor, but as giving them a right to a several judgment against Fortin by way of contribution, entirely ignoring the fact that Fortin was a creditor of, as well as debtor to, the corporation. Fortin could not complain if he had agreed that these defendants might pay Richardson in full, and thus discharge their liability to the corporation. The stipulation, however, under which the 14 defendants paid the Richardson judgment expressly reserved to Fortin all rights in the pending action, and under that stipulation these defendants could not deprive Fortin of his right to contribution as a stockholder or his right as a creditor of the corporation. When the 14 defendants paid Richardson, it was subject to an equitable adjustment of their and Fortin's rights as stockholders and Fortin's rights as a creditor, as shown by the pleadings and evidence,

Simply stated: The 14 defendants and Fortin were liable for the two judgments sued upon, within the limit of \$50 per share, to the extent of the unpaid balance of their subscribed stock. A judgment could not be entered against Fortin in his own favor, as he was plaintiff; but the proportionate amount due from him on both claims sued upon should have been deducted from the amount due him on his judgment, and he should have had a several judgment against each of the 14 defendants for his proportionate share of the indebtedness of the corporation to him. In other words, Fortin should be treated as both creditor and debtor, and in arriving at what should be paid him there should be first deducted from his claim the amount of his proportionate liability to the corporation on both claims, and the balance should be apportioned among the said 14 defendants, and judgment entered accordingly. The right of the creditors to be subrogated to the corporation to the extent of claiming any unpaid balance due from the stockholder to the corporation is too well settled to require any citation of authorities, and a creditor does not lose this right by being a stockholder. He may be postponed to other creditors not stockholders, but the principle does not apply here, as the only other creditor was fully paid. This principle admitted, it seems to us too plain to require argument that the trial court erred in ignoring Fortin's relation as a creditor. If the 14 original defendants chose voluntarily to pay Richardson, stipulating that Fortin's rights should be unaffected thereby, we do not see upon what principle Fortin can be made to suffer. The claim that Fortin is estopped because his attorney was Richardson's attorney is not tenable. The attorney did not stipulate for Fortin, and, besides, if he had, Fortin was fully protected by the terms of the stipulation. It was held in *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319, that when the corporation is insolvent (as is the case here) the creditors cannot take upon themselves the authority of the corporation, and pay the subscription to one creditor to the injury of the other creditors. This was, in effect, what these 14 defendants did. They undertook to relieve themselves by paying their entire subscription to one creditor,—Richardson,—wholly disregarding the rights of the remaining creditor, Fortin.

2. In the cross bill filed with the answers of the 14 original defendants certain 30-odd other stockholders were brought into the action, and most of them were served, and appeared by answer; and it was alleged in the cross bill that they were solvent, and able to contribute their share of any judgment rendered. This cross bill was not served on Fortin, the co-plaintiff, nor was it answered by him. But he claims that the parties were before the court, and the issues presented by their pleadings were there also; and that, as the avow-

ed object of the pleadings was to have an adjudication of the liability of these new parties, and to compel them to bear their just proportion of any relief to which the original complainant should be found to be entitled, the court should have found upon these issues. The 14 defendants having, as they supposed, fully discharged their liability by paying Richardson (in which they each paid substantially 50 per cent. of their corporate liability), and the court having so regarded their payment, it became a matter of indifference to them, and apparently so to the court, what was done with these new parties; and the trial court therefore cut the case in the middle at this point, and made no findings as to them, thus in effect increasing the burden of the original 14 defendants and Fortin also. These 14 defendants do not appeal, and cannot complain; but Fortin complains, and now insists that he should have had the benefit of findings, and, if these additional parties were in fact stockholders, and still owed the corporation as subscribers to its stock, they should have been made to share his burden. The question need not be decided, since the case must be remanded, and plaintiff Fortin can, if he wishes, easily remove all question by an appropriate pleading, or by obtaining the proper order of the court.

3. Appellant makes the point that, as the court found that he has never paid anything to the corporation for his shares, the stock was, therefore, void, and he was not liable thereon. Appellant relies on section 359, Civ. Code, which provides that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received." The court did not find that Fortin was to receive these shares as a gratuity. It found that he, as did all other stockholders, subscribed for certain shares, and agreed to pay therefor \$50 per share, but had not paid. He became creditor of the corporation beyond the amount he owed it as a subscriber, about the time he subscribed, and it may have been for this reason that he was not called upon to pay at the time he subscribed, or at all. Whatever the reason was, he entered into the agreement with his fellow stockholders, and he furnished merchandise and labor to the corporation with knowledge of the agreement, and became indebted to the corporation for his shares as the others did. Under the circumstances he cannot be heard to question his liability as one of the original promoters of the enterprise which the corporation was formed to carry out. Fortin is in the same position as the stockholders whom he sues. They had not paid, nor had he. To obtain a judgment against them, he assumes that they are liable on their subscriptions, but for his subscription, made under the same circumstances as theirs, he is not liable. If the position be sound, he is "hoist with his own petard," and they, too, must escape liability. But we do not decide how far a promise to pay in the future for shares delivered will

be regarded as "money paid, labor done, or property actually received." Respondents contend, and with reason, that a promise to pay may be enforced, and is property; that, for example, a promissory note given in good faith by a solvent subscriber in payment of his subscription is "property actually received." The question does not necessarily arise. Appellant is in no position to repudiate his obligation to the corporation. The law on the point, as upon other questions in this case, will be found in a learned note to *Thompson v. Bank* (Nev.) 3 Am. St. Rep. 797 (s. c. 7 Pac. 68).

4. It is not necessary to pass upon the motion to dismiss the appeal from the judgment. The errors complained of are reviewable on the appeal from the order, and hence the alleged defective appeal from the judgment is immaterial. Nor is it necessary to decide whether an agreement may be made among all the stockholders that the shares shall be deemed fully paid by payment of an agreed amount less than the par value. Such an agreement has been held to be good among the stockholders under circumstances when not conclusive as to creditors. See *Thompson v. Bank*, supra, note. Appellant, as a stockholder, was party to the agreement in the present case, and cannot avoid its consequences as a creditor. The judgment and order are reversed, and the cause remanded for a new trial.

(130 Cal. 631)

SAN MATEO COUNTY v. COBURN. (S. F. 1,450.)¹

(Supreme Court of California. Dec. 12, 1900.)

COUNTY HIGHWAY—CONDEMNATION PROCEEDINGS—DECISION OF COUNTY BOARD—COLLATERAL ATTACK—COMPENSATION—CONSTITUTIONAL LAW—APPEAL—REVERSAL OF DECREE—EFFECT ON ORDER FOR POSSESSION.

1. The necessity, location, and extent of a public highway are matters of a political or legislative character, and the legislature, by Pol. Code, § 2681 et seq., having vested in county boards of supervisors power to determine such questions, the decision of a county board proceeding in accordance therewith is not subject to collateral attack; and in a subsequent proceeding by the public to condemn a right of way for a public road the court cannot review the action of the board in determining these questions, notwithstanding section 2690 provides that the suit for condemnation "shall be determined by the court or jury in accordance with the rights of the respective parties, as shown in court independent of such proceedings before said board."

2. A county being a political and not a municipal corporation, it cannot appropriate a right of way to its use until full compensation has been first made in money, or ascertained and paid into court for the owner, irrespective of any benefit, as required by Const. art. 1, § 14, in relation to such appropriations by corporations other than municipal.

3. As a final decree of condemnation can be made only after full compensation has been made to the owner, or ascertained and paid into court for him, an order for possession, being founded on the decree, must fall with the reversal thereof for inadequacy of the compensation made.

Department 1. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Proceedings by the county of San Mateo against Loren Coburn to condemn land for a public road. From a decree confirming the amount of damage awarded him by the county board, from an order denying a new trial, and from an order permitting plaintiff to enter into possession of the land, defendant appeals. Reversed.

Joseph H. Skirm, for appellant. Henry W. Walker and Geo. C. Ross, for respondent.

HARRISON, J. The plaintiff seeks to acquire by condemnation a right of way over certain lands of the defendant for a public road. It is shown by the complaint that a sufficient petition for laying out a public road was presented to the board of supervisors of the plaintiff, and that viewers were thereupon appointed, and that their report was afterwards approved by the board, and the amount of damage that would be sustained by the defendant was ascertained and declared, and by order awarded to him; that the amount so awarded was set apart for him in the county treasury, and notice thereof given to him, and that he did not accept the same within 10 days thereafter; that thereupon the board of supervisors by an order directed that proceedings be instituted by the district attorney to procure the right of way under the provisions of the Code of Civil Procedure. The defendant, in his answer, denied the necessity of a right of way over his lands for any public use, or that the laying out or opening of a public road on said lands is a public necessity, and, in addition thereto, claimed that he would sustain damage much greater in amount than had been awarded by the supervisors. The cause was tried by the court, and findings made in accordance with the allegations of the complaint, and that the value of the land taken for the road and the improvements thereon was \$800. The court also found that the benefits which the defendant would receive from the opening of the road would be equal to the damage occasioned thereby to his remaining land. Judgment was thereupon entered in favor of the defendant for \$800, and for the condemnation of a right of way over his lands as set forth in the complaint. The plaintiff paid into court for the use of the defendant the amount of the judgment, and the court thereupon entered its judgment of final condemnation of said land for the purposes of a public highway. Defendant gave notice of a motion for a new trial, and while said motion was pending the court, upon motion of the plaintiff, made an order that, upon the payment into court of a further sum of money as a fund to compensate the defendant, the plaintiff might take possession and use the land so condemned until the final adjudication of the controversy. The defendant's motion for a new trial was denied, and he has appealed from this order, and also

¹ For opinion on rehearing, see 63 Pac. 321.

from the decree of confirmation, and from the order permitting the plaintiff to enter into possession of the land. At the trial, when the plaintiff rested its case, the defendant moved to dismiss the proceeding upon the ground that no evidence had been offered tending to show that the use for which the condemnation of his land was sought was a public use. The court denied this motion, and afterwards excluded evidence of that character offered by the defendant, and ruled that the only issue to be tried was the value of the lands to be condemned. These rulings are now assigned as error.

1. The right of the state to appropriate private property for public use is an element of sovereignty, and in section 14 of article 1 of the constitution the people of this state have limited this right by declaring the conditions upon which alone it may be exercised. It is the function of the legislative department to determine in the first instance what shall constitute a public use, and whether any private property shall be taken for such use, as well as the extent to which such property may be taken; and in section 1237 et seq., Code Civ. Proc., the legislature has enumerated certain public uses for which the state may exercise its eminent domain, as well as the manner and extent of its exercise for those uses. It is not to be held, however, that the mere declaration by the legislature that the object for which private property may be taken is a public use will preclude the owner from contesting the right to deprive him of his property. If it is sought to condemn the property for a use which is evidently private, or to accomplish some purpose which is not of a public character, courts will disregard the legislative declaration that such use is public. The declaration by the legislature is entitled to great consideration, and if the purpose for which the condemnation is sought is clearly for a public use, or one which in ordinary acceptance or experience expresses a public use, it will be conclusive upon the judiciary. *Stockton & V. R. Co. v. Common Council of City of Stockton*, 41 Cal. 175. But, if it is clear that it is for a private purpose, the legislative declaration will be of no avail. *Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269. So, too, if it can be shown by extrinsic evidence that the end sought to be accomplished is not of a public character, but is solely for private purposes, the condemnation will be denied, as being in excess of the legislative power. In *re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429. As was said by the court in this case: "It is difficult to make an exact definition of a public use. It is easier to define it by negation than by affirmation." And in another portion of the same opinion: "The general principle is now well settled that, when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to

be used, and the extent to which such right shall be delegated, are questions appertaining to the political and legislative branches of the government, while, on the other hand, the question whether the uses are in fact public, so as to justify the taking in invitum of private property therefor, is a judicial question, to be determined by the courts." See, also, *Lewis, Em. Dom.* § 158. There is no room in the present case for any question as to the character of the use for which the condemnation of the land is sought. It needs no argument to show that a highway or public road is a public use. See *Lewis, Em. Dom.* § 166. If it would be claimed otherwise in any particular case, or that the road is in fact for a private use, the burden of showing such fact rests upon the contestant. Whether a public highway is demanded in any particular region, as well as its location and extent, are also matters of a political or legislative character. *Wulzen v. Board*, 101 Cal. 15, 35 Pac. 353; *Siskiyou Co. v. Gamlich*, 110 Cal. 94, 42 Pac. 468; *Lewis, Em. Dom.* §§ 238, 239. In the Political Code of this state (section 2681 et seq.) the legislature has established a tribunal for determining these questions, and has provided for notice to all persons interested therein, and given them an opportunity to be heard. If this tribunal proceeded in accordance with the provisions of these sections, it acquired jurisdiction to determine these questions, and its determination is not subject to collateral attack. In a proceeding thereafter by the public to condemn a right of way for this public road, the court is not authorized to review the action of the board of supervisors in determining these questions. The provision in section 2690, Pol. Code, that the suit for condemnation "shall be determined by the court or jury in accordance with the rights of the respective parties, as shown in court independent of said proceedings before said board," is not to be construed as authorizing the court to review the determination of the board of supervisors as to the proper location of the highway, or the propriety or necessity of establishing it. The clause is not without ambiguity, but full effect is given to its provisions by holding that, after the suit for condemnation has been brought, the court, in determining the rights of the parties thereto, shall disregard any "informalities" which may have occurred in the proceedings before the board. If it had been the intention of the legislature to establish a different rule upon this subject from that which had previously existed, it is reasonable to suppose that it would have expressed such intention distinctly and in unambiguous terms.

2. The court, however, erred in failing to determine the amount of damages that the opening of the road would cause to the lands of the defendant not taken for the road. The defendant testified that damage would be caused to the remainder of his lands by such opening, and the finding of the court that

the benefits which the other portion of his lands would receive from the opening of the road are equal to the damages occasioned by its severance implies that some damage would be caused thereby. Const. art. 1, § 14, declares that "no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner irrespective of any benefit from any improvement proposed by such corporation." It is unnecessary to determine whether a county is a "corporation," within the meaning of this clause, since, if this be conceded, it is a corporation "other than municipal." A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government. It was held in *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, that under the constitution of this state a county is not a municipal corporation, but, if it may be regarded as a corporation at all, it is but a "political corporation." See, also, *People v. Sacramento Co.*, 45 Cal. 695; *State v. Leffingwell*, 54 Mo. 458; *Sharp v. Contra Costa Co.*, 34 Cal. 284; *Askew v. Hale Co.*, 54 Ala. 639; *Commissioners v. Mighels*, 7 Ohio St. 109; *Woods v. Colfax Co.*, 10 Neb. 554, 7 N. W. 269; *Stermer v. Board*, 5 Colo. App. 379, 38 Pac. 839; *Dill. Mun. Corp.* § 22.

3. As the error of the court in determining the amount of damages necessitates a reversal of the judgment, the order permitting the plaintiff to take possession of the land sought to be condemned must also be reversed. A final decree of condemnation can be made only after full compensation has been made to the owner, or ascertained and paid into court for him; and, as the order for possession pending the appeal must have this final decree for its foundation, it must fall with the reversal of the decree. The judgments and the orders appealed from are reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

130 Cal. 674

MURPHY v. MADDEN, Treasurer. (Sac. 673.)

(Supreme Court of California. Dec. 17, 1900.)

CRIMINAL LAW—WITNESSES—FEES.

Pen. Code, § 1329, declares that when a person attends the trial of a criminal case as a witness, on a subpoena, and he has come from without the county, or is unable to pay the expenses of such attendance, the court may direct, by an order on its minutes, that an order be drawn on the county treasurer in favor of the witness for a reasonable sum. St. 1895, p. 267, determines the fees of witnesses, but makes no provision as to the enforcement of payment. *Held*, that where petitioner attended as a witness in a criminal case, on a subpoena, and the judge made an order in writing,

but not entered on the minutes, that a warrant be drawn on the treasurer for a certain sum in favor of the "above-named witness" (no name being given), and subsequently a succeeding justice made an order on the minutes, termed a "nunc pro tunc order," that a warrant be drawn for the witness, and that such order operate as if made on the date of the former, it was proper for the county treasurer to refuse payment, since the first order was ineffectual, and the nunc pro tunc order had no valid prior order to rest on, and was void.

Department 2. Appeal from superior court, Modoc county; N. D. Arnot, Judge.

Petition by John Murphy for mandamus against John Madden, treasurer of Modoc county, to compel the payment of a warrant drawn on him by the county auditor. From a judgment denying the writ, plaintiff appeals. Affirmed.

G. F. Harris, for appellant. John E. Raker and E. C. Bonner, Dist. Atty., for respondent.

TEMPLE, J. This appeal is from a judgment in the superior court denying a writ of mandate to the county treasurer. The judgment was upon demurrer, the plaintiff declining to amend. The petition shows that petitioner attended as a witness in the trial of a criminal case, in obedience to a subpoena, for seven days, and, to attend, traveled one mile. Judge Clafin, who presided at the trial, made an order in writing, but which was not entered in the minutes of the court, as follows, after the title of the cause: "The auditor of Modoc county, California, is directed to draw his warrant upon the treasurer of said county in favor of the above-named witness, payable out of the general fund of the county, for ten dollars and sixty cents. Witness my hand this 19th day of December, 1896. C. L. Clafin, Judge of Superior Court." Thereafter, March 8, 1897, upon a showing, the superior court made what is called an "order nunc pro tunc." That was after the term of Judge Clafin had expired, and Hon. J. W. Harrington was superior judge. In this order, inter alia, it is recited that it appeared that the plaintiff, in obedience to a subpoena, actually attended as a witness in the trial of a criminal case, and that the amount allowed was necessary for the expenses of the witness, and is not in excess of \$1.50 per day, and 10 cents per mile for travel, and the auditor was ordered to draw his warrant for the amount. The former order made by Judge Clafin is then described as being for the same amount, and the order then proceeds as follows: "It is ordered that this order be entered as of the same date, to wit, 19th day of December, A. D. 1896, and be and operate as fully in particular as if said order had been made and entered by the Honorable Clafin on said date in the minutes of the court." Prior to this so-called nunc pro tunc order, to wit, December 19, 1896, the auditor had issued a warrant to petitioner for the amount. On the 8th day

of March, 1897, after the nunc pro tunc order had been made, this warrant was presented to the treasurer, who refused to pay the same, and thereupon this proceeding was inaugurated.

The order made by Judge Clafin is ineffectual from any point of view. It is in favor of no one, and does not authorize the auditor to draw his warrant for any person. The recital is, "in favor of the above-named witness," but no person is named. It could have no validity under section 1329 of the Penal Code, for the further reason that it was not made by the court and entered in the minutes of the court. Counsel contends that it is, or may be, an ex parte order, and as such might have been made in chambers. But, conceding it to be an ex parte order, still this would not follow; for it is expressly provided in section 1329, *Id.*, as to this order, that it must be, "if the attendance of the witness be upon a trial," by the court, and by order entered upon its minutes; in other cases, by the judge, by written order. The statute itself discriminates between the "court" and the "judge," and provides that in one case the court must act, and in the other the judge may. Whatever is done by the court is also done by the judge, as an essential constituent of the court, but the converse is not true. The order made by Judge Harrington was evidently intended to be a compliance with the act to establish fees, passed in 1895 (St. 1895, p. 267), and counsel on both sides seem to so consider it. Supposing that act to apply,—a proposition which is seriously contested,—it simply determines fees which certain persons, officers, witnesses, and others, are entitled to charge, but declares nothing as to who shall pay, or in what mode payment can be enforced. Counsel for appellant contends that section 1329 of the Penal Code provides the mode in which witnesses in criminal cases are to be paid. I am unable to agree with counsel in this contention. Section 1329 provides only for the special cases of witnesses from without the county, and those too poor to pay the expense of attendance. As to neither class does it provide compensation or anything in the nature of fees, and, as to the poor, it simply furnishes the court with the means of procuring the attendance of the witnesses. There being no mode provided for the payment of these fees, supposing they constitute a valid charge against the county,—which we do not determine,—they are to be submitted to the board of supervisors as other claims against the county are submitted.

We have not found it necessary to determine whether the successor of Judge Clafin could pass upon the claim of the witness under the fee bill of 1895. If the court had made a valid order, which for some reason was not entered in the minutes, no doubt this order so made, or another to the same precise effect, could have

been subsequently entered as of the date the first order was made; but as the court in December, 1896, failed to make an order in the matter, the so-called nunc pro tunc order made by Judge Harrington must be sustained, if at all, as an order made in the first instance. Nor do we find it necessary to decide whether Modoc county has a special fee bill. The judgment is affirmed.

I concur: McFARLAND, J.

BEATTY, C. J. I concur. I wish to add to what is said by Justice TEMPLE that, although there is no law which authorizes a court or judge to make an order for the payment of any claim of a witness, except in the cases specified in section 1329 of the Penal Code, I still think that all fees claimed under the act of 1895 (St. 1895, p. 273) must be audited by the court before any claim therefor can be allowed and ordered paid by the board of supervisors.

(131 Cal. 1)

THOMPSON et al. v. STAACKE et al. (S. F. 2,301.)¹

BANK OF CALIFORNIA v. SAME.

(Supreme Court of California. Dec. 18, 1900.)

EXECUTOR'S ACCOUNTS — ALLOWANCE TO WIDOW—OBJECTION TO ACCOUNT—COLLATERAL ATTACK.

Where an executor is ordered by the court to pay a certain monthly allowance to the widow of testator, and creditors of the estate do not appeal from the order, which is not void on its face, or ask that it be set aside, they cannot object to the allowance of the executor's account, showing such payments, on the ground that the estate was insolvent when the order was made.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Objection by Louisa J. Thompson and others to the final account of George Staacke as executor of the estate of Thomas Bell, and objection of the Bank of California to the same. From an order allowing the account, the objectors appeal. Affirmed.

A. N. Drown, Naphtaly, Freidenrich & Ackerman, Garret W. McEnerney, Wm. B. Bosley, John S. Drum, Maurice V. Samuels, and James M. Allen (J. F. Leicester, of counsel), for appellants. Sidney V. Smith, T. Z. Blakeman, and Brewton A. Hayne, for respondents.

GAROUTTE, J. Thomas Bell died testate in the city and county of San Francisco. Subsequent to the issuance of letters testamentary, and prior to the return of the inventory and appraisement, the court made an order for a family allowance of \$2,000 per month; this allowance to continue until the further order of the court. The administration of the estate proceeded on its course, and nearly three years later two

¹ For opinion on rehearing, see 63 Pac. 668.

creditors of the estate filed a petition asking that the order for a family allowance previously made be modified. Theresa Bell, the widow of Thomas Bell, deceased, contested the application, and upon the hearing the original order was modified to the extent that the allowance was fixed at \$1,500 per month, commencing at that date. The administration still continuing, about three years later the order of family allowance, at the instance of the same creditors, after a hearing and contest upon the part of the widow, was again modified, being fixed upon that hearing at the amount of \$100 per month. Under these various orders of family allowance more than \$80,000 has been paid by the executors to the widow, and much the greater portion of this amount has been allowed and settled in the accounts rendered by the executors to the court. But upon the hearing of the last account rendered by the sole executor, Staacke, creditors appeared and objected to those items of the account consisting of various sums of money paid by the executor to the widow under the two later orders of family allowance, and these creditors based their objections upon the ground that the two aforesaid orders were void by reason of the fact that the estate was insolvent when they were made. At the hearing of the account they offered evidence tending to show the insolvency of the estate at that time, and this evidence was rejected. The sums paid to the widow to which objections were made were allowed by the court, and this appeal is taken by the creditors from the order settling the account.

This court will not concern itself as to whether or not the original order for a family allowance became void ipso facto either upon the return of the inventory, or expired by mere lapse of time upon the expiration of one year from its date, by reason of insolvency coming upon the estate. The moneys here involved are moneys expended under the subsequent orders, and our attention will be directed to these orders alone; for, if the original order was void at the time the later orders were made, and therefore not susceptible of modification, then the second order made was a new and independent order, and must look to itself for sufficient strength to stand alone. Had the court power to make the second order? Or, bringing the question directly home, upon the hearing of an account of the executor may the creditors object to the allowance of moneys paid out under this order? We are entirely satisfied the creditors cannot successfully support the contention made. The order is not void upon its face, and it is too late upon the hearing of the account to show that the estate was insolvent when the order was made, and that therefore the court lacked jurisdiction to make it. Such a holding would place executors and administrators in a sorry plight, as would be fully exemplified in this case if these items for money paid

were rejected from the account. Conceding the court had no power to make the order if the estate was insolvent, still the making of the order in itself is an adjudication that the estate was not insolvent. In principle, this identical question is decided by the case of *In re Welch*, 106 Cal. 430, 39 Pac. 805, where the court, in speaking of an order of family allowance, said: "It is asserted that this order is invalid for lack of a finding that the property exempt from execution, and already set apart to the support of the widow, was insufficient for the purpose. * * *

The fact that the court, after setting aside exempt property, made its order for family allowance, involved of necessity the decision that the amount originally set apart was insufficient. The order for additional allowance in itself was a declaration of that insufficiency." The time for appeal from the order has long gone by, and the attack here made is essentially a collateral attack. The making of the order necessarily involved a determination that the estate was solvent, and it is now proposed to show upon this collateral attack that the finding of the court as to the solvency of the estate is untrue. This cannot be done. These appellants had ample opportunity to protect themselves, if the estate was insolvent, by directly attacking the order. If they had no notice of the hearing upon which the order was made, then, clearly, they had the right subsequently to ask the court to set it aside. Indeed, section 1466 of the Code of Civil Procedure contains no provision for notice to creditors before making an order for the family allowance. *Leach v. Pierce*, 93 Cal. 619, 29 Pac. 235. By the aforesaid section the court only has power to make an order of allowance when the amount already set apart under sections 1464 and 1465 is insufficient for the support of the widow; and appellants here, with equal legal propriety, could contest this account upon the ground that when the order was made the court had previously set apart an amount sufficient for the support of the widow, and that therefore the order made was void. Yet the case of *In re Welch*, supra, holds directly to the contrary of that contention. Again, by section 1466 the court "may make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family." It might with equal legal propriety be contended that the order of allowance was void, or at least void pro tanto, upon the ground that it was too large, and that the amount was not necessary for the maintenance of the family. Of course, the validity of an order of allowance cannot be attacked collaterally upon these grounds. As far as the validity of any particular order of allowance is concerned, it must be held that these matters were considered and determined when the order was made, and were determined in a way that supports the validity of the order made. The same rule necessarily

applies upon the question of the insolvency of the estate, and it must be held that, when the court made the order or orders involved, it decided that the estate was solvent. It is said in *Burris v. Kennedy*, 108 Cal. 336, 41 Pac. 458, "The same presumption must now attach to decrees in probate proceedings upon collateral attack as to judgments in cases at common law or in equity."

There are two separate appeals in this case, brought here upon a single record. For the reasons given, the order settling the account of the executor, from which the appeals are taken, is affirmed as to both appeals.

We concur: VAN DYKE, J.; McFARLAND, J.

(130 Cal. 657)

COIT et al. v. WESTERN UNION TEL. CO.
(S. F. 1,521).¹

(Supreme Court of California. Dec. 14, 1900.)

TELEGRAPHS — UNREPEATED MESSAGE — RELEASE OF LIABILITY — AGENCY — GROSS NEGLIGENCE.

1. A finding that an error in a telegram as delivered was not due to the gross negligence of the telegraph company, or any other degree of negligence, is equivalent to a finding that the company exercised great care, within Civ. Code, § 2162, requiring telegraph companies to exercise great care and diligence in the transmission and delivery of messages, and hence the company was not liable for loss resulting from the error.

2. Where plaintiffs requested certain information by telegram, and it was sent them by an unrepeat message, under a contract with the telegraph company that it should not be liable for mistakes in any unrepeat message, whether happening by the negligence of its servants or otherwise, plaintiffs by such request made the sender their agent, and hence were bound by the contract, and the telegraph company was not liable to them for damages for a mistake not caused by its gross negligence.

3. Plaintiffs' correspondent sent them an unrepeat telegram under a contract releasing the telegraph company from liability for mistakes in unrepeat messages, whether caused by the negligence of its servants or otherwise, in reply to an inquiry for a price on steel rails. At the time the message was received for transmission the telegraph line was working badly, on account of storms along the line, and sometimes messages could not be transmitted, but when the message was sent the line was in working order. *Held*, that the transmission at such time was not gross negligence, and hence plaintiffs could not recover for a mistake in the message as delivered to them.

Department 1. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

Action by Griffith Coit and another against the Western Union Telegraph Company for damages for failure to correctly transmit a message. From a judgment for defendant, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Thornton & Merzbach, for appellants. R. B. Carpenter, for respondent.

GAROUTTE, J. Plaintiffs telegraphed to W. B. Dennis, at St. Louis, asking him to tele-

graph them the lowest cash price for 220 tons of 40-pound steel rails. The message was correctly delivered, and in answer thereto Dennis telegraphed to plaintiffs the price to be \$37 per ton. This dispatch was delivered in due time, but when delivered it read \$27 per ton; the mistake in the message having occurred in transit, by reason of atmospheric disturbances. Relying upon the words of the message as delivered, plaintiffs entered into contracts to buy and sell steel rails, and great damage resulted to them by reason of the mistake of defendant heretofore stated. To recover this damage the present action is brought. The facts of the case are largely agreed upon, and in addition the court made a finding of fact as follows: "The defendant, Western Union Telegraph Company, was not guilty of gross or any other degree of negligence in the transmission of the message of Dennis to the plaintiffs; nor was the error or mistake in the said dispatch of said Dennis, as the same was delivered to said plaintiffs, due to or caused by the gross or any other degree of negligence of the said defendant, Western Union Telegraph Company." Upon the facts, judgment was rendered for defendant, and this appeal from the judgment and order denying a motion for a new trial is now before us. This finding in favor of defendant of no negligence is essentially a finding of the ultimate fact in the case, and will be so treated by the court in the consideration of the merits of this appeal.

The Civil Code declares (section 2162), "A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages." In many jurisdictions it is held that the phrase "gross negligence" is a misnomer, and that the adjective "gross" in no way qualifies the noun "negligence." But in this state the rule is recognized to the contrary, not only by the decisions of this court, but by many sections of our Civil Code. The phrases "gross negligence" and "slight negligence" are found in common use in the law of this state, and, being so used, each must be held to have a distinctive meaning. The defendant in this case was required to use great care in the transmission and delivery of this message. The court found that, in the transmission and delivery of this message, defendant was not guilty of any negligence. Not being guilty of any negligence whatever, defendant must be held to have used great care; and the finding of fact quoted is the equivalent of an express finding that defendant used great care in the performance of its duty in the transmission and delivery of the message here involved. But, in view of the conclusion at which the court has arrived, it is unnecessary to determine whether or not the evidence in this case is sufficient to support a finding of fact to the effect that defendant was not guilty of any negligence whatever, and this conclusion is based upon the following reasons:

The written message which was delivered

¹ Rehearing denied January 12, 1901.

by Dennis to defendant, to be sent to San Francisco and delivered to plaintiffs, contained the following regulation and stipulation bearing upon defendant's duties and liabilities: "It is agreed between the sender of this message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." In this case the message sent from St. Louis to plaintiffs was not a "repeated message." The foregoing stipulation constituted a valid and binding contract between Dennis, the sender, and the defendant company. As to its validity and binding force in this state, at least, the law may be considered settled. *Hart v. Telegraph Co.*, 66 Cal. 579, 6 Pac. 637; *Redington v. Cable Co.*, 107 Cal. 317, 40 Pac. 432; *Primrose v. Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883. These authorities declare the rule of this state upon the question. It follows, therefore, that if Dennis, the sender of the message, was bringing this action against defendant for damages suffered by him, he would be bound by the agreement made, and could only recover in case defendant was guilty of willful misconduct or gross negligence in the performance of its duty. The interesting question then presents itself, do these plaintiffs, the addressee and receiver of the message, stand in a better position, as against defendant's negligence, than does Dennis, the sender of the message? In England it is held by the courts with entire unanimity that the addressee of a message has no right of action against the telegraph company for failure of performance of duty. And this conclusion is based upon the proposition that the relation between the parties is purely one of contract, and the addressee is not a party thereto. In this country it may be deemed settled law that the addressee has a right of action against the telegraph company when by its negligence he has suffered damages. At the same time the different reasons given by the different courts in adopting this rule of law are many. We will not here enter into a discussion of the general principles governing litigation arising between individuals and telegraph companies in the matter of sending and receiving messages, but will confine ourselves to a consideration of the law bearing upon the facts of this particular case.

Plaintiffs telegraphed to Dennis, in St. Louis, requesting him to send by telegram the price of 220 tons of steel rails. In pursuance of that request, Dennis telegraphed the desired information. It is thus plain that Dennis performed service for plaintiffs at their request. And, that being so, we deem the conclusion irresistible that, in the performance of the service, Dennis was acting for plaintiffs, and was their agent. The fact that plaintiffs by a telegram requested

him to perform this service is immaterial. They could have made the request with the same legal result either by letter or parol. If a party residing in St. Louis had been engaged for a consideration by plaintiffs to telegraph them the information here desired, and that party had done so, certainly such party would have been the agent of plaintiffs. Yet the fact, if it be a fact, that no consideration was paid by plaintiffs for the performance of the service by Dennis is not a material element in the consideration of the question of agency. Dennis, in sending the message, being the agent of plaintiffs, the addressee of the message, they were bound by the contract made with the defendant by their agent. Plaintiffs, by requesting him to send the message, necessarily authorized him to contract with defendant as to how that message should be sent. And this general authorization was sufficiently broad to include the agreement as to nonliability heretofore set out, and therefore the agreement was binding upon the principal, these plaintiffs. In discussing this identical question, Thompson on the Law of Electricity (section 237) says: "In such a case is the receiver of the message bound by the stipulation, assuming that the sender was bound by it? If the right of action which the receiver has against the company rests upon privity of contract, and depends upon the circumstances that the sender was his agent,—in other words, if the contract with the telegraph company was the contract of the receiver, through his agent, the sender,—then, on the most unshaken ground, the receiver would be bound by this condition, if the circumstances were such that it would bind the sender." Now, in this state, by the authorities already cited, it is plain that Dennis was bound by the stipulation; and, having power to make it, his principal can only stand in his shoes. But it is said the action of the addressee of a message is founded upon tort, namely, a breach of public duty, and that therefore the question of contract does not enter into it. Yet, in a case like the one at bar, it may with equal legal propriety be said that a cause of action by Dennis against defendant would be founded on tort, namely, a breach of public duty, and thus eliminate any question of contract from the case. But this court has said that it cannot be done, and that Dennis must stand upon his contract as made. In cases where no question of privity of contract arises between the sender and the receiver of a message, the addressee may rest his right of action on tort; but where a party to a special contract, either directly, or indirectly through the sender, his agent, brings his action against the company, he must stand upon his contract rights.

We find many cases which support the conclusion at which we have arrived. The roads traveled by courts in arriving at this

conclusion are many, yet those roads all lead to the same destination. In the leading case of *Ellis v. Telegraph Co.*, 13 Allen, 238, no question of agency was adverted to in the opinion, yet the court said: "Besides, it is difficult to see how the plaintiff, who claims through a contract entered into by the sender of the message with the defendants, which created the duty and obligation resting in the defendants, can claim any higher or different degree of diligence than that which was stipulated for by the parties to the contract. Certainly a derivative or incidental right cannot be greater or more extensive than that which attached to the principal or source whence such right accrued or was derived." In *Curtin v. Telegraph Co.* (Sup.) 38 N. Y. Supp. 58, it is said: "The stipulation for exemption from liability contained in the printed blank of the company, upon which the sender writes his message, constitutes a contract which binds him and the person to whom the message is addressed, if the assent of the sender to such stipulation can be assumed." In *Aiken v. Telegraph Co.*, 5 S. C. 371, it is held: "It is equally clear that any stipulation of an express nature intended to mold and limit his obligation must be construed as attaching to the obligation in its fullest extent, and affecting equally all the persons related to it, either as sender, receiver, or agent of transmission. Under this view of the contract, the plaintiff is entitled to enforce its performance as a direct party in interest." In *De Rutte v. Telegraph Co.*, 1 Daly, 556, we find this language: "When the defendants, therefore undertook and were paid for sending the message, their contract was with the plaintiff, through his agent, and the action for a breach of it was properly brought by him." There is some authority opposed to the general tenor of the cases cited,—as, for example, *Telegraph Co. v. Dryburg*, 35 Pa. St. 303, and *Olympe de la Grange v. Southwestern Tel. Co.*, 25 La. Ann. 384. But no question of agency appears to have been involved in those cases, and it is upon the contract made by Dennis with the defendant, and the privity of contract existing between Dennis and plaintiffs, that we plant our conclusion upon this branch of the case.

In view of what has been said, the remaining question presents itself, has defendant been guilty of willful misconduct or gross negligence? No question of willful misconduct is presented by the record, and the question then is, does the evidence support the finding of fact that defendant was not guilty of gross negligence? Gross negligence is defined to be "the want of slight diligence." "Gross negligence is an entire failure to exercise care, or the exercise of so light a degree of care as to justify the belief that there was an indifference to the rights and welfare of others." "Gross negligence is that entire want of care which

would raise a presumption of the conscious indifference to consequences. See *Redington v. Cable Co.*, supra. It is conceded that the mistake in the message was occasioned by atmospheric disturbances, and that "it is impossible to overcome the action of the elements upon the wire and repeaters with any kind of care and diligence." Plaintiff's counsel, in his brief, says: "In this case negligence does not consist in the manner in which the act was attempted to be done, but in the attempt to do the act at all." The mistake in the message arose in transit between Denver and Los Angeles. And, in view of the fact that the message had arrived at Denver from St. Louis in due time and in proper form, there is no showing of gross negligence up to this point. Especially is this true in view of the further fact that when the message arrived at Chicago from St. Louis, in transit to San Francisco, the only open line of communication to the point of its destination was via Denver and Los Angeles. It follows that counsel's claim is that, in view of the general atmospheric disturbances going on between Denver and Los Angeles at the time, defendant should have held the message at Denver until climatic changes for the better had taken place. There can be no question but that it was the duty of defendant to forward this message from Denver at the earliest practicable moment. Our statute, in terms, demands it. Now, this message was received at Denver at 1:55 a. m. February 20th, and a great storm was then prevailing at intervals of distance and intervals of time between that point and Los Angeles. During the night of the 19th-20th more than 200 messages were transmitted over the line in question from Denver. The operator at Denver knew the line had been working badly by reason of the storm, and at times it was impossible to get a message through. The line was working badly at the time the message was received at Denver, and had been so working off and on all night. But at the time the message was sent from Denver, about 5 a. m., the wire was in good working order. The two operators at Denver and Los Angeles respectively engaged in sending and receiving the aforesaid 200 messages subsequently never heard of any complaint as to the manner of their transmission. Under the circumstances here depicted, defendant was required to do either one of two things, namely, hold the message at Denver for an unlimited time, or send it on its way. And, testing the facts in view of the meaning of the words "gross negligence" as the law defines them, this court cannot say that the finding made by the trial court to the effect that defendant was not guilty of gross negligence has no support in the evidence. The wire at the time the message was sent "was in good working order." The fact that a storm was rioting over the route should not of itself convict defendant of

gross negligence in attempting to forward a message. If that be the law, then messages would not be sent for days at a time, or even weeks, during the winter season. The important question is, what is the condition of the wire? Is it in good working order? And is there a reasonable probability that the message as sent will arrive at its destination? Here the salient fact appears that the wire was in good working order when the message was sent. Taking the evidence altogether, the finding of the court that there was no gross negligence upon the part of the defendant will not be disturbed. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

130 Cal. 683

PEOPLE v. WARREN. (Cr. 667.)

(Supreme Court of California. Dec. 18, 1900.)

LARCENY — INDICTMENT — DESCRIPTION OF PROPERTY — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE — REVIEW — PRESUMPTION — INSTRUCTIONS — POSSESSION OF PROPERTY — CURED ERROR.

1. A description of the property stolen, in an indictment for larceny, as "four calves then and there the personal property of A. L.," is sufficiently certain.

2. In reviewing an order denying a new trial for newly-discovered evidence, it will not be presumed, in support of an affidavit of a witness to an alibi, that the offense was committed at a time to which the affidavit related; there being no evidence in the record.

3. Where, on a motion for a new trial on account of newly-discovered evidence, it was not shown why the evidence was not produced, and it appeared from counter affidavits that the substance of what was set forth in the supporting affidavit was testified to by affiant on the trial, the motion was properly denied.

4. In a prosecution for larceny, an instruction offered by defendant that "the possession must be personal and exclusive, and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant," was properly modified by striking out the part following the word "exclusive," and adding in lieu thereof, "or it must be the possession of some person or persons by the consent and will of the accused, and in either case the possession must involve a distinct and conscious assertion of possession by the accused."

5. In a prosecution for theft of calves, the jury was erroneously instructed that the distinction between an accessory before the fact and a principal in case of felony had been abrogated, and all persons concerned in its commission, whether they directly committed the act constituting the offense, or aided or abetted in its commission, though not present, shall be prosecuted, tried, and punished as principals; but this was followed by a correct instruction that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid or abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed; and the jury were further instructed that the burden was on the prosecution to prove that the calves were stolen by defendant alone, or by defendant and another person or persons, who had conspired together to do so, or that they were stolen by

some other person or persons, while defendant aided and abetted in stealing them. *Held*, that the error in the first instruction was cured.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

J. A. Warren, Jr., was convicted of larceny, and he appeals. Affirmed.

Graves & Graves, for appellant. Atty. Gen. Ford, for the People.

COOPER, C. The defendant was convicted of the crime of grand larceny, and has appealed from the judgment and from an order denying his motion for a new trial. It is conceded that the evidence was sufficient to justify the verdict, but certain errors are urged which we will notice in the order presented in defendant's brief. It is claimed that the indictment does not state facts sufficient to constitute a public offense, for the reason that the personal property alleged to have been stolen is not described with sufficient certainty. The description is "four calves then and there the personal property of Anton Luchessa." This description is sufficiently certain. *People v. Littlefield*, 5 Cal. 356; *People v. Stanford*, 64 Cal. 28, 28 Pac. 106; *State v. Stelly*, 48 La. Ann. 1480, 21 South. 89; *State v. Friend*, 47 Minn. 449, 50 N. W. 692.

Defendant made a motion for a new trial upon the ground of newly-discovered evidence. In support of the motion he filed the affidavit of one Music, in which it was stated by Music that he was at the ranch of J. A. Warren, Sr., the father of defendant, two or three days before the 17th day of November, 1899, and that the father and two of his sons were marking and branding calves in the corral, and so marked and branded eight or ten calves; that defendant was not there, and Music did not see him that day. The larceny is charged to have occurred on the 22d day of November, 1899. We do not see how the fact that Music did not see defendant at the corral two or three days before the 17th of November, 1899, could have affected the result. It is said the evidence of Music would have tended to prove an alibi. The evidence introduced at the trial is not in the record, and we cannot presume that the larceny was shown to have been committed at the time of marking the calves spoken of by Music. The affidavit of Music shows that George Warren was present in the corral at the time of the marking spoken of by Music, as well as his brother William, and his father, J. A. Warren, Sr. It is not shown why the evidence, if material, was not produced at the trial, as the affidavit shows that at least four parties were present at the marking. It was further shown by counter affidavits that Music was a witness at the trial, and in substance testified to the same facts set forth in his affidavit on motion for a new trial. A motion for a new trial upon the ground of newly-discovered evidence is looked upon

with suspicion and disfavor, and a party who relies upon such ground must make a strong case, both in respect to diligence on his part and as to the truth and materiality of the evidence, and if he fails in either respect his motion must be denied. *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *Same v. Rushing* (Cal.) 62 Pac. 742. The showing made in this case was not sufficient either as to diligence or as to the truth and materiality of the evidence.

The defendant offered the following instruction: "The possession of stolen property in a case of larceny is a circumstance tending to prove guilt only where it appears that the defendant acquired the possession by his own act or with his concurrence or knowledge. The possession must be personal and exclusive, and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant." The court modified the instruction by leaving out the words, "and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant," and in lieu thereof added, "or it must be the possession of some person or persons by the consent and will of the accused, and in either case the possession must involve a distinct and conscious assertion of possession by the accused." The modification was proper. It clearly appears therefrom that if the property had been found in the possession of a third party without the knowledge of defendant, and with no assertion of possession on his part, such circumstance would not tend to prove his guilt. The jury were clearly told that the possession of a third party must involve a distinct and conscious assertion of possession by the defendant. Of course, the possession of a third party by the consent and will of defendant and for his benefit would be his possession. The court instructed the jury: "The court further instructs the jury that the distinction between an accessory before the fact and a principal in case of a felony is abrogated, and all persons concerned in the commission of a felony, whether they directly committed the act constituting the offense, or aided or abetted in its commission, though not present, shall be prosecuted, tried, and punished as principals." This instruction was erroneous, as held by this court in *People v. Dole*, 122 Cal. 492, 55 Pac. 581. In that case, however, it was held that where other instructions were given by which it clearly appeared "that merely aiding or assisting in the commission of a crime without guilty knowledge is not criminal," the instructions were to be read together, and the error was cured. In this case the erroneous instruction was followed by the correct instruction: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being pres-

ent, have advised and encouraged its commission, are principals in any crime so committed." And the court further instructed the jury that the burden was upon the prosecution to prove "that the calves were stolen by the defendant and by no other person, or that they were stolen by the defendant and another person or persons who had conspired together to commit the crime, or that they were stolen by some other person or persons, while the defendant aided and abetted such other person or persons in stealing them." The jury could not, in view of these instructions as a whole, have believed that defendant could be found guilty for merely aiding innocently, and without guilty knowledge or intent, in the commission of the offense charged. We advise that the judgment and order be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

130 Cal. 678

PEOPLE v. WARREN. (Cr. 666.)

(Supreme Court of California. Dec. 18, 1900.)

CRIMINAL LAW — TRIAL — INTOXICATION OF COUNSEL — COMMITMENT FOR CONTEMPT — ADJOURNMENT — CONTINUANCE — DENIAL — RECEPTION OF VERDICT — INSTRUCTIONS — CURED ERROR.

1. After the jury had been impaneled, and the trial had proceeded to the afternoon of the second day, the court was compelled to commit defendant's counsel for contempt incurred on the court's adjournment of the case by reason of the counsel's intoxication. *Held*, that an adjournment a reasonable time thereafter to allow other counsel to become familiar with the facts of the case was all that defendant could claim, and that a continuance was properly denied.

2. The jury, after being out several hours, asked to have read the testimony of a witness. It was found that this would take several hours, and owing to the lateness of the hour the court, without objection or exception, announced an adjournment until the next day, when the testimony was to be read, but just before the time set therefor the jury announced an agreement. *Held*, that their verdict was thereupon properly received, without the reading of such testimony.

3. Error in an instruction that all persons who aid or abet in the commission of a crime, though not present, shall be prosecuted and punished as principals, was cured where the jury were elsewhere told that all persons who "aid and abet in the commission of a crime are principals," and "in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence."

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

George Warren was convicted of larceny, and he appeals. Affirmed.

Louis Lamy, C. A. Palmer, and Graves & Graves, for appellant. Atty. Gen. Ford, for the People.

COOPER, C. Defendant was jointly indicted with one J. A. Warren, Jr., for grand

larceny, and convicted. This appeal is from the judgment and an order denying a new trial. It is conceded that the evidence is sufficient to sustain the verdict.

Defendant contends that the indictment did not describe the property alleged to have been stolen with sufficient certainty. The description has been held sufficient in *People v. Warren* (this day filed) 63 Pac. 86; and upon the authority of that case the point is settled.

Error is assigned in the refusal of the court to continue the case during the trial for the purpose of allowing defendant to employ other counsel. The facts, as shown in the record, are as follows: The trial commenced on Monday, April 2, 1900, and a jury was impaneled. At 1:30 p. m. of April 3d, at the opening of the afternoon session, Ernest Graves, who had up to that time been defendant's sole attorney, came into court in an intoxicated condition; and, after some time taken up in attempt to proceed with the trial, it became apparent to the judge presiding that the defendant's attorney was so much under the influence of liquor that the business of the court could not proceed in regular order. The court thereupon admonished counsel, stating that counsel was evidently not in a condition to proceed with the trial; and, while the court was so speaking, counsel interrupted in an insolent and impudent manner, saying, "The allegations of the court are false." Thereupon the court fined the attorney \$50 for contempt of court, but suspended the execution of the fine until the conclusion of the trial, expressly stating that it was not the intention of the court to stop the proceedings of the trial. The court thereupon admonished the jury, and adjourned until 3 o'clock p. m. of the same day. Just as the judge rose to leave the bench the attorney, in a loud, violent, and offensive manner, applied to the judge an insulting epithet. The court then ordered the attorney into custody of the sheriff, and made an order for him to show cause on the following day, April 4th, at 9 o'clock a. m., why he should not be punished for contempt. The case was then continued until April 4th, at 9 o'clock a. m., at which time the court imposed a further fine upon the attorney, and made an order committing him to jail for five days. The court thereupon sent for William Graves, the partner of Ernest Graves who had been sent to jail, and appointed said William Graves as counsel for defendant. The said William Graves requested time to investigate the facts of the case, and the court thereupon continued the case until 1:30 p. m., and directed the reporter to read to said William Graves, if desired, all the proceedings in the case. Upon the calling of court at 1:30 p. m., William Graves made a motion for a continuance, upon his own affidavit and the affidavit of defendant, in which it was stated that William Graves was not

familiar with the facts of the case, and could not safely proceed, and that he was pressed with other professional engagements. The court, after the motion for a continuance was argued and considered, remarked: "I would wish very much to be able to give the defendant an adjournment for some time if it were not for the fact that the jury has been impaneled, and that there are a large number of witnesses here in attendance, and we are in the midst of the trial. Mr. Graves has pleaded other engagements,—Mr. William Graves. I will not set aside the order I made yesterday. I will still let you stand as attorney of record, and I will appoint Mr. Palmer—Charles Palmer—as additional counsel for defendant. I will let this case stand over until to-morrow at half-past one p. m., at which time the defendant will be prepared to proceed. Mr. Reporter, you will read for the counsel any of the testimony that has been taken in the proceeding, that they may be fully advised of the proceedings to date, whenever they desire it, between now and 1:30 p. m. to-morrow." April 5th, at 1:30 p. m., Louis Lamy, an attorney at law, appeared at the request of William Graves, and, with said Palmer, acted as attorney for defendant. The said attorneys, Lamy and Palmer, renewed the motion for a continuance, which the court denied and ordered the trial to proceed. The trial then proceeded, witnesses were examined, and on April 9th, after serving out his five days, Ernest Graves appeared in court and assisted the said Lamy and Palmer in the defense. The trial was completed on April 11th, and the case argued to the jury, and Ernest Graves took part in the argument. We do not think the court erred in refusing to further continue the case. Motions of this kind rest much in the discretion of the court below, and it is only in cases of arbitrary action or abuse of discretion that we would be justified in interfering with the order of the court. In this case the court did not act arbitrarily, but proceeded with care and a constant regard for the rights of defendant. Several adjournments were granted to give counsel time to prepare for trial and to become familiar with the case. While the rights of a defendant should always be carefully guarded, so that his defense may be fully presented, at the same time the public interest and business must be conducted in an orderly manner. Here a jury had been impaneled, and the trial had progressed to the afternoon of the second day. Witnesses were in attendance, and the case taking its regular course. The counsel could not, by becoming intoxicated or incurring the penalty of contempt, give the defendant the right to an indefinite postponement of the case. All the defendant could require, as a matter of right, would be a reasonable time to have other counsel become familiar with the facts of the case. This time was granted by the

court, and, under the circumstances, appears to have been amply sufficient. The court must have discretion in such cases. *People v. Goldenson*, 76 Cal. 341, 19 Pac. 161.

It is claimed that the court erred in not ordering the testimony of J. A. Warren, Sr., read to the jury. The case had been submitted to the jury about three hours, when they came into court after 11 o'clock p. m. and asked to have the testimony of said Warren read. The judge then asked the reporter how long it would take to read the testimony, and was informed that it would take about two hours, as there was about 300 pages of it. The judge then announced to the jury, in the presence of counsel, that owing to the lateness of the hour it would be necessary to adjourn until the next day at 9 o'clock a. m., when the testimony would be read. No objection or exception was then made, and the jury retired and court adjourned. A few minutes before 9 o'clock the next morning the jury came into court and announced that they had agreed upon a verdict. Counsel then objected to the verdict being received because the testimony called for by the jury had not been read. The judge remarked that the jury had found a verdict without having such testimony read, and that he knew of no course except to receive it, and that the jury might be polled, and, if any juror desired to express himself, he might do so. The jury were polled, and all answered that it was their verdict. The court did not deny the right of defendant to have the testimony read. Neither was it an abuse of discretion to adjourn court till the following day for such purpose. The court would not be required to remain in session all night for the purpose of having testimony read to the jury.

The court erred in giving to the jury the instruction to the effect that all persons who aid or abet in the commission of a crime, though not present, shall be prosecuted and punished as principals (*People v. Warren* [this day filed] 63 Pac. 86); but the error was cured, as in that case, by a direct and clear statement of the law in other parts of the charge. The jury were elsewhere told that all persons who "aid and abet in the commission of a crime are principals," and "in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence." In such case we cannot believe that the jury understood that a person who innocently aids in the commission of an offense may be found guilty. The jury, if possessed of common sense, could not have given the word "aid" its extremely narrow and literal sense. The judgment and order should be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

131 Cal. 105

LEMASTERS v. SOUTHERN PAC. CO. (L. A. 791.)

(Supreme Court of California. Dec. 24, 1900.)

RAILWAYS—COLLISION—INJURY TO LICENSEE — CONTRIBUTORY NEGLIGENCE — WILLFUL AND WANTON MISCONDUCT—IMMATURE AGE OF DECEASED—INSTRUCTIONS NOT SUPPORTED BY EVIDENCE.

1. Where deceased, a fireman on a switch engine of defendant, while not on duty jumped on the rear footboard of the switch engine, to ride to the roundhouse, and was killed in a collision, and it was against the rules of defendant to ride on the footboard, of which deceased had knowledge, the contributory negligence of deceased barred a recovery for his death.

2. Where deceased was killed in a collision caused by an open switch, while riding on the footboard of a switch engine, instructions on the question of willful and wanton misconduct on the part of the defendant were improper, as the evidence presented no question of that character.

3. Where deceased, a bright and active boy of 17 years, who had been employed for 2 months as fireman on defendant's switch engine, was killed while riding on the footboard of the engine when not on duty, an instruction that if deceased was a trespasser the jury could take into consideration his youth, and the immature judgment which naturally belongs to youth, in determining his negligence, was erroneous; the evidence presenting no question that deceased was immature or inexperienced.

4. Where the court charged that, if deceased was killed through the wanton and willful neglect of the defendant, the jury must be satisfied that the accident causing the death was not

caused alone by negligence, but that the negligence must have been willful and wanton, to make the defendant liable, and also charged that if defendant failed to give proper signals and keep a proper lookout in order to prevent a collision, and by reason of such negligence, without fault of the deceased, he was killed in a collision, the verdict must be for the plaintiff, the two instructions were directly contradictory and erroneous.

5. Where deceased, a fireman on a switch engine, was killed in a collision while riding on the footboard of the engine while not on duty, an instruction that if the servants of defendant in charge of the engine knew that deceased was riding on the footboard, in a dangerous position, and they did not stop and order him off or compel him to get off, but allowed him to remain without objection until the collision occurred, defendant was liable for his death, provided the defendant did not exercise ordinary care to prevent the accident, was erroneous.

Department 1. Appeal from superior court, Kern county; J. W. Mahon, Judge.

Action by John Lemasters against the Southern Pacific Company. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

J. W. Ahern and Walter J. Trask, for appellant. A. J. Bledsoe, for respondent.

GAROUTTE, J. This action was brought by a father to recover damages for the death of his son. The deceased was a bright, active boy, nearly 17 years of age. He was a fireman upon a switch engine of defendant, and had been working in that capacity for nearly 2 months. At the time of the accident he was not on duty. The pay car of defendant, to which was attached a switch engine, started to go from the railroad station to the roundhouse. A board is attached respectively to the front and rear of this engine, about a foot above the track. This board is placed there for the use of the yardmen in directing the movements of the engine. As the engine started to the roundhouse, the deceased, in company with three others, jumped upon the rear board; and while standing upon it, and riding towards the roundhouse, the engine, by reason of an open switch, passed to another track and collided with a stationary engine there located. Deceased was killed, being jammed between the engine and the car, and the other three parties were severely injured. If deceased had been a passenger upon the train of defendant, and had located himself in a position of danger similar to that where he here placed himself, it is evident damages could not be recovered for his death. His contributory negligence in placing himself in that position would be a complete bar to a recovery. And we cannot see how plaintiff is in a better position to bring this action than he would have been if deceased had been a passenger upon defendant's train. As disclosed by the facts, deceased was either a trespasser or a mere licensee. As a trespasser, defendant owed him no duty; and if he was a mere licensee riding upon the train, even conceding that de-

fendant owed him a duty, still he certainly had no more rights than a passenger situated under the same circumstances. It would be an anomaly to hold that a mere licensee could occupy a position, as to the defendant, more favorable to himself than could the ordinary passenger traveling upon the train. Again, if deceased was a licensee, he was only a licensee to ride upon the train. He was not a licensee to ride upon this board attached to the engine. It was against the rules of defendant for persons to ride upon this board, and deceased was acquainted with that fact. In addition to these circumstances, there is no evidence that the deceased, or anyone else, with the consent of defendant, at this particular time or at any other time, rode upon this board. In this case the doctrine of *Esrey v. Southern Pac. Co.*, 103 Cal. 541, 37 Pac. 500, is invoked,—a case of wanton and willful misconduct upon the part of the defendant. But this is no such case. Here defendant did not know that deceased was upon the board, and, even if it had known it, it did not know that the switch was open. If defendant had known that the switch was open and that deceased was upon the board, and, being possessed of that knowledge, had run the train upon the other track, thereby colliding with the second engine, possibly the doctrine of the case cited could be invoked. *Wilcox v. Railway Co.* (Tex. Civ. App.) 33 S. W. 379, in its facts, is similar to the case at bar, except by the facts of that case it appears that the young man injured was riding on the engine board with the consent of the engineer and other employés. Yet it was there held that, having placed himself in the position of danger, he was barred from recovering damages for injuries received by reason of defendant's negligence. See, also, *Eaton v. Railroad Co.*, 57 N. Y. 382.

Instructions of the court were given to the jury upon the question of willful and wanton misconduct upon the part of defendant. In view of what has been said, the evidence presented no question of that character.

Again, the court instructed the jury that, if deceased was a trespasser, the jury could take into consideration his youth, and the immature judgment which naturally belongs to youth, etc. When we consider that the deceased was nearly 17 years of age,—a bright, active boy who had been for 2 months working as a fireman upon the identical engine upon which he was riding at the time of the accident,—we feel assured there is no place to be found in the case where instructions were appropriate, which deal with this question of the immature judgment of childhood.

The court gave the jury the following instruction at the instance of defendant: "In this case the plaintiff claims that his son, Charles Lemasters, was killed * * * through wanton and willful neglect of the defendant; and, before you can find a verdict against the defendant, you must be sat-

ified that the accident causing the death was not caused alone by negligence, but that negligence must have been willful and wanton." The following instruction was given at the request of plaintiff, in speaking as to the duty of the defendant to give signals and keep a proper lookout in order to prevent a collision: "And if you find from the evidence that the servants of defendant failed therein, and by reason of their negligence, and without the fault of the deceased, Charley Lemasters, he was killed in a collision as alleged in the complaint, it will be your duty to find a verdict for the plaintiff." These two instructions are directly contradictory. The court also gave the jury the following instruction: "And if the servants of defendant in charge of and operating said engine and train, knowing that the deceased, Charley Lemasters, was riding on the footboard of said switch engine, in a dangerous position, yet did not stop the train and order him off, or compel him to get off, but allowed him to remain where he was, without objection, until the collision occurred, then the defendant is liable for his death, and your verdict must be for the plaintiff, provided you find the defendant did not exercise ordinary care to prevent the accident." If this instruction be sound law, then the ordinary tramp riding upon a brakebeam could recover damages for injuries received in a collision occasioned by the negligence of defendant, if the defendant knew the tramp was riding. The instruction does not contain a sound exposition of law. For the foregoing reasons, the judgment and order are reversed and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

6 Cal. Unrep. 626

EASTON PACKING CO. v. KENNEDY et al.
(S. F. 2,118.)

(Supreme Court of California. Dec. 24, 1900.)

BILLS AND NOTES—CONSIDERATION—FAILURE—PROOF—SUFFICIENCY—BONA FIDE PURCHASERS—NOTICE OF FAILURE OF CONSIDERATION—REJECTION OF EVIDENCE—HARMLESS ERROR.

1. Defendants executed two notes, for \$385 each, in payment of a commission for selling land, and payable only in the event that the vendees of the land remained on it for one year, and made improvements equal in value to the notes. The vendees plowed 100 acres, which increased its value \$2.50 per acre, erected buildings, constructed drainage worth \$75, and a levee worth \$64, but with the consent of defendants, to whom they executed a reconveyance, abandoned the premises before the expiration of the year. *Held*, that a finding that there was not a failure of consideration for the notes was proper.

2. Where there was sufficient evidence of plaintiff's ownership of the notes in suit, and the court found against the defendants on the only defense set up by them, error of the court in finding that plaintiff came into possession of the notes without notice of equities in favor of defendants was harmless.

3. Error in rejecting certain evidence as to the conditional delivery of a note was cured by the subsequent admission of all facts tending to show the real consideration for the note.

4. Where the makers of notes resisted payment on the ground of failure of consideration, evidence to vary the terms of the notes, which in no way related to consideration, was properly excluded.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action by the Easton Packing Company against J. W. Kennedy and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Harris & Hubbard and George L. Warlow, for appellants. Frank Kauke and A. M. Drew, for respondent.

CHIPMAN, C. Action on two promissory notes. The complaint was dismissed as to defendant Pool. Plaintiff had judgment against defendants Kennedy and McCormick, from which, and from the order denying motion for new trial, they appeal. The notes in suit were executed by defendants, and delivered to one Summers, the payee, October 30, 1893, and each was for \$385, due one year from date, and provided for payment of a reasonable attorney's fee and expenses of suit, if sued upon. Plaintiff became the holder and owner of the notes, as found by the court, January 19, 1897. Defendants, in a separate defense, alleged that it was agreed that the notes were "payable only in the event that the purchasers of certain real property, that day (October 30, 1893) conveyed to certain parties by these defendants, should make the payments for said property as stipulated in the agreement of purchase and sale and the mortgage for the purchase price of said premises, in which sale the said Summers had assisted"; that the true and only consideration for the notes was the payment to be made by the purchasers of said property; that before the maturity of the notes sued on the purchasers abandoned it, surrendered possession to defendants, and refused to continue in possession of the property under the agreement of purchase or to make any payments; that the consideration for said notes has wholly failed. The court found that Summers rendered service to defendants Kennedy and McCormick in negotiating and assisting in a sale and in securing purchasers for certain real estate belonging to Kennedy and McCormick, and the notes sued on were executed for and in consideration of said services so rendered, and said services were rendered and fully performed at and prior to the execution of said two notes on the said 30th day of October, 1893. And said notes were payable one year after their said date, and were so payable without regard to the payments to be made by the said purchasers of said real property. The court

found against defendants on the special defense pleaded, and finds that the consideration for the notes had not failed.

The evidence showed that the notes represented Summers' commission for finding purchasers for the Kennedy and McCormick land. He found the purchasers, and the sale was made, the vendees taking a deed. They assumed the payment of a mortgage resting on the land for \$4,000, and gave their notes and mortgage for the balance of the purchase price, the first notes falling due two years after date, or one year after the notes in question became due. The remaining ten equal payments matured at annual intervals of one year, the last being twelve years from date. Defendants seem to have abandoned the special defense set forth, and relied on evidence that the consideration was that the vendees of the land should remain on it for at least one year, and within that time make certain improvements, of a value not less than the notes given to Summers. Kennedy and McCormick testified that such was the consideration for the notes. Summers was called as a witness for defendants. He was not asked by defendants as to the consideration of the notes nor as to the alleged agreement. On cross-examination he testified: "These two notes came through a land transaction for commission. At the time of the delivery of these notes there was nothing further that I had to do. As far as I had to do the sale was complete, but there was a stipulation,—a verbal agreement—" The witness was interrupted by plaintiff's counsel at this point, and was told that he had not asked him as to any agreement, and this witness for some reason was not interrogated by either party as to the consideration for the notes, although he was a party to the alleged agreement that they were not to be paid unless the work referred to was performed. There was evidence tending to show that the vendees of defendants plowed about 100 acres of the land, and that this was worth \$2.50 per acre; that they made some improvements thereon, erected some buildings of uncertain value, dug a half mile of drainage ditch, costing \$75, and erected a levee of about same length, costing 40 cents a rod. There was some question as to whether the work was judiciously made, and benefited the land to the extent of its cost. But the alleged agreement proven may fairly apply to work done, and not to its ultimate value to the property. It appeared, also, that the vendees left the ranch before the first year expired, and refused to return to it when requested by defendants; and defendants thereupon, on November 8, 1894, a few days after the notes here in suit were due, and without the consent of the holders of the notes, took a reconveyance of the property from the purchasers, and canceled their notes and mortgage, and allowed the vendees to remove the buildings from the land. What became of the ven-

dees' obligation to pay the prior mortgage is not shown, and so far as appears they are still liable for that amount, and defendants have the benefit of the agreement to pay this amount. It appears, also, that while Summers held the notes it became necessary for him to raise \$200, which he was enabled to do by procuring the individual indorsement of one Rowell, then president of plaintiff company, and delivered the notes in suit to Rowell as collateral security, and he delivered them to the bank that furnished the money, with the note signed by Summers as principal and Rowell as surety. Before Rowell consented to become surety for Summers, he spoke to defendant McCormick, one of the owners of the land, about the notes in suit. Rowell testified: "Before I took these notes at all, I saw McCormick in regard to them, and asked him if the notes were all right. He said they were, and if it hadn't been for that I never should have taken them. Had no knowledge or information of the notes prior to that time. Had no other information than what I got from McCormick at that time." He further testified that McCormick explained to him that the notes were given to Summers "as commission on a land trade"; that he asked him if there was any condition, and McCormick said that Summers was to keep the notes until a certain amount of work was done on the land, "and that the work was done, and more too." Defendants paid \$114.29 on this note, which was credited on the notes in suit by the court.

Conceding that defendants showed that the consideration for the notes was the doing of certain work by the vendees of defendants, and that the vendees would remain on the property one year, the evidence is sufficient to warrant the trial court in its finding that the consideration had not failed. I do not think the fact that the vendees left the land before the expiration of the year shows failure of consideration, the essential thing to defendants, as guaranty of good faith in making the purchase, was that the vendees should expend an amount of money on the land at least equal to the commissions paid to Summers. They did the work, but concluded to give up the place, and defendants consented that they should do so, and took a reconveyance, and canceled the mortgage.

Appellants claim that the findings that plaintiff came into possession of the notes on January 19, 1897, as owner and holder, without notice of any defense by the defendants, is not justified by the evidence. Conceding that plaintiff took its title to the notes subject to all the equities of the makers, the evidence supports the findings of the court against the only defense set up by defendants, and it is therefore immaterial whether or not plaintiff had notice, and, if the court erred in finding that plaintiff had no notice of any defense claimed by defend-

ants, the error was harmless. There is sufficient evidence of plaintiff's ownership of the notes.

Error is claimed in rejecting certain of defendants' offered evidence relating to the alleged conditional delivery of the notes to Summers. The points raised would be worthy of attention if it did not appear from the record that defendants succeeded in getting before the court all the facts bearing upon the question of the consideration for the notes. We have carefully examined the alleged errors, and, conceding error, we find them cured by the unrestrained admission of all the facts tending to show what the consideration was. Evidence tending to vary the terms of the note, not related to the question of consideration, was properly excluded. We advise that the judgment and order be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(131 Cal. 55)

SPIELBERGER v. THOMPSON. (Sac. 734.)¹
(Supreme Court of California. Dec. 21, 1900.)

NOTES—CONSIDERATION—HOLDER.

1. A nonsuit cannot be urged against plaintiff on the ground that he was not the holder at the time of the trial of the note sued on, where it appears that before it was assigned to plaintiff it was placed in the hands of C. as collateral, that the indebtedness for which it was held as security was paid by plaintiff's assignor, and under instructions from defendant, the maker, C. refused to return it to plaintiff, and the answer alleged that C. held it as trustee of defendant.

2. There is consideration for a note where, all the parties to a litigation over the estate being anxious to amicably terminate it, and, the attorney for one of the plaintiffs therein refusing to consent to a dismissal till his fee was paid, one of the defendants told said plaintiff, who had not money to pay his attorney, that if he would dismiss the case she would give him a note to pay his attorney, and would pay the note when she got her money from the estate, and this was agreed to, and steps were immediately taken towards, and resulting in, dismissal, after some delay, largely occasioned by said defendant.

Department 1. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Action by Joseph Spielberger against California Thompson. Judgment for plaintiff, and defendant appeals. Affirmed.

McKune & George, for appellant. Edward J. Dwyer and Devlin & Devlin, for respondent.

GAROUTTE, J. Plaintiff, as assignee, brings this action upon a promissory note, against the maker thereof. Its execution and delivery are admitted, but various defenses to its payment are made. These defenses will be considered.

1. It is claimed that plaintiff was not the holder of the note either when the action was brought or the trial had, and for this reason a nonsuit should have been granted. Under the facts disclosed by the record, there is nothing in the point. Before the note was assigned to plaintiff it was placed in the hands of C. W. Clarke as collateral security. The indebtedness for which the note was held as security was paid by plaintiff's assignor, and, under instructions from the defendant, Clarke refused to return the note to him. But, beyond this, defendant alleges in her answer that Clarke held the note as her trustee. If the note was in the possession of her trustee, it was in her possession, and she is foreclosed by her allegation in the answer from successfully urging a nonsuit upon the ground that plaintiff was not the holder of the note at the time of the trial.

2. It is claimed that the note was given without consideration. Let us pause for a moment to look at the facts. The Oppenheimers were engaged in litigation regarding certain trust property; some were plaintiffs, others were defendants, and still others cross complainants. The payee and assignor of the note was a son. The drawer and defendant was a daughter. All parties litigant appeared to be anxious to bring the litigation to an amicable conclusion. Plaintiff's attorney in the litigation would not consent to a dismissal of the actions until his fee was paid, and his objection to a dismissal was a formidable bar in the way looking towards the accomplishment of the desired end. The evidence at this point is somewhat conflicting as between the assignor of the note and the defendant, but upon this evidence the court found against the defendant's testimony, and we are only concerned in testing the sufficiency of the evidence to support the aforesaid finding. In substance, the payee of the note testified that he told defendant he had no money with which to pay the fee of plaintiff's attorney, and she then said "If I would dismiss the case she would give me a note for fifteen hundred dollars to pay the fee of Mr. Johnson, and would pay the note when she got her money from the estate. The note was given to me in consideration of the dismissal of the cases pending at the time. I immediately took numerous steps, and tried numerous times, by my attorneys, to dismiss the action." It further appeared that the plaintiff's assignor paid the attorney his fee, and some time thereafter the action was dismissed. The dismissal was delayed for some months after the execution of the note, but this delay was largely occasioned by defendant herself. It was essentially a question of fact as to the intention of these two parties, respectively, in the making and receiving of the note in controversy. There is no question of actual fraud involved in its procurement. It is not shown but that the attorney was in fact objecting to the dismissal of the action until his fee was paid. And there is no claim

¹ For opinion on motion for rehearing, see 63 Pac. 678.

that he ever objected to its dismissal after the note was given. From all these facts and circumstances, the finding of a sufficient consideration for the giving of the note will be upheld.

3. We find nothing in the offered and rejected documentary evidence which demands a new trial. We do not see that it had any substantial bearing upon the issues of fact under examination. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

131 Cal. 64

WILLIAMS v. TAM. (S. F. 1520.)

(Supreme Court of California. Dec. 21, 1900.)
GIFTS—PARTNERS—SALE—INTEREST OF THIRD PARTY—NOTICE.

1. Where one refuses to accept the money which his wife's daughter owes him, but, on his wife insisting that he should accept it, he tells her to take it and use it herself, and she does take it from a loan thereafter obtained on the daughter's property, the gift is to take effect at once, and so is a valid gift inter vivos.

2. A partnership in training and racing horses does not give one of the partners authority to sell a horse owned by them as tenants in common, though by them trained and raced as partners.

3. Where W., on selling a horse, tells the buyer that his wife owns a half interest therein, the buyer is put on inquiry as to the authority of W. to sell her interest.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Action by Amanda M. Williams against Joseph H. Tam. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas A. McGowan, for appellant. Geo. D. Collins, for respondent.

HAYNES, C. The complaint alleges that the plaintiff and defendant are owners in common of two horses named, respectively, "Midas" and "Sport McAllister"; that said horses are in the possession of defendant; that she is excluded from the use and possession of the horses,—and prays for a decree of partition, that a sale of the horses be ordered, and for an accounting. The defendant denies that the plaintiff has any interest in the horses, and claims to be the sole owner of them by virtue of a sale to him by the husband of the plaintiff, one Dow Williams. The decree granted the prayer for a sale and partition, but denied the accounting; and defendant appeals from the judgment, and also from an order denying a new trial.

Appellant specifies many particulars in which he insists the evidence does not justify the findings. The evidence, however, is sharply conflicting in most material particulars. The facts may be briefly stated as follows: Dow Williams, the husband of the plaintiff, and one Manuel Morris jointly purchased the horse Midas. In the early part

of 1895 Morris sold his interest in the horse Midas to the plaintiff, and executed a bill of sale to her. Appellant contends that the purchase was made with community funds, and that the horse became community property, and that Midas and Sport McAllister, subsequently acquired, were sold and transferred to him by the husband, Dow Williams. Plaintiff insists that the purchase was made with her separate money. The price was \$500. Plaintiff's daughter, Miss Riley, owed Mr. Williams \$450, but he refused to accept it from her. Plaintiff insisted that he should accept it, and he told her to take the money and use it herself. Plaintiff then secured a loan of \$750 upon her daughter's property, and out of that money paid Morris for his interest in the horse Midas. The other horse was afterwards purchased with the earnings of Midas. The court found these facts upon sufficient testimony, and concluded that said interest in said horses constituted her separate property. The interest acquired by the plaintiff from Morris was in the early part of 1895. These horses were trained and run on the race track until in March, 1896, when Dow Williams was excluded from the privileges of the Bay District track. Not being able to find a purchaser readily, and being told that the horses would also be ruled off, he testified that he went to the defendant, Tam, for legal advice; that it resulted in the execution of a bill of sale of the horses to defendant, dated April 9, 1896, the consideration recited being \$10; and that he then informed "Judge Tam Mrs. Williams had a half interest in those horses." On April 9, 1897, Dow Williams gave Tam his personal receipt for \$200 "in full of all demands on account of the sale of the horses Midas, Sport McAllister, and Venus;" and the court found that on that date, and at no other time, Dow Williams sold and conveyed his interest in said horses to the defendant, "and that prior to such sale and conveyance defendant had notice of the said ownership of plaintiff in said horses."

1. Appellant contends "that there is no evidence to sustain the finding that the half interest in the horses became the separate property of the plaintiff by reason of their being purchased with this alleged gift." Sections 1146 and 1147 of the Civil Code, and several cases, are cited to support said proposition. There is here no question as to what is essential to constitute a valid gift. As stated in *Zeller v. Jordan*, 105 Cal. 148, 38 Pac. 640, cited by appellant: "A gift inter vivos, to be valid, must take effect at once, and there must remain nothing to be done essential to its delivery. If it is to take effect in the future, it is no gift, only a promise to give." But the gift was not to take effect in the future, as in the case above cited, where it was "to take effect at the death of the donor." Here there was no revocation of the gift, and it was in fact received by the donee and appropriated to her own use.

2. It is next contended by appellant that,

if said money was the separate property of the wife, she and her husband were co-partners, and that his transfer to defendant was valid and transferred her interest. Plaintiff and her husband were not engaged in the business of buying and selling horses for profit. Their business was training and running horses upon the race track. As to the horses, which were kept and used for a special purpose, they were tenants in common. "A husband and wife may hold property as joint tenants, tenants in common, or as community property." Civ. Code, § 161. There can be no implication arising from the use made of the horses, nor from the relationship of the parties, that Williams had any authority to sell his wife's interest in the horses, and no authority is shown to have been given him by the plaintiff for such purpose; nor was there any evidence of an agency, whether real or ostensible, for the sale of the plaintiff's interest in the horses. The evidence is that defendant was informed by Dow Williams that his wife owned a half interest in the horses, and that should have put him upon inquiry as to Dow Williams' authority to represent his wife in a transfer of the property. Besides, the bill of sale did not purport to be executed by the plaintiff, nor on her behalf. He cannot, therefore, successfully contend that the plaintiff is estopped by the fact that the horses were in the possession and apparent control of Dow Williams.

3. The motion for nonsuit was properly denied. In his brief, appellant rests this point upon his argument of the points above noticed, and therefore it need not be further discussed.

4. It is contended that the court failed to find upon the special defense that the husband was the reputed owner of the horses, and that defendant purchased them in good faith. The court expressly found "that prior to such sale and conveyance defendant had notice of the said ownership of plaintiff in said horses." The judgment and order appealed from should be affirmed.

We concur: COOPER, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

131 Cal. 41

STARR v. KREUZBERGER et al. (Sac. 739.)

(Supreme Court of California. Dec. 20, 1900.)

APPEALS—FROM JUDGMENT AND ORDER DENYING NEW TRIAL—STAY BONDS.

An appeal on a stay bond from an order denying a new trial, being prior to dismissal of the appeal from the judgment, stays execution on the judgment; so that, pending the appeal from the order, judgment cannot be entered against the sureties on the stay bond on the appeal from the judgment, though it in terms provides that the sureties will pay the judgment if the appeal be dismissed.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Action by Albert H. Starr against Lucas Kreuzberger and another. Plaintiff's motion for judgment against John Skelton and others, sureties on defendants' stay bond on appeal, was denied, and he appeals. Affirmed.

A. L. Shinn and H. Starr, for appellant.
Holl & Dunn, for respondents.

CHIPMAN, C. Appeal from an order denying plaintiff's motion for judgment against the sureties on a stay bond. The action was for personal injuries, and plaintiff had judgment March 15, 1898. April 4, 1898, defendants appealed from the judgment, and gave the usual appeal bond, and also an undertaking to stay execution of the judgment. The appeal was dismissed by this court on November 14, 1898 (grounds not shown), and on December 22, 1898, remittitur was filed in the court below. On January 27, 1899, plaintiff moved for judgment against the sureties upon the stay bond. The appeal bond provided, among other things, that: "If the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellants will pay the amount directed to be paid by the judgment; and that, if the appellants do not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered in said action on motion of respondents, and without notice to us or either of us, in his favor, against the undersigned sureties," etc. This bond was given under section 942, Code Civ. Proc. It appeared that defendants gave notice of motion for a new trial in due time, and in due time their statement on the motion was duly settled and filed. Thereafter, to wit, on September 13, 1898, the motion was duly made, and on the same day was denied, and on October 28, 1898, defendants served and filed their notice of appeal from the order, and on the same day duly filed an undertaking on appeal, which was substantially the same in form as the bond given on the appeal from the judgment, and was in fact a stay bond. At the hearing of plaintiff's motion for judgment on the first bond the court denied the motion, and this appeal is from that order.

It will be observed that before the judgment was entered here (November 14, 1898) dismissing the appeal from the judgment, the motion for a new trial had been heard and denied (September 13, 1898), and the appeal taken from the order, and the stay bond filed (October 28, 1898). In *Holland v. McDade*, 125 Cal. 353, 58 Pac. 9, it was held that upon an appeal from an order denying a new trial in an action for the recovery of money the reversal of the order would necessarily set aside the judgment; and it was

further held, approving *Fulton v. Hanna*, 40 Cal. 278, that such bond operates to stay execution pending such appeal. See, also, *Owen v. Water Co.*, 124 Cal. 331, 57 Pac. 71. In the *Holland-McDade Case*, Holland was defendant in the case of *Curry* against Holland, in which *Curry* had judgment. Holland moved for a new trial, and his motion was denied, whereupon he appealed from the order denying the motion, and, without appealing from the judgment, gave a stay bond on his appeal. Notwithstanding this appeal, and after the stay bond was filed, *Curry* took out execution on his judgment, and McDade, as sheriff, served it by levying on certain property belonging to Holland, and on his refusal to release it from execution Holland sued him for damages. The question was, did the stay bond given on the appeal from the order have the effect to stay execution on the judgment? The answer was in the affirmative. In the case now here plaintiff could not have had execution if defendants had not appealed from the judgment (*Baldwin v. Superior Court*, 125 Cal. 584, 58 Pac. 185, and cases supra); nor could he if defendants had appealed from the judgment, and had given an insufficient or fatally defective bond, and the appeal for that reason had been dismissed, because they would then have been in the same position as if they had not appealed at all from the judgment. We cannot see that any different result would follow where the appeal is from the judgment, and a sufficient stay bond has been given, but for failure for some defect in the proceedings the appeal is dismissed after a stay bond has been filed in the appeal from the order. This latter bond must have the same effect whether the appeal is from the judgment or not, and the fact that a stay bond has been given on the appeal from the judgment can make no difference. It is true, the bond given on the appeal from the judgment in the present case in terms provides that the sureties will pay the judgment if the appeal be dismissed; but the sureties are not liable before the principal, the judgment debtor, has himself become liable. If execution will not issue against the judgment debtor, the plaintiff cannot proceed against the sureties. *Parnell v. Hancock*, 48 Cal. 452. See, also, *Sharon v. Sharon*, 84 Cal. 424, 23 Pac. 1100; *Id.*, 84 Cal. 433, 23 Pac. 1102. If it be true, as is now settled, that the stay bond given on the appeal from the order stays execution on the judgment, it must stay its execution for all purposes and as to all persons. To hold that it may be executed against the sureties when it may not be executed against the principal "would," as was said in *Parnell v. Hancock*, supra, "be to place the sureties in a position apparently less favorable than that occupied by their principal." Besides, defendants may prevail, and secure the reversal of the order, the effect of which would be to set aside the judgment; but their appeal would be barren of

results if the judgment had already been enforced either against the principal or the sureties. We think the reasoning in *Holland v. McDade* applies with equal force to the present case, and is authority for holding that the lower court rightly decided the motion. We advise that the order be affirmed.

We concur: GRAY, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(131 Cal. 101)

JONES v. IVERSON et al. (S. F. 613.)¹

(Supreme Court of California. Dec. 22, 1900.)

APPEAL—NOTICE—SUFFICIENCY—PLEADING—DEMURRER—APPEAL—TRANSCRIPT—FOREIGN MATTER—REVERSAL—COSTS.

1. Where the record on appeal showed only one judgment, and no order in the nature of a judgment, a notice of appeal "from said judgment made and entered in said action in favor of defendants and against the plaintiff" was sufficiently specific to entitle appellant to be heard on appeal.

2. Where a portion of the complaint stated a cause of action, a general demurrer to the whole complaint was improperly sustained.

3. Where the first part of the complaint stated a cause of action, and was followed by matter foreign to such cause of action, which was objectionable for misjoinder of actions and parties and for ambiguity, a special demurrer to the whole complaint was improperly sustained; since, if any part of the complaint shows a cause of action free from objection, a special demurrer to the whole will not lie.

4. Where the transcript on appeal is filed with matters foreign to the case, full costs will not be awarded to appellant on reversal.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; H. L. Gillespie, Judge.

Action by David Jones, as administrator with the will annexed of Evan Davis, deceased, against Neils Iverson and others. From a judgment in favor of defendants, entered on demurrer to the complaint, plaintiff appeals. Reversed.

David Jones, in pro. per. L. G. Morse, for respondents.

CHIPMAN, C. Defendants demurred to the complaint on several grounds. The demurrer was sustained, and, plaintiff declining to amend, defendants had judgment, from which plaintiff appeals.

1. Respondents object to the consideration of the appeal on the ground of the insufficiency of the notice. It is as follows: "[Title, court, and cause.] Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the state of California from said judgment made and entered in said action in favor of the defendants and against the plaintiff. * * * The notice does not give the date of the judgment, nor identify it in any way, except by the statement as above given. If the record

¹ Rehearing denied January 22, 1901.

showed more than one judgment, or if it showed, in addition to that judgment, an order in the nature of a judgment, the notice might be ineffectual for uncertainty. But, as there was but one judgment, to wit, the judgment on demurrer in favor of defendants and against the plaintiff, we think the notice was sufficiently definite to entitle appellant to be heard here.

2. The demurrer went to the sufficiency of the complaint, and also specially set forth as grounds misjoinder of parties defendant, that several causes of action have been improperly united, that the complaint is unintelligible, uncertain, and ambiguous. The complaint was drawn by plaintiff and signed in propria persona. It is obvious that he is a layman with a very imperfect notion of what constitutes the statement of a cause of action in plain and concise language. Briefly, it is alleged in the complaint that one Evan Davis died testate in April, 1888, seised of certain land in Mendocino county, and plaintiff was duly appointed administrator of the estate of deceased, with the will annexed; that on May 3, 1892, "plaintiff was, ever since has been, and now is, the owner, and seised in fee, and entitled to the possession of that certain tract of land" (here follows a description of the land of which the complaint alleges ownership of deceased at his death, and also an additional tract not in the former description). The complaint (paragraph 11) then sets forth that while plaintiff was such owner, possessed and entitled to possession of said land, the defendants wrongfully and unlawfully entered into and upon the said land, and ousted plaintiff therefrom, and ever since have wrongfully and unlawfully withheld and now withhold possession, etc., to plaintiff's damage in the sum of \$50,000. Then follow some 60-odd folios of allegations of various incidents in the history of plaintiff and the said Davis, and their relations with sundry persons, and sets forth certain litigation had by plaintiff and said Davis with sundry persons that apparently have nothing whatever to do with the cause of action set out in the first 11 paragraphs of the complaint, and ought to have been stricken out on motion. The special demurrer seems to have been directed to this portion of the complaint, although it in terms applies to the entire complaint; and might, as to the matters referred to, have been sustained. But we think there is a cause of action stated in the earlier part of the complaint, which must be held to be sufficiently pleaded as against a general demurrer, and is equally good against the special demurrer. The rule is well established that a general demurrer directed to the whole of the complaint should be overruled if some portion of the complaint states a cause of action. A special demurrer is, or should be, directed to specific portions of the complaint, and the grounds should be specifically pointed out. The grounds for the special demurrer in the

present case are not pointed to any particular paragraph or paragraphs, but are directed to the whole complaint. But the first 11 paragraphs state a cause of action, and, separated from the succeeding paragraphs, are not obnoxious to the special demurrer. We must look to these succeeding paragraphs to ascertain the grounds for the special demurrer. It may be admitted that these subsequent matters are wholly foreign to the cause of action stated in the first part of the complaint; it may be that, as to these foreign and irrelevant matters, there would appear misjoinder of actions and parties, and unintelligibility and ambiguity of statement; still, as the demurrer is to the whole complaint, and there remains a good cause of action elsewhere stated, it was error to sustain the demurrer. If enough appears to make the pleading easy of comprehension and free from reasonable doubt, a demurrer on the ground of ambiguity should be overruled. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376, citing *Salmon v. Wilson*, 41 Cal. 595. In *Weaver v. Conger*, 10 Cal. 234, the court said: "The complaint was very loosely drawn, and contains much useless verbiage; but, taking it altogether, the facts stated were sufficient to sustain an action. The demurrer was to the whole complaint; and, not being good as to all, was properly overruled." In that case there was a general demurrer and a special demurrer for misjoinder of causes of action. See, also, *People v. Morrill*, 26 Cal. 336. Where the special demurrer is to the whole of the complaint, the rule should be the same as in the case of a general demurrer to the whole complaint. If in a portion of the complaint there is stated a good cause of action, free from ambiguity or uncertainty, or which, in short, is not amenable to any of the grounds urged in the special demurrer, it is error to sustain the demurrer as to the entire complaint. It would seem that the redundant and irrelevant matter to which the special demurrer was directed in this case could have been reached better by a motion to strike out. However this may be, the court should have overruled the general demurrer, and should have sustained the special demurrer as to all that part of the complaint following the first 11 paragraphs, with leave to amend. If plaintiff had, in such case, persisted and refused to amend, there would be some reason for sustaining a judgment against him on the demurrer. The judgment should be reversed, but, as the transcript is stuffed with matters having nothing to do with the case, plaintiff should recover no more than one-fifth of the costs of appeal.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed, plaintiff to be allowed one-fifth of the costs of the appeal.

131 Cal. 80

KLUMPKE v. BAKER et al. (S. F. 1,640.)¹
(Supreme Court of California. Dec. 22, 1900.)

TAXATION—ASSESSMENT—LANDS JOINTLY ASSESSED—EFFECT—COLLECTOR'S RECORDS—ERROR—EFFECT ON TAX DEED.

1. Pol. Code, § 3628, provides that no mistake in the name of the owner to whom real estate is assessed shall invalidate the assessment. Id. § 3650, subsec. 3, provides that the assessor shall specify, in the assessment book, city and town lots, naming the city or town, and the number of the lot or block, according to the system of numbering of such city or town. *Held* that, where there was no system of subdividing blocks into lots, the assessor was authorized to assess parts of blocks according to ownership, and his error in including in one parcel land owned by more than one person would not invalidate the assessment, such error being merely a mistake in the name of the owner.

2. Pol. Code, § 3778, requires the tax collector, before delivering any certificate of sale for taxes to the purchaser, to copy from such certificate the description of the lands sold into a book to be kept in his office. Section 3787 declares that a tax deed shall be conclusive evidence of the regularity of all proceedings, from the assessment to the execution of the deed. *Held*, that where the collector made a mistake in the copy of the description of the land kept in his office, such error would not prejudice the rights of a purchaser at the tax sale after receiving his tax deed.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Klumpke against Baker and others. From an order denying a new trial, plaintiff appeals. Reversed.

R. H. Countryman, for appellant. H. C. Firebaugh, D. T. Sullivan, and W. F. Sullivan, for respondents.

HARRISON, J. Action to quiet title. Judgment was rendered in favor of the defendants, and the plaintiff has appealed from an order denying a new trial. The plaintiff's title is based upon certain tax deeds for different portions of the premises described in the complaint, three of the deeds being for the taxes thereon for the fiscal year ending June 30, 1883, and one for the succeeding year. The deeds were all executed to the plaintiff July 13, 1886, and this action was commenced July 11, 1891. Upon the introduction of the deeds in evidence the plaintiff rested. Unless, therefore, some evidence was introduced on the part of the defendants which had the effect to impeach the validity of these deeds, the plaintiff was entitled to judgment. Pol. Code, § 3788.

The defendants offered certain evidence to the effect that the lots for which the deeds had been executed had not been assessed to their respective owners, two of said lots having been assessed to the defendant George H. Baker, whereas they were, at the time of the assessment, the property of his wife, Mary A. Baker, and stood of record in her name. Evidence was also introduced to the

effect that each of these lots included a portion of the lot belonging to an adjacent owner. The respondents contend that, by reason of the assessments thus made, the tax deeds are entirely inoperative, and confer no title upon the plaintiff. Section 3628, Pol. Code, provides that the assessor shall assess the property "to the person by whom it was owned or claimed, or in whose possession or control it was at twelve o'clock M. of the first Monday of March next preceding; but no mistake in the name of the owner, or supposed owner of real property, shall render the assessment thereof invalid." The assessment is not against the owner, but is of the property, and that must be correctly described. The name of the owner of the property assessed is an incidental provision for the sake of convenience, but a failure to give the correct name of the owner is declared by the statute not to impair the assessment. In *Lake Co. v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 20, 4 Pac. 876, it was said: "The ascertainment of the name of the owner is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final so far as the validity of the tax is concerned." The failure of the assessor to describe the land in accordance with the metes and bounds given in the conveyance to the person who is assessed therefor, as well as his including therein land which is owned by another person, is only "a mistake in the name of the owner" of the lot assessed, and does not render the assessment invalid. The cases cited by the respondents arose under a statute which did not contain the above provision of section 3628. Each of the parcels described in the other two tax deeds was assessed to unknown owners. Such assessment is expressly authorized by section 3636, Pol. Code.

The provision in subdivision 3 of section 3650, that the assessor must specify in the assessment book, under its appropriate head, "city and town lots, naming the city or town and the number of the lot or block, according to the system of numbering of such city or town, and improvements thereon," was followed in the present assessments. The assessor observed the provisions of this section by specifying the number of the block according to the official subdivisions of the land in that portion of the city; and it does not appear that there is any "system" in San Francisco for the subdivision of the blocks into lots. In such a case, the assessor may assess any subdivisions according to their individual ownership, and his determination thereon is not open to review, and, if erroneous, does not invalidate the assessment. In *Cadwalader v. Nash*, 73 Cal. 43, 14 Pac. 385, cited by the respondents, it appeared that the pueblo lots had been officially divided into city blocks, and these blocks again subdivided into a large number of lots, which were desig-

¹ For opinion on motion for rehearing, see 63 Pac. 676.

nated by numbers upon the official map, and that the assessor disregarded these subdivisions, and assessed the east half of the pueblo lot as a single parcel.

Section 3778, as it stood at the time of the tax sales in question, provided that the tax collector, before delivering any certificate, must enter in a book kept for that purpose in his office a description of the land sold, corresponding with the description in the certificate, and certain other particulars. At the trial herein the defendants offered this book in evidence, and in one instance the description therein of the land sold varied from that contained in the certificate and in the tax deed, and was in itself defective, and they contend that by reason thereof the deed was ineffective. A proper construction of the several provisions of the statute fails to sustain this contention. Section 3776 provides that, after receiving the amount of the taxes and costs, the collector must make out, in duplicate, a certificate, stating certain matters therein specified; and section 3777 declares that one copy of the certificate must be delivered to the purchaser, and the other filed in the office of the county recorder. By section 3779 it is declared that "on filing the certificate with the county recorder the lien of the state vests in the purchaser, and is only divested by the payment to him, or to the county treasurer for his use, of the purchase money and fifty per cent. thereon." Section 3786 declares that "the matters recited in the certificate of sale must be recited in the deed," and that such deed is primary evidence of certain facts; and section 3787 declares that the deed is "conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed," one of which is the act of the tax collector in copying the certificate into the book of descriptions. It is not to be held that the rights of the purchaser can be impaired by the failure of the tax collector to make a correct copy of the certificate in this book.

In one of the deeds the land is described as commencing at a point 69 feet easterly from Lyon street, and the complaint describes the land in controversy with the same boundary. Evidence was offered in behalf of the defendant O'Connor to the effect that the block which embraces the land in controversy is of smaller dimensions than that delineated upon the assessor's map, and that the land claimed by him commences, for its western boundary, at a point 15 feet east of Lyon street. Whether the land claimed by him is included in the tax deed is to be determined by ascertaining the actual location of Lyon street. The court made no finding upon this subject, and the record does not contain any evidence from which that fact can be ascertained. The evidence introduced on behalf of the defendants was insufficient to defeat the title of the plaintiff as shown by

the tax deeds, and for that reason the court erred in refusing to grant a new trial. The order is reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(130 Cal. 642)

PEOPLE v. CLARKE (Cr. 635.)¹

(Supreme Court of California. Dec. 14, 1900.)

MURDER—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.

1. One accused of murder, on the day of the killing, borrowed a shotgun and four shells, stating his purpose was to shoot squirrels. He used two of the shells in shooting squirrels. Between 5 and 6 o'clock of the same day a Chinese laundryman, with his laundry, went into the house where accused boarded, and never came out. Next day his body was found concealed beneath the floor of the house. Death had resulted from two shotgun wounds inflicted with the borrowed gun and two of the borrowed shells. Gunshots, coming from the house, were heard about the time the Chinaman was at the house. Accused was seen at the house shortly after the shots were heard. The owner of the house, who was absent that day, returned to his house drunk between 7 and 8 o'clock that night. Accused made false statements when questioned by the officers after the killing, and made a bold attempt to escape from their custody. *Held* sufficient to sustain a conviction of murder in the second degree.

2. On a trial for murder alleged to have been committed in a house, a witness who heard the shots may be asked if he could tell from the sound of the shots whether they were in the house or out of it.

3. Where a witness states that he could distinguish by the sound the difference between shots fired with a shotgun and those fired with a rifle, and that he heard the shots which killed deceased, on a trial for the murder he may state that the shots sounded like those from a shotgun.

4. Where on a trial for murder a witness states that he was sitting on a rock near the house where deceased was killed, and heard shots in the house, and shortly thereafter saw accused come out, third persons, to whom such witness stated he pointed out the rock, may state that the house could be seen from the rock, in rebuttal of evidence by accused that it could not be seen therefrom.

5. Where a murder was committed either by accused or another, and accused claimed on the trial that it was committed by such other, the prosecution may prove by the latter that he did not kill the deceased.

6. On a trial for murder, the motive for which is assigned as robbery, accused cannot be impeached by showing his illicit relations with a certain woman.

7. On a trial for murder, the motive for which is assigned as robbery, the improper admission of evidence of accused's illicit relations with a certain woman is not reversible error, where evidence of the same general character was introduced by accused.

8. Where a motion for a new trial for newly-discovered evidence is based on accused's affidavit, stating that his evidence on the trial was false, and on affidavits of others setting out matters merely cumulative, its refusal will not be disturbed on appeal.

9. On a trial for murder, based on circumstantial evidence, an instruction authorizing the jury, if they have a reasonable doubt as to which of two opposing conclusions the chain of circumstances leads, they should give ac-

¹ Rehearing denied January 10, 1901.

cused the benefit of such doubt, is properly refused, where both of the opposing conclusions might lead to accused's guilt.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Harry W. Clarke was convicted of murder in the second degree, and he appeals. Affirmed.

W. H. Shinn and D. Allen, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. The defendant has been convicted of the crime of murder of the second degree, and appeals to this court. It is earnestly insisted that the evidence does not warrant a conviction. The evidence was purely circumstantial, and the salient facts are these: One Joseph Hunter, a constable, lived in a four-room house near the public road, some three miles distant from the city of Los Angeles. The defendant, a young man of slight physique and weight, afflicted with a perceptible lameness in one leg, had been living with Hunter for some weeks. Upon the day of the killing, Hunter was in the city of Los Angeles; the defendant being alone at the house. During the early part of the day defendant borrowed a shotgun of one neighbor, and four loaded shells of another, stating his purpose was to shoot squirrels. And during the early afternoon he undoubtedly fired two of these shells at squirrels near his house. Between 5 and 6 o'clock of this day a Chinese laundryman drove up to the house for the purpose of delivering laundry, as was his usual weekly custom. He went into the house with the laundry, and never came out. His horse and wagon stood in front of the house for an hour or more, and then the horse wandered away aimlessly down the road. Upon the following morning suspicion of murder became rife in the neighborhood, and upon the third or fourth day thereafter the dead body of the Chinaman was found concealed beneath the floor of the house. Death had resulted from two shotgun wounds inflicted with the borrowed gun and two of the borrowed shells. At some time between the hours of 5 and 6 o'clock of this day, and after the Chinaman had entered Hunter's house, one witness heard two shotgun shots, apparently coming from within the house, and other witnesses heard at least one shot coming from the same direction. Two bedsheets, evidently taken from defendant's bed, were found wrapped around the head and shoulders of the dead man. Spots of blood were found at various points in the house, and evidence of an attempt to conceal and erase them was apparent. Indeed, there is no question but that the Chinaman was killed in the house by gunshot wounds inflicted with the borrowed gun and shells. Defendant made many false statements when questioned by the officers after the killing, and also made a bold effort to escape from their custody. He was seen at the house by one witness a few minutes after the two shots were heard,

although he claims to have left the house soon after the Chinaman had entered it and not to have returned until an hour or two later. About 10 or 11 o'clock of that night, at the house, he showed a woman friend considerable silver money, and the theory of the state is that the purpose of the killing was robbery. Hunter returned to his house drunk, at some time between 7 and 8 o'clock of that night. There are other items of evidence looking towards defendant's guilt, which it is not necessary to here detail. If the Chinaman was killed between the hours of 5 and 6 o'clock of that afternoon, or even as late as 7 o'clock, the defendant's guilt is well assured; and that the gunshots heard by the aforesaid witnesses as coming from the direction of the house caused the death of the Chinaman is equally well assured. There were but four loaded shells for the gun, and two of these shells had been fired early in the afternoon at squirrels. The remaining two shells were the shells used in the killing. Defendant, by his counsel, claims that Hunter must have killed deceased; but that theory is confronted with the fact that Hunter did not return to his house until after 7 o'clock, at least, and the two shots from the gun, as testified to by the witnesses, must have been fired previous to that time. While the fact cannot be considered upon the question of the sufficiency of the evidence to support the verdict, still it may be mentioned that the correctness of the jury's disbelief in the evidence of defendant as to his alibi was subsequently impregably fortified by his own affidavit introduced upon his motion for a new trial, wherein, under oath, he admitted his testimony at the trial to be false, and stated that he was present at the killing, and saw Hunter fire the shots that killed the deceased, and subsequently stood by when Hunter concealed the dead body. We have given the salient facts disclosed by the record. In addition to these, there are many others of minor importance; and, taking them altogether, we are prepared to say that the verdict of the jury has full support in the evidence, and it will not be disturbed by this court upon the ground urged.

A witness, under objection, was asked the following question: "Q. Could you tell from the sound of the shots about where they were, —whether they were in the house or out of the house?" The objection was properly overruled. *People v. Chin Hane*, 108 Cal. 602, 41 Pac. 697. The witness was also justified in testifying that the shots sounded like those fired from a shotgun. Even if it be conceded that this evidence should only come from the mouth of an expert, still there was no objection to the question upon that ground; and the witness also stated that he was able to distinguish, by the sound, the difference between shots fired from a shotgun and those fired from a rifle.

The witness Le Page testified that he was sitting upon a rock several hundred feet from

Hunter's house when he heard the shots fired, and that a few minutes thereafter he saw defendant come out of the house, look into the wagon of the Chinaman, and then return into the house. The defendant offered evidence to the effect that a person sitting on the rock described by the witness could not see Hunter's house. The location of this particular rock, therefore, became very material; and in rebuttal Le Page testified that he pointed out to the state's witnesses the rock upon which he was sitting when he saw defendant at the house. These witnesses then testified that the house could be seen from the rock pointed out by Le Page. We see no valid objection to this line of testimony.

There was no error committed by the court in allowing the prosecution to prove by Hunter that he did not kill the Chinaman. It may be said the evidence points with unerring certainty to the fact that either the defendant or Hunter killed the Chinaman. Indeed, counsel for defendant all through the trial of the case claim that deceased must have been killed by Hunter. Under these circumstances, the testimony of Hunter was competent and admissible. *People v. Van Horn*, 119 Cal. 328, 51 Pac. 538.

The defendant, when on the witness stand, was asked in regard to one Miss Letitia Allec: "Q. You were living there with her, was you not?" The question was clearly objectionable, and clearly prejudicially objectionable. You cannot degrade or impeach a witness in this way. Under almost any circumstances other than those here presented, this error would demand a reversal of the judgment and a new trial of the defendant. This court has held questions of this character prejudicially objectionable so many times in the past that it is surprising the state's officers will continue to indulge in the practice of asking them. In the very recent case of *People v. Crandall*, 125 Cal. 135, 57 Pac. 785, the whole matter is fully discussed, and the authorities cited. But, in view of the fact that other evidence of the same general tenor was introduced upon the part of the defendant, we think it apparent that the error committed by the trial court in the admission of the answer to this question did not prejudice him. The record discloses, by the evidence of defendant's witnesses, that this woman had been living a portion of her time prior to the killing at Hunter's house, with defendant. The woman herself testified in answer to defendant's counsel: "About two weeks before the shooting I remember riding from the city with Joe Hunter towards his place. At that time, and between the city and his place, on the road, he said to me: 'Why don't you get rid of Harry? He hasn't got any money, and if you get rid of him I will give you all the money and

fine clothes you want.' He also said on the same occasion that Harry was no good, only for his good looks." And upon cross-examination she says: "Joe Hunter didn't say to me that I had better marry Clarke. He wanted me to quit Harry and go with him. That is all."

Defendant made a motion for a new trial upon the ground of newly-discovered evidence, and in support of his motion presented many affidavits. He himself made an affidavit to the effect that his testimony bearing upon his claim of an alibi was false, and that he was present in the house and saw Hunter kill the Chinaman and subsequently conceal the body. As tending to furnish statutory grounds for a new trial, we attach no importance whatever to this affidavit. The court below evidently had but little doubt of its falsity. Indeed, it appears by the record that, subsequent to defendant's conviction, Hunter was tried for the murder of the Chinaman and acquitted; the jury evidently not believing defendant's testimony, which was in line with his affidavit here under consideration. We have also examined the contents of the other affidavits introduced by him as showing newly-discovered evidence. As to some of them,—for example, that of Anna Bibby,—it may well have impressed the trial court as being entirely unbelievable. Others contain matters of minor importance, and still others set out matters of an entirely cumulative character. In view of the law by which this court is governed in reviewing a question of this character, we will not disturb the order denying the new trial upon the ground of newly-discovered evidence. *People v. Demasters*, 109 Cal. 607, 42 Pac. 236. We do not find it necessary to pass upon the admissibility of certain counter affidavits offered by the state upon the hearing of the motion for a new trial.

Complaint is made of the court's refusal to give the following instruction: "The court instructs the jury that if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong; and therefore, in such a case, if you have a reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt would thereby be created, and you should give the defendant the benefit of such doubt and acquit him." In view of the fact that both of these "opposing conclusions" might lead to defendant's guilt, the instruction, for this reason alone, was properly refused.

There is no substantial error disclosed by the record. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.

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PEOPLE v. TERRILL. (Cr. 634.)

(Supreme Court of California. Dec. 27, 1900.)

CRIMINAL LAW—BILL OF EXCEPTIONS—NECESSITY—RULE OF COURT.

Rule 29 of the supreme court provides that, in all cases of appeal to the supreme court from orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions. *Held*, that where an information was set aside on the ground that the defendant had not been legally committed by a magistrate, and the record, on an appeal from the order, did not include the affidavits and papers used on the preliminary examination in a bill of exceptions, the order must be affirmed.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by the people against Samuel B. Terrill. From an order granting a motion to set aside the information, the people appeal. Affirmed.

Atty. Gen. Ford and James H. Campbell, for appellant. Jackson Hatch, for respondent.

McFARLAND, J. This is an appeal by the people from an order of the court below granting a motion to set aside the information. The main ground of the motion was that prior to the information respondent had not been legally committed by a magistrate. What is called the "Transcript on Appeal" shows what purport to be a large number of affidavits and other papers and testimony given and proceedings had at the preliminary examination; but there is no bill of exceptions authenticating these matters, and therefore there is nothing before us into which we can look to see whether the order appealed from was or was not erroneous. The Codes contain no provision, either in civil or criminal cases, for authenticating papers or evidence used on a motion, other than a bill of exceptions, and formerly there was great difficulty and confusion on the subject. It was held in *Walsh v. Hutchings*, 60 Cal. 228, that the certificate of the clerk would not do. In *Peper v. Land Co.*, 56 Cal. 173, the judge of the lower court had certified to the papers used, and the court said that, "as the Codes had prescribed no mode of authentication, this court has the power to prescribe by a rule how such papers can be brought before it on appeal," and that, "as it has such right to make a rule in advance, it has a like power to ratify and adopt the mode followed in this case," and the papers named in the judge's certificate were considered. There is no decision as to when the judge must make his certificate, and his recollection of the facts might be very indistinct; and in *Borkheim v. Insurance Co.*, 38 Cal. 627, the court suggests to members of the bar that they "request the judge, at the hearing of such motion, to indorse each affidavit or other document as having been

used upon the motion." In *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967, the whole matter was extensively discussed, several justices expressing opinions. It was held in the leading opinion "that the papers could only be presented to this court by bill of exceptions," but, as the certificate of the judge was itself insufficient, it was probably on that ground that the appeal was dismissed; the court being embarrassed by former decisions. But it was suggested in that case, which was decided in 1899, that there should be a rule of court on the subject to "operate prospectively"; and immediately afterwards the rule, then No. 32, and now No. 29, was adopted, which is as follows: "In all cases of appeal to this court from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law." Afterwards, in March, 1891, the case of *White v. White*, 88 Cal. 429, 26 Pac. 236, was decided, in which this court said: "The transcript on appeal herein purports to show that certain affidavits and testimony of witnesses were used upon the hearing of the motion which resulted in the order appealed from, but there is no bill of exceptions in the record. In the case of *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967, the members of this court were divided as to the proper practice to be pursued in authenticating the record on appeal from this class of orders, but since then the court has adopted rule 32, which, we think, should be deemed as settling the practice, so far as relates to appeals taken since it went into effect; and, this appeal having been taken since that date, the rule is decisive of the question arising on this motion." That case was decided nearly 10 years ago, and the rule itself has been in existence more than 11 years, and there is no reason why since then all difficulties on the subject should not be avoided by a compliance with the rule. Of course, the rule does not apply to papers which are themselves parts of the judgment roll, as was the case in *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639. The order appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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DENNIS v. KOLM et al. (KOLM, Intervener).
(L. A. 748.)

(Supreme Court of California. Dec. 22, 1900.)

ACTION AGAINST FIRM—INTERVENTION—INTERESTED PARTY—EVIDENCE OF PARTNERSHIP—PRIMA FACIE CASE—ADMISSION OF DECLARATIONS.

1. In an action against a firm, an intervener claiming to own money attached therein as the property of one who denied that he was a member, and alleging that the money was the proceeds of a note and mortgage which he assigned to her, is an interested party, within

Code Civ. Proc. § 387, authorizing intervention by any one having "an interest in the matter in litigation."

2. On an issue in an action against a firm as to whether an intervener owned the proceeds of a note and mortgage attached as the property of a defendant, who denied that he was a member, and which note and mortgage she claimed he had assigned to her, declarations made by the other defendants as to the partnership affairs, who composed the firm, the amount of the investments of each in the business, and the object of the member in question in disposing of the note and mortgage to intervener, were admissible.

3. After a prima facie case as to partnership is made, the admissions and conduct of the several partners in the course of the partnership business are admissible against the others.

4. Whether a prima facie case as to partnership has been made, so as to justify admission of the declarations of partners, is for the court to determine in a trial before a jury.

5. On an issue as to whether a mercantile partnership existed between two brothers and a third, who denied it, it appeared that the latter was in the store, and in and about the business, conducting and managing it, apparently as the others. Before the business started in the place in question, he said to one witness that he was going to invest some money, and look around and start in business there. He afterwards said to another that he had more money invested in the business than his brothers. After the store was closed, and he had removed to a distant city, and begun business alone, he said, in answer to a question as to some of his goods, that "we" (meaning himself and brothers) had a store at the place in question, but could not agree, and, after disposing of what they could, the balance of the goods were to be shipped to where he then was. He also said in a letter that, "We are also through with the business," that each went his own way, and that they could not think of such a thing as to conduct a business in partnership again. *Held* to establish a prima facie case of partnership, warranting the admission, as evidence that he was a partner, of the declarations of his two brothers.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by B. H. Dennis against K., T. E., and H. Kolm, co-partners, doing business as Kolm Bros., in which Bertha Kolm intervened. From a judgment for defendant H. Kolm and the intervener, and from an order denying a new trial, plaintiff appeals. Reversed.

Dillon & Dunning, for appellant. McKeeley & McKeeley and L. C. Whitney, for respondents.

COOPER, C. This action was brought to recover for goods, wares, and merchandise alleged to have been sold to the defendants as co-partners under the firm name of Kolm Bros. One Perkins had in his hands about \$870, which plaintiff claimed to be the money of H. Kolm, who was alleged to be one of the partners. Plaintiff had the \$870 attached in this action as the property of H. Kolm. Bertha Kolm, a sister, filed a complaint in intervention, in which she denied that the money so attached was the property of H. Kolm, or of Kolm Bros., and alleged that the same was her property, and asked that she be adjudged to be the owner thereof. A de-

murrer was interposed by plaintiff to the complaint in intervention, overruled, and plaintiff filed an answer to said complaint. The respondent H. Kolm filed an answer to the complaint of plaintiff, in which, among other things, he denied that he ever was at any time a member of the firm of Kolm Bros., or that he was in any way indebted to the plaintiff. The case was tried before a jury, and verdicts rendered for the respondent H. Kolm and the intervener, Bertha Kolm. Upon these verdicts judgment was entered. This appeal is from the judgment and an order denying plaintiff's motion for a new trial.

It is claimed that the court erred in overruling the demurrer to the complaint in intervention, for the reason that the said complaint does not state facts showing that the intervener has any interest in the matter in controversy, or that the decision would in any way affect her rights. It is provided in the Code of Civil Procedure (section 387): "Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both." In this case the intervener claimed the money in the hands of Perkins as the proceeds of a note and mortgage that had been assigned to her by respondent H. Kolm. She alleged that Kolm Bros. were at no time the owners of said note or mortgage, or of the money in the hands of Perkins, but that she was the owner of the same. If she could show that H. Kolm was not one of the co-partners of the firm of Kolm Bros., then he was not indebted to plaintiff. If plaintiff was not a creditor of H. Kolm at any time, then he could not attack the transfer of the note and mortgage made by H. Kolm to the intervener. We think the intervener had such interest as would entitle her to intervene under the statute. It was said by this court in *Coffey v. Greenfield*, 55 Cal. 382, in speaking of the interest which entitles a party to intervene: "And the Code does not attempt to specify what or how great this interest shall be in order to give a right to intervene. Any interest is sufficient. The fact that the intervener may or may not protect his interest in some other way is not material. If he has an interest in the matter in litigation, or in the success of either of the parties, he has a right to intervene." The provisions of our statute are taken substantially from the Code of Procedure of Louisiana, and the practice in that state is to allow a party to intervene whose property has been seized or attached in the suit. *Pom. Rem. & Rem. Rights*, p. 464, § 427, note 2; *Field v. Harrison*, 20 La. Ann. 411; *Yale v. Hoopes*, 16 La. Ann. 311; *Letchford v. Jacobs*, 17 La. Ann. 79.

Plaintiff claims that the court erred in sustaining objections made by respondents to several questions tending to prove declarations made by F. Kolm and T. E. Kolm as to the partnership affairs, who composed the

firm, the amount of the investments of each of the brothers in the business, as to the object of respondent H. Kolm in disposing of the note and mortgage to respondent Bertha Kolm. The above statement shows generally the nature of the offered evidence, and it will not be necessary to consider the questions and rulings separately. The court, after several questions were asked tending to show the above matters, in sustaining objections to the questions said: "I don't care to hear any authorities upon the proposition that one man can, by any declaration of his, bind another, except he be present and hear it, as to the relation between them. I said yesterday that this is a case of trial by jury in which they determine all questions of fact. It is not within the province or power of this court to say whether any prima facie case or any other case is made out. The objection is sustained." The court erred in excluding the offered evidence. It was one of the main points at issue as to whether or not H. Kolm was one of the partners of the firm of Kolm Bros. It was also material to determine the issue as to the ownership of the note and mortgage which H. Kolm claims to have sold to his sister Bertha. After a prima facie case as to partnership is made, the admissions and conduct of the several partners in the course of the partnership business are admissible as against the others. 1 Greenl. Ev. § 177; Colly. Partn. § 775; 1 Lindl. Partn. (2d Ed.) p. 128, note 2. And in a trial before a jury it is incumbent on the judge to determine the question whether there is prima facie evidence of a partnership. *Hilton v. McDowell*, 87 N. C. 364; *Bryce v. Joynt*, 63 Cal. 378. The ultimate facts in such cases should be determined by the jury upon proper instructions from the court, but, the prima facie showing of a partnership having been made, the court should admit all evidence that is admissible upon the theory that the partnership has been fully proven. Any other rule would deprive a party of very material testimony. In this case, for instance, if the jury had concluded that a partnership existed, and that H. Kolm was a member of the said partnership, it would not have had before it any of the evidence that was offered upon the theory that he was such partner. The exclusion of the evidence was upon the theory that H. Kolm was never a partner of Kolm Bros. If the jury had found such co-partnership, then the evidence was admissible. In order for it to be admitted the case would have to be retried. There was ample evidence to show prima facie that H. Kolm was a partner of Kolm Bros. He was in the store, and was in and about the business, conducting and managing it apparently as the other brothers. Before the business was opened in Los Angeles the witness Linehan testified that H. Kolm told her "that he was going to invest some money, and look around, and start in business here in Los Angeles." The witness Jappa testified that H. Kolm told him that "he had

more money invested in the business than his brothers." The witness Stelinski testified that, after Kolm Bros. had closed their store in Los Angeles, he was present at a store in Chicago being opened by H. Kolm, and witness saw goods marked very low, and some of the cases had "Los Angeles" written upon them, which appeared to be obliterated; and witness said to H. Kolm, "Have you stolen those goods, or found them, because you can sell them so cheap?" Kolm answered: "We had a store in Los Angeles,—we brothers,—but we couldn't agree. * * * After disposing of what we could, the balance was shipped to Chicago." He said they were three in partnership. He said, "The Jews swindled enough, and it is not more than right that we should do the same, or swindle them." In a letter written at Chicago, August 22, 1897, to his sister, the intervener, H. Kolm said: "Now, we are already through with the business, and live again on Fry street here. Each goes his own way whence he came. Theodore will soon be West again, Ferdinand again at Moody's school, and I am out working at present. * * * We cannot think of such a thing as to conduct a business in partnership again." There are other circumstances and admissions, but the above is sufficient. It was the duty of the court to determine whether or not a prima facie case showing H. Kolm to have been a partner was established. Such prima facie case was established. The offered evidence was admissible upon the theory that H. Kolm was a partner. We advise that the judgment and order be reversed.

We concur: CHIPMAN, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

131 Cal. 96

LARRABEE v. TOWN OF CLOVERDALE
et al. (S. F. 1,583.)¹

(Supreme Court of California. Dec. 22, 1900.)

MUNICIPAL CORPORATIONS — SURFACE WATER IN STREET—DIVERSION ONTO PRIVATE PROPERTY—ACTION FOR NUISANCE—NON-SUIT—EVIDENCE—GRADE OF STREET—RULE AS TO CONSEQUENTIAL DAMAGES—APPLICATION.

1. In an action against a town for a nuisance caused by the diversion onto plaintiff's lot of surface water running past the same, it was claimed that the water never ran there in a well-defined channel. Plaintiff testified that, from the time she went to reside on the lot in 1886, "there was a waterway at the edge of the sidewalk, * * * perhaps eighteen inches deep," crossed by "a plank about three feet long." Another witness said that the water had flowed along the street in question from the time it was graded, in 1881, and before that, for 25 years or more, had flowed along generally in the direction of the street, in "a well-defined water course and channel, meandering generally along what is now the general course" of such street. Other witnesses said that prior to 1893 there was no regular ditch along the street, but only a gutter, and that the water

¹ Rehearing denied January 22, 1901

was confined merely by the sidewalk on one side and the rise of the street on the other. *Held*, that it was error to grant a nonsuit on the ground that there was no evidence that the stream had flowed in a clearly-defined channel.

2. A municipality, the same as an individual, has no right to divert surface water from the channel in which it flows in a street, whether natural or artificial, and however it may have come into the street, and throw it onto the land of another.

3. The rule that a city, in grading a street in the regular performance of its legitimate functions, is not responsible for consequential damages, does not apply to its direct invasion of the rights of a lot owner, where it diverts water from its channel in the street, and throws it onto his premises.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by Hester A. Larrabee against the town of Cloverdale and others. Plaintiff was nonsuited, and from an order denying a new trial she appeals. Reversed.

Smith & Murasky, for appellant. James W. Oates and J. R. Leppo, for respondents.

SMITH, C. The plaintiff was nonsuited in the court below, and appeals from an order denying a new trial. The suit was brought to enjoin the maintenance of an alleged nuisance, and for damages suffered by the plaintiff by reason of it. The defendants, other than the town, were trustees of the town, but are sued individually. There was no evidence tending to establish the cause of action as against them, and as to them the nonsuit was rightly granted. The material facts of the case, as disclosed by the evidence, are as follows:

Plaintiff is the owner of a lot containing about two acres of land in the town of Cloverdale, fronting northwest on First, and northeast on Washington, street. First street runs northeast and southwest; but the witnesses speak with regard to it as though it ran east and west, and for convenience of expression I will adopt this usage. The plaintiff has been the owner of the lot in question since 1890, and had previously resided thereon with her husband from 1886. During all this time there was a waterway running along the south side of First street past her lot, in which during the rainy season, or at least during wet seasons, there was running water. This water, prior to 1893, crossed Washington street through a culvert, and passed on to West street, about a thousand feet further on, and thence along the same southerly to a large ditch, and into the river. But in that year Washington street was graded across First street so as to form an embankment across the waterway, and without culvert, by which the water was diverted from its former course, and made to flow along the west side of Washington street, near the east boundary of plaintiff's lot. The result was that, during the two rainy seasons following this work, the water was backed up over the land of the plaintiff, and part of

her land, with 30 or 40 feet of her fence on Washington street, washed away. The channel of the water was also washed out to the depth of about 3 or 3½ feet, and to the width of 6 or 7, and access and egress to and from her land thus impeded.

One of the grounds for nonsuit was that prior to 1893 the water—which respondent claims was mere surface water—"never run there in any well-defined channel for any considerable time," and the court seems to have based the decision on this ground, or, as expressed by itself, on "the absence of a clearly-defined channel upon First street prior to 1893." But there was evidence that there was such a channel. The plaintiff testified that from the time she went to reside on the place in 1886 "there was a waterway at the edge of the sidewalk * * * perhaps eighteen inches deep, with a sandy, pebbly bottom," crossed by "a plank about three feet long." And the witness Criger testified that the water had flowed along First street from the time it was first graded, in 1881, and before that, "for 25 or more years," had "flowed along generally in the direction of First street," in "a well-defined water course and channel, meandering generally along what is now the general course of First street." Some of the witnesses, indeed, testified that prior to 1893 there was no regular ditch along First street, but only a gutter, and that the water was confined merely by the sidewalk on one side and the rise of the street on the other. But this is not in conflict with the other evidence, but equally establishes the existence of a "water course" or "clearly-defined channel"; and, indeed, had it been otherwise, it should, on motion for a nonsuit, have been disregarded.

The fact that the water flowed only during the rainy season, or during rainy weather, or, as claimed by respondent, was mere surface water, is quite immaterial; and it may even be admitted (though there was evidence to the contrary) that the course over which the water flowed was not a natural water course. It was sufficient that there was, and for many years had been, a definite channel, whether natural or artificial, and that the defendant obstructed this channel, and thus diverted the water onto plaintiff's land; that is to say, not only onto the west half of Washington street, which is presumably the land of the plaintiff (Civ. Code, §§ 831, 1112), but onto her lot outside the street. "An individual has no right to collect in artificial channels mere surface water, and precipitate it on the land of another. Nor has a corporation, whether public or private, the right to collect in such channels the mere surface water precipitated by rain or snow over large districts, and throw it upon the property of another." *Conniff v. City and County of San Francisco*, 67 Cal. 45, 7 Pac. 41. With reference, therefore, to the damage accruing from the impact of the water onto the plaintiff's land, the case comes directly within the principle cited.

And, generally, I think, the case comes within the authority of the decision last cited, and of *Los Angeles Cemetery Ass'n v. City of Los Angeles*, 103 Cal. 461, 37 Pac. 375. In *Conniff v. City and County of San Francisco*,—which was a case very similar to this,—the channel obstructed is referred to in the course of the opinion as “a natural channel”; but the meaning of this expression is to be interpreted by reference to the actual character of the channel as shown by the pleadings and evidence in the case, and from this it does not appear to have been anything more than “a water course crossing the street,” and “the channel of usual escape.” We may therefore construe the term “natural channel” as including all channels through which, in the existing condition of the country, the water naturally flows. As is said in *Los Angeles Cemetery Ass'n v. City of Los Angeles* (pages 466, 467, 103 Cal., and page 377, 37 Pac.): “In all regions of country having a broken surface, and subject to heavy rainfall, surface water does make for itself or assume definite channels in seeking, pursuant to the law of gravitation, a lower level,” and it is also said that municipal corporations are bound to provide for the escape of surface water in all “that class of cases where the surface water, owing to the conformation of the adjacent country, has formed for itself a definite channel in which it is accustomed to flow.” In both of the cases cited the decision and language of the court must be construed as referring to the existing condition of the surrounding country, which had come, in each case, to be a part of a city, and thus materially and essentially transformed from its original condition. In each case, though the channel of egress was probably the same as before the city existed, the waters flowing to it—by reason of the grading of lots and streets—may, and, indeed, must, have been different from what before the improvement of the city naturally flowed to the same point; and it is to the conditions existing at the time of the suit, and not to those anciently or originally existing, that the decisions must be understood to relate. And this, on principle, must be the true construction of the term “natural channel,” when used in the present connection; for, by the necessarily great changes that must occur in the conformation of the country in the building of a city, the natural channels for the surface water are changed; and as the changes in the ground are inevitable and legitimate, and therefore natural, the new channels, through which, under natural laws, the surface waters are discharged, must also be regarded as natural.

Some other grounds are urged by respondent in support of the judgment, to which we will briefly advert:

(1) It is claimed that the natural course of the surface waters from the cañon west of the town, in which they have their source, was not along First street, but from the land of one Smith, west of the western terminus

of the street, southwesterly into a ditch passing to the south of the plaintiff's lot; that the waters were diverted to the course along First street by a board fence erected by Smith about the time of the construction of the embankment across First street complained of; and that in fact the damage to the plaintiff was caused by the increased flow of water thus occasioned, and would not otherwise have occurred. To understand this position, it should be understood that prior to 1893 there was a picket fence through Smith's place, on the prolongation of the south line of First street, which in 1893 was replaced by the board fence referred to. But, as we have seen, the evidence showed that long before the year referred to the course of the water had been along First street, and that any material difference was made in the flow is a mere inference. Nor, though it were otherwise, would the liability of the defendant be affected. There is no reason to suppose that the increased flow, if any, would have damaged the plaintiff's land if it had not been turned by the defendant; and, however the water may have come into the street, the defendant had no right to turn it upon the land of the plaintiff.

(2) It is further urged that the grading of Washington street by the city was in the regular performance of its legitimate functions, and that it is not responsible for consequential damages. But the case is not one to which this principle can apply. The act complained of was a direct invasion of the plaintiff's rights, and consequently unlawful. *Conniff v. City and County of San Francisco*, 67 Cal. 50, 7 Pac. 44, and cases cited. I advise that the order denying a new trial be reversed as to respondent the town of Cloverdale.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed, with reference to the respondents other than the town of Cloverdale, and as to the respondent last named it is reversed, and cause remanded for a new trial.

131 Cal. 34

STANFORD v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 1,171.)¹

(Supreme Court of California. Dec. 20, 1900.)

TAXATION—STOCKS AND BONDS—SITUS.

Stocks and bonds of a foreign corporation, owned at the time of his death by a resident of California, where his estate is being administered, and inventoried by his executrix as part of the estate committed to her charge, is there taxable to her, under Const. art. 13, § 8, as property “owned or claimed” by her, though testator had pledged it for a loan in another state, and it still remains so pledged.

Commissioners' decision. Department 2. Appeal from superior court, city and coun-

¹ Réhearing denied January 19, 1901.

ty of San Francisco; J. C. B. Hebbard, Judge.

Action by Jane L. Stanford, executrix of Leland Stanford, deceased, against the city and county of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

Wilson & Wilson, for appellant. Franklin K. Lane, for respondent.

CHIPMAN, C. Action to recover certain taxes, paid under protest, upon certain stocks and bonds situated in New York City. Defendant had judgment on the demurrer to the complaint, from which this appeal is prosecuted.

It appears from the complaint that at his death plaintiff's testator was the owner of a large number of stocks or shares and certain bonds of foreign corporations, all of which, except certain described shares of stocks, were, on and prior to the first Monday in March, 1894, in the state of New York, and pledged as collateral security for the payment of a loan, "and were not on and prior to said date, and thence hitherto never have been, in the possession of this plaintiff as executrix as aforesaid"; that before the assessment in question plaintiff "made a formal statement in writing to said assessor that the said property so assessed by said assessor to this plaintiff as said executrix was not at any time on or since said first Monday in March, 1894, in the possession of said estate * * * or of this plaintiff as executrix," except as above stated, and that "this plaintiff, as such executrix, did not have in her charge, possession, or control the personal property, or any part thereof, so assessed," except as above shown; that plaintiff appeared before the board of equalization, and made application "to strike out the said assessments, and fully set forth the facts upon which it was claimed that the assessments or valuations should be stricken out." The personal property involved is divided into three classes: First, shares of stock of foreign corporations, the certificates of which were physically in the possession of the executrix in San Francisco at the date of the assessment; second, shares of stock of foreign corporations, the certificates of which were not within the state, nor in the actual possession of the executrix, on the tax day, but were in New York City, where they were held in pledge as collateral security for certain advances made thereon prior to the testator's death, the amount of which advances does not appear from the complaint; third, bonds of foreign corporations similarly situated to the shares last above named.

1. As to the assessment of the property falling within the first classification, the learned counsel for plaintiff make no point in their brief. This property is clearly taxable in this state. In *re Fair's Estate* (Cal.) 61 Pac. 184, and cases therein cited. See, also, *Mackay v. City and County of San Fran-*

cisco (Cal.) 61 Pac. 382, and cases therein cited, and *Id.*, 113 Cal. 392, 45 Pac. 696.

2. Plaintiff does not attempt to distinguish between the stocks and bonds which were outside the state before the death of plaintiff's testator, and we see no ground upon which the one may and the other may not be taxed. The same principle must govern both. Appellant contends that, so far as the executrix was concerned, these stocks and bonds had a situs outside of this state, and were never in her possession or control, and are, therefore, not taxable here; that under sections 1613, 1615, Code Civ. Proc., the executrix is chargeable only with such property as may come into her possession, and is not responsible for what she cannot collect. It is stated in the brief of counsel that upon her appointment as executrix plaintiff filed an inventory and appraisal, and, as was her duty, included therein a list of the stocks and bonds in question which she had been informed were in New York City, pledged as aforesaid; but that she never had the property in possession or under her control, and is not accountable to the probate court or to any legatees or devisees for it, nor could she collect commissions on it as executrix; and it cannot, therefore, be taxed here. We do not see that the extent of the executrix's accountability or liability for the property in her official capacity affects the question of its being liable to taxation. While she has not the possession, she yet has a control in so far that she may pay off the lien, and would then be entitled to possession and absolute control. Her pecuniary liability as executrix may be limited by reason of the possession being in another person, and still there remain a responsibility and control. Certainly, the property belongs to the estate, and the executrix, having taken it up on her inventory, is charged with a duty to protect and care for it. We are not willing to admit that she would be free from liability should she negligently allow the property to be lost to the estate. But at most the circumstance alone of her acting in a representative capacity can have but little bearing upon the question as to the situs of the property. That situs is in California, as we shall see under the general rule laid down in this state, unless for some reason it can be excepted therefrom. In short, it seems to us that the case stands as if the testator were alive, and the property had been taxed to him. Plaintiff represents him for purposes of taxation while representing his estate as executrix of his will.

Appellant cites several cases and quotes from *Desty on Taxation* to the point that it is the actual situs of the personal property, and not the domicile of its owner, that determines where the tax should be laid. It is not necessary to enter upon the discussion of this proposition. It has been expressly held by this court, quite recently, that bonds of a West Virginia railroad com-

pany, which had never been physically present in this state, but were kept in New York City, or elsewhere at the East, have their locality or situs for the purposes of taxation "at the place where they are held,—that is, owned." In *re Fair's Estate*, supra. See, also, *Mackay v. City and County of San Francisco*, supra. The testator in the present case died while a resident of California, and in California his estate is being administered by his executrix. Among other of the properties of her testator the executrix inventoried, and thereby charged herself with, the personal property in question as part of the estate committed to her charge. Unquestionably, this property is "held—that is, owned"—in California, and has "its locality for purposes of taxation at the place" where so owned, unless the general rule is subject to modification, or is inapplicable where the stocks and bonds, as in the present case, were pledged by the testator in his lifetime as collateral security without the state. In *Re Fair's Estate*, supra, it was said that there was an exception to the rule there laid down, which had received extensive recognition, namely, "where the paper evidences of debt are in the possession and control of an agent of the owner in a state foreign to the domicile of the latter, and are held by the agent for management in the course of the permanent business of the owner,—as, for example, to collect the money to become due thereon, and to reinvest it,—the securities are deemed taxable at the domicile of such agent." The cases cited as so holding are *Catlin v. Hull*, 21 Vt. 152 (the leading case); *People v. Smith*, 88 N. Y. 576; *Finch v. York Co.*, 19 Neb. 50, 26 N. W. 589; *Goldgart v. People*, 106 Ill. 25. Appellant contends that, if these securities may have a "business situs" in New York, under the circumstances last above cited, "a fortiori they should not be assessed to the executrix when they are held by a pledgee adversely to her, and when she has absolutely no control over the same." But it will be observed that the exception to the general rule assumes that the securities "are held by the agent for management in the permanent business of the owner," at the place where they are held; and, as was said in *Mackay v. City and County of San Francisco*, supra, the investment and reinvestment is "in such manner that the property or credits come in competition with the capital of the citizens of the state in which the agent resides." In the instance of securities thus sent away as the basis for a permanent business in a foreign state, the accumulations to be there invested and reinvested, and the principal to remain as the source of income for the investments, the case is quite different from that of a temporary hypothecation as security for a loan. In the one case there is a transfer of capital from the owner's residence to the foreign state, there to be used in prosecuting

a permanent business, and for the purposes of taxation for that reason is held to have a "business situs"; in the other case the transfer is for a specific and temporary purpose that may be accomplished in a brief space of time, and may be, and presumably is, to aid the business of the owner at his place and residence. The reasons for creating an exception in favor of the "business situs" have no application to the case here, and furnish no argument, a fortiori or otherwise, for making an exception to the rule.

We are cited to *Story*, Conf. Laws, § 550, where it is written: "Although movables are, for many purposes, to be deemed to have no situs except that of the domicile of the owner, yet, this being a legal fiction, it yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined." Appellant also cites *Green v. Van Buskirk*, 7 Wall. 140, 19 L. Ed. 109, and adds: "The case at bar is clearly such a case where an examination as to situs is necessary for the purposes of justice." Waiving the question whether Mr. Story referred to intangible property, such as stocks and bonds, when he spoke of "movables," we find no peculiar circumstances in this case that would seem to make it necessary to examine the situs of the property in order to do justice. It is quite common in all parts of the United States for business men engaged in large operations, as was Gov. Stanford, to resort to the principal or some other money center in a foreign state for financial aid, and the pledging of intangible securities is the common means of obtaining such assistance. Sometimes money is borrowed to nearly the full face value of the security (depending upon its stability and character); sometimes on a small margin of that value. If the rule contended for by appellant were adopted, it would furnish an opportunity to escape taxation at the place where the securities are owned by pledging them in a foreign state for a merely nominal loan. We are not informed by the complaint of the circumstances attending the pledging of the securities here in controversy. Even if it be conceded that, where the full value of the securities has been borrowed, an exception might be made (which we by no means would be understood as deciding), no such circumstance is here presented. So far as we know, the equitable interest of the estate in these securities may be equal to nine-tenths of their value, or even more.

The Political Code (section 3629) provides that the assessor "must assess such property [i. e. taxable property] to the persons by whom it was owned or claimed, or in whose possession or control it was, at twelve o'clock meridian, of the first Monday in March next preceding"; and the constitution provides that all property shall be assessed "to the person by whom it was owned or claimed, or in whose possession or control it was," on the tax day. Const. art. 13, § 8. Shares of stock

and bonds pledged as collaterals to secure advances made thereon are assessable in the name of the pledgor. At his death plaintiff's testator was the owner of the shares and bonds by him pledged. They became part of his estate, and were inventoried as such; and it must follow that they were property "owned or claimed" by appellant as executrix on the statutory tax day, and to her the law directs the assessment to be made. In the state of Ohio the assessment is required by law to be to the person in the possession or control of the property. In *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. 168, defendant owned certain stocks which he had pledged as collateral security for loans, with power in the pledgees to cause a transfer of the stock to their own names, and to sell if the loans were not paid. It was contended that the shares could not be taxed to the owner, because they were not in his possession or under his control within the meaning of Rev. St. §§ 2730, 2736, 2737. The court said: "We are of a contrary opinion. The books of the company showed the shares to be in the name of the defendant, and he was the real owner. He had the power to resume absolute control by paying off the indebtedness. It is not the policy of our law to assess taxes upon pledged property against the pledgee, and the language of the sections referred to will not, in reason, bear so literal a construction,"—citing *President, etc., of Waltham Bank v. Inhabitants of Waltham*, 10 Metc. (Mass.) 334; *Tucker v. Aiken*, 7 N. H. 113. It will be admitted that all property not used for some excepted purpose should bear its share of the public burdens, and it must be admitted that the securities in question should pay taxes somewhere. Doubtless the testator gave his note, or some evidence, for the advances to the New York pledgee, and as his property the pledgee should pay taxes in New York on that note or other evidence of the debt. But it would be gross injustice to compel him to pay tax on the securities held by him in which he has no interest except as security. It was so held in *Gibbins v. Adamson*, 5 Kan. App. 90, 48 Pac. 871, where plaintiff, a resident of Kansas, having given his own note for \$2,800 to a resident of Missouri, and afterwards indorsed a note secured by mortgage on Kansas lands, and assigned the note and mortgage to the resident of Missouri as collateral security, and they were thereafter held continuously until after the tax day in Kansas. The collateral note was taxed in Kansas. We are clearly of the opinion that upon the complaint presented in this case the demurrer was rightly sustained, and the judgment should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

131 Cal. 15

ARGONAUT MIN. CO. v. KENNEDY MIN. & MILL. CO. (Sac. 733.)

(Supreme Court of California. Dec. 19, 1900.)

MINES—LOCATION—EXTRALATERAL RIGHTS—DIVERGENCE OF END LINES—EFFECT.

1. Act Cong. May 10, 1872, § 3, provides that locators of mining claims shall have certain lodes through their entire depth, though they may extend outside the vertical side lines of the location, provided that such extralateral rights shall only extend to that part of the vein lying between vertical planes through the end lines of the location, and also that no locator shall be authorized by his right to the dip of his lode to enter on the surface of the claim of another. *Held*, that the proviso did not grant any additional rights to one claiming a location under a previous act, since it does not purport to confer ownership of all the lode between such vertical planes, but only to provide that no one shall pass beyond them.

2. Act Cong. 1866, in relation to mining locations, granted extralateral rights, but did not require the end lines of locations to be parallel. Act Cong. May 10, 1872, also granted extralateral rights, but required the end lines to run parallel to each other, and confirmed the rights of locators under former laws. Plaintiff's location and its application for a patent were made under the act of 1866, but patent did not issue till subsequent to the act of 1872. *Held*, that the nonparallelism of its end lines did not deprive plaintiff of the right to follow its vein on the dip beyond the side lines of the surface location.

3. Plaintiff's patent for a mining location granted 1,589.94 feet of the lode through its entire depth, provided that its extralateral rights should be confined to that part of the lode which lay between vertical planes drawn downward through the ends of the survey at the surface. The survey at the surface had end lines diverging in the direction of the dip of the vein. *Held*, that plaintiff was entitled to that part of the vein at any depth which lay between vertical planes drawn at right angles to the general course of the vein on the surface.

In bank. Appeal from superior court, Calaveras county; G. W. Nicol, Judge.

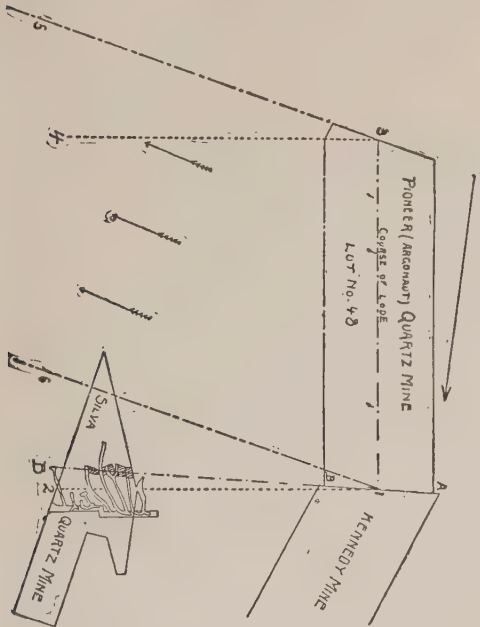
Action by the Argonaut Mining Company against the Kennedy Mining & Milling Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John M. Wright and Byron Waters, for appellant. Lindley & Eickhoff, Wm. J. McGee, and F. J. Solinsky, for respondent.

TEMPLE, J. This is an action for damages for the value of ore alleged to have been taken by defendant from plaintiff's mine, situate in Amador county. The defendant denies taking any ore or gold-bearing rock from plaintiff's mine, and avers that defendant is the owner of the mine from which the rock was taken. The cause was submitted in the trial court upon an agreed statement of facts, each party having the right to object to the relevancy, competency, and materiality of any part of it. Certain objections to evidence were made by the appellant, which were overruled by the court, and the main argument here has been in regard to these rulings. Much of the evidence was objected to simply upon

the ground of immateriality. All that I deem it necessary to say in regard to such rulings is that, admitting that the trial court erred, as I am inclined to think it did, defendant has suffered no harm. The question of law upon which the case must turn is not changed or affected by receiving this immaterial evidence.

The controversy is indicated by the following diagram:



The plaintiff owns the Pioneer quartz mine, and the defendant owns the Kennedy mine and the Silva mine. All three mines had passed to patent before the ore was taken out by defendant. The ore was taken under the Silva location, and within its exterior limits carried vertically down. It was taken from the discovery lode of the Pioneer location, which is the only lode which has its apex within that location. It enters that location near the middle point of the southern end line, and runs northerly through the location in a direction practically parallel to the side lines, through the center of the northern end line. In fact, save that the end lines are not parallel, the location and the lode are the ideals upon which the rules and regulations of miners and the laws of congress seem to have been based.

The defendant does not assert any right to the ore in dispute by virtue of its ownership of the Kennedy mine, and nothing further need be said about it. Defendant asserts title to the ore by reason of its ownership of the Silva ground, under what counsel call the common-law right to everything beneath the surface. It admits plaintiff's ownership of the Pioneer mine, and that the lode has its apex, as stated, within its surface location, but denies that the quartz taken by it from that lode is within that loca-

tion. This is asserted, as I understand the contention, upon two grounds: First, defendant contends that, because of nonparallelism of the end lines of the Pioneer, it carries no extralateral rights; and, second, if the court can as matter of law construct for it parallel end lines, the southerly end line being the base line from which the location was projected, the parallel will be made by extending the northern end line in a direction parallel to the direction of the southerly end line.

The dip of the lode is easterly at an angle of about 60° from the plane of horizon, and the end lines of the Pioneer diverge in that direction to the extent of about $14^\circ 45'$. The ore was taken out directly beneath the Silva surface location at depths varying from 1,400 to 2,000 feet beneath the surface. The Silva location is more than 900 feet easterly from the easterly line of the Pioneer location. The Pioneer was located, as the patent shows, under the law of 1866. The application for a patent was filed January 13, 1871. On the 23d day of February, 1872, the Pioneer entered and paid for its mine, and the patent is dated August 12, 1872. The act to promote the development of the mining resources of the United States was passed May 10, 1872. For reasons, which will appear as this opinion proceeds, I think plaintiff is entitled to all the rights which would attach to such a location under the law of 1866, and to any additional rights which inured to such locations under the act of 1872.

Among the contentions of the respondent is this: "Although the end lines were not required to be parallel under the act of 1866, yet if, by any process of reasoning, any limitation upon the extralateral right was imposed upon the locators' title by reason of the divergence of end lines, such limitation was removed by the act of May 10, 1872, which granted to owners of locations therefore made the right to pursue the vein on its downward course, between the end-line plane of such location as it existed." This proposition is based upon the language of the first proviso in section 3 of the law of 1872. After stating that the locators shall have certain lodes throughout their entire depth, although they may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines, it proceeds: "Provided, that their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid through the end lines of their location so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges." Then follows another proviso, that no locator, by reason of his right to the dip of his lode, shall be authorized to enter upon the surface of a claim owned by another. These provisos grant no rights additional to those

already given, nor do they purport to do so. They are both express limitations upon rights already given. The proviso does not confer ownership to all within those planes, but says, in effect, that no locator may pass beyond them. No rule of construction with which I am familiar would authorize or require a different reading of the section, especially in the face of the evident policy to strictly limit the rights of all locators as to length along the vein or lode.

We have many graphic accounts of the rush of gold hunters to California in 1849. The river banks and gulches were suddenly crowded with eager and earnest men anxious to dig for gold. There was no law by which any one could secure to himself any portion of the rich placers. In the absence of regulation, the strongest or most unscrupulous would get the lion's share. The miners, of necessity, made and enforced their own laws. Some regulations as to mining claims sprung into existence naturally, in fact necessarily. First, so far as possible, each person was given a specified portion of the ground, which he could mine. Secondly, the allotment to each was so limited that there should be no monopoly. So far as possible, all should have an equal chance. The right of the first possessor was preferred, but no matter was considered more important than the limitation upon the extent of the claims. And, thirdly, as a corollary from these two cardinal rules, the third follows: That each claimant shall mark plainly upon the surface of the earth the boundaries of his claim, that others may locate claims without interfering with him. These essential rules have been the basis of most of the rules and regulations of miners, and have been recognized in every mining district on the Pacific Coast, and in all attempts by legislation, territorial, state, or national, to regulate mining locations. Indeed, it may be said that the purpose of all these laws and regulations is to secure these ends.

These views are, as I think, expressed by Judge Field in the celebrated Eureka Case, 4 Sawy. 302, Fed. Cas. No. 4,548. The locations there considered were made under the law of 1866, and one of the questions to be decided was whether the defendant was entitled to its allotted distance along the vein, although in its strike the vein passed beyond its exterior surface lines. There was no contention based upon diverging end lines, and there could not have been; for the ore body in dispute was within planes passing through the end lines of the Champion location, which belonged to plaintiff, and was not within such planes passing through the end lines of any location under which defendant claimed. Defendant, on this point, simply contended that it had the oldest location, and under the law of 1866 had a right to the number of feet on the lode called for in its location, although it extended within the junior locations owned by plaintiff. It was held that defendant could not follow the lode on its strike through any

line of its surface location. In reaching this conclusion the court emphasized the invariable and inexorable policy to limit the location along the course of the vein to the quantity located, and to the line of the surface location, and to permit an extension of right only on the dip.

Bearing, then, in mind that the argument was to show that under the law of 1866 the locator could not, for the purpose of securing his length of lode, pass the lines of his surface location, we may be instructed by the decision. It is first said the locations under the law of 1866 are not invalid because the end lines are not parallel. The law did not require such parallelism, and the requirement in the law of 1872 was merely directory, and no consequence attached to a deviation from the direction. "Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations as the length of the lode."

The locator was limited to his number of feet on the lode throughout its entire depth, and the court realized that the only possible mode of so limiting the right was by parallel end lines. The miners seem to have regarded a lode as something like a plank. All a locator had to do was to measure off his distance upon it, and then make a "square cut" at the end. Judge Field's idea that the planes of the end "cuts" must be parallel in order to limit the locator at all depths to his number of feet claimed upon the surface is further shown. He says: "It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors, and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules. Similar rules have been adopted in numerous mining districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been adopted in any mining district in California or Nevada. And the construction is one which the law would require in the absence of any construction by miners.

If, for instance, the state were to-day to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width, cut through the block. No other mode of division would carry out the grant. The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein, with its dips, angles, and variations, to any depth, although it may enter land adjoining; that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles, and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course, or "strike," as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode within which he is permitted to work, and out of which he cannot pass."

Judge Field here was endeavoring to show that the locator was limited, under the law of 1866, to the specified number of linear feet on the lode throughout its entire depth. The extent of his right could be measured by the feet on the surface. The statement that the requirement in the law of 1872, that the end lines shall be parallel, was only directory, was overruled in *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98, but that the limitation upon the line or distance on the lode continues throughout its entire depth has always been recognized. And, indeed, it seems obvious that the opposite contention could not be thought of. A proposed rule may be tested by inquiring what may be done with it. Suppose the divergence here had been 150° instead of 15°, the dip being at a small angle from the plane of the horizon; the statutory limitation upon the length which could be taken on the lode would be a farce, even were the ledge the ideal ledge of miners. The Pioneer would soon have extended itself to the entire length of the lode.

I think the law of 1872, instead of extend-
Cal.Rep. 63-65 P.—5

ing the rights of locators under the law of 1866 along the lode, expressly limits them in that respect to the rights they had under the previous laws. Section 2 provides: "Mining claims upon veins or lodes * * * heretofore located shall be governed, as to length on the vein or lode, by the customs, regulations and laws in force at the date of their location." These words themselves, in my opinion, are sufficient to support the declaration of the court in the *Eureka Case*. Speaking of the limitations provided in section 3 of the act of 1872, which I have noticed, of lodes to planes through the end lines: "The act in terms annexes these conditions to the possession, not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that in the opinion of the legislature no change was made in the rights of the previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes, found within the surface lines." This proposition is substantially reiterated in *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98, and in many other cases, including the latest to which our attention has been called (*Walrath v. Champion*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170).

It remains but to add on this point that the patent under which plaintiff claims only grants of the discovery lode 1,589.94 linear feet "of the said Pioneer quartz vein, lode, ledge or deposit, as hereinbefore described, throughout its entire depth; * * * provided, that the right of possession to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction," etc. And in the habendum is added, as a condition, "that the grant hereby made is restricted to the land hereinbefore described as lot No. forty-eight (48), with fifteen hundred and eighty-nine and $\frac{94}{100}$ linear feet of the Pioneer quartz vein, lode, ledge, or deposit, throughout its entire depth," etc. I think it clear that there is no attempt here to convey all within planes passing through the end lines, if such planes would at any depth include more than the amount specifically defined on the strike of the lode.

Upon this conclusion that a patent to a location with end lines diverging in the direction of the strike does not convey all within those planes, but, at the most, not more than the stated number of feet on the lode, at any given depth, the appellant contends that such patent grants no extralateral rights at all. Such would be the law if the loca-

tion were under the law of 1872, and, as the patent to the Pioneer was issued after that law took effect, counsel contends that it is subject to its requirement that the end lines must be parallel or the patentee has no extralateral rights. Another objection is that there is no description of the segment of the lode which extends beyond the surface location, and no grant can be effectual which does not define the thing granted. Parallel end lines were not required in locations by the law of 1866, and yet extralateral rights were specifically given. The act refers to rules and regulations made by miners, but it is not said that any such rule required parallel end lines. It is claimed in argument that such was, in general, the custom of miners, but it is not even contended that there was such a custom in Amador county, and all the patents shown in this case lack such parallelism.

I think it would have been competent for congress in the law of 1872 to have required parties who had equitable rights to patents to cause such adjustments of their surface lines as would indicate and define their extralateral rights; in other words, to have made their end lines parallel before a patent would issue, on pain of losing all extralateral rights. There are no such provisions in the act of 1872, but the rights of locators under former laws are expressly confirmed to them. The presumption is very strong against forfeiture, and against such construction of any law as would work a forfeiture. The language of an act to have such effect must be very plain, or the court will, if possible, give a construction to it that would not have that effect.

It is admitted that such extralateral rights are recognized and asserted in the Eureka Case, and I think the language used by Judge Field in *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98 (the Horseshoe Case), is equally clear upon this matter: "Under the act of 1866 (14 Stat. 251), parallelism in end lines of a surface location was not required, but, where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes down through the side lines." This very clearly implies that a locator under the act of 1866 has such right, although his end lines are not parallel. In many other cases the same thing is implied. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; *Walrath v. Mining Co.* (C. C.) 63 Fed. 552; *Id.*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170.

We come, then, to the other phase of the question: Can it be determined as matter of law, from the patent or the complaint, what segment of the dip, if any, the plaintiff acquired by his location or patent? It is ad-

mitted, or rather contended, by counsel on both sides that the court cannot construct end lines. If the court is to adjudge that plaintiff is entitled to follow the dip beyond his lines, it must find some mode of limiting the right along the vein, and that limitation must result as matter of law from the patent, when the necessary facts are shown as to the property it attempts to convey; that is, as to the course and dip of the lode.

The contention of the parties in regard to this matter is shown upon the diagram. Of course, it is understood that plaintiff contends for all included between planes drawn through its end lines, although they diverge, and would inevitably extend his rights along the strike, while defendant contends that because of such divergence plaintiff has no extralateral rights. But each party has an alternative theory, in case its primary contention is not sustained. Plaintiff says, if planes through its end lines do not control, then planes are indicated between lines perpendicular to the general course of the lode.

Defendant's alternative is that, as the southern end line constitutes the initial line in the survey, it necessarily follows from the requirement of parallel end planes that the northern end line shall be parallel to it; that by locating and fixing the southern end line first the northern end line was thereby also definitely and finally located. These theories are shown in the diagram. 3-5 is the southern end line continued; 1-6 is a parallel line from the northern end of the lode. This shows defendant's theory. These lines would give the ore in dispute to defendant. The lines suggested by plaintiff are 1-2 and 3-4. These are at right angles to the general course of the lode, and planes descending through them would give the ore to plaintiff. The line, B-B', is the northern end line continued, and between that line and 3-5 is plaintiff's first contention, which we have considered.

I am not referred to any authorities which support the contention of appellant that the southern end line must be considered as the basis from which the surface form of the location was projected. As stated, the argument is that, having been first located, it followed, as matter of law, that the other end line must be in the same direction in order that end lines may parallel. But the location was made, surveyed, the land paid for, and application made for the patent, before the law of 1872 was enacted. The act of 1866 did not require parallel end lines to insure extralateral rights, or at all. There was therefore no implication that the second end line should be parallel to that first established. It was not an absolute necessity, that by a naked description one end line should be described before the other. A side having been located, one sentence could have created both end lines from each end, and at right angles to the side line, in a certain direction.

No such general rule, therefore, applicable to all cases could be adopted. Planes so constructed could not result as matter of law.

Planes through the lode at the end lines of the location, at right angles to the general course, would impose the required limitation upon the rights of the locator along the lode. The rule that they must be so constructed would be universally applicable; at least, theoretically. The congressional system for the sale of mineral lands is founded upon the proposition that the course of the lode can be traced. That nature, in her infinite variety, does not always so deposit her mineral gifts, is unfortunate; but I think, in construing the law, we may have regard to the views of the lawmakers in regard to its subject, however crude and inadequate such views were. The law of 1866 is said to have been but a crystallization of the rules and customs of the miners. The first lodes worked were, I think, nearly in a uniform direction. The individual claims were short, usually 200 feet. Under such circumstances, it was not difficult to appropriate to each his number of feet on the dip at any depth. In California mines such claims were very often consolidated and disputes avoided. Often, as on the Comstock lode, the miners agreed upon a base line from which the surface form of locations were projected, or to which they were adjusted. This would result in parallel end lines.

The general practice, I think, was to have their claims bounded, so far as the lode was concerned, by parallel end lines, whatever might be the form of their surface location. In fact, they adopted the idea put forth by Judge Field in the Eureka Case. Their rights on the lode were limited to planes at the limit of their right to the lode on the surface, at right angles to the general course of the lode. The Eureka Case is perhaps the only express authority for this proposition, but I do not find, as claimed by the learned counsel for the appellant, that it has been repudiated by later cases. On the contrary, these cases which imply extralateral rights when the end lines are not parallel seem to concede this rule. I am unable to understand *Walrath v. Mining Co.*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170, upon any other theory. There was liberty of surface form under the act of 1866, but the law strictly confined the right on the vein below the surface. This accords both with the Eureka Case and the Flagstaff Case, 98 U. S. 463, 25 L. Ed. 253. In the latter case it was said: "But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." But rights on the strike were limited by the surface lines of the location under both laws. Judge Field was familiar with the mining customs and laws. I have no doubt he expressed in the Eureka Case what had been and was the universal understanding and

practice of miners. The rule there declared seems to me reasonable, and, in fact, the only one that can be applied to such patents issued under locations made before the law of 1872 came into existence. If, as suggested, the officers of the land office usually adjust and make the end lines of locations parallel before issuing the patent, such patents, when issued, will be conclusive evidence that such also was the location.

A case has been cited in which the end lines of the location converge in the direction of the dip. *Carson City Gold & Silver Min. Co. v. North Star Min. Co.* (C. C.) 73 Fed. 597. It was held that the locator had extralateral rights because the conveyance would give less rather than more on the dip of the vein. This may be all right, as it seems to me, however, not because the patent carries less rather than more than would pass had the end lines been parallel, but because that which is granted is described so that it can be definitely located. Under the force of the restriction contained in section 3 of the law of 1872, the locator could not take beyond planes through his end lines. This confined him, within well-defined boundaries, to less on the dip below the surface than he had upon the surface. If this was an attempt to construe the act of 1872, the logic might be questioned. That act, as construed, does not grant extralateral rights because the end lines are parallel or converge towards the dip of the vein, but if they are parallel. The location there under consideration was made under the act of 1866, and carries extralateral rights because the extent of such rights is definitely described. At least, such was the fact, and no other reason was required. It was therefore not necessary in that case to consider the point here under debate. If this position be correct, the complaint does definitely describe the segment of the lode from which the ore was taken. The judgment is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; HENSHAW, J.; HARRISON, J.

(131 Cal. 85)

HOXIE v. BRYANT. (L. A. 774-776.)¹

(Supreme Court of California. Dec. 22, 1900.)
EXECUTION—LEVY ON NOTE AND MORTGAGE—ORDER OF COURT—RIGHT TO OBJECT.

1. It is immaterial whether a levy on a note, which could be taken on execution and sold, was made by an order of court or otherwise.

2. Code Civ. Proc. § 17, subd. 3, includes notes in its definition of personal property. Section 688 provides that property may be attached or taken on execution in like manner as on writ of attachment; and by section 542, subd. 3, personal property capable of manual delivery must be attached by taking it into custody. Held, in view of these provisions, that a note of which the sheriff may peaceably take actual possession may be levied on and sold under execution.

3. A judgment provided that a note and mortgage filed in the case should be delivered

¹ Rehearing denied January 22, 1901.

to defendant on his payment of the judgment, but he failed to pay the same, and made no attempt to prevent the note becoming barred by the statute of limitations. *Held*, that he could not object to a levy on, and sale of, the note and mortgage under the judgment.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Action by H. E. Hoxie against E. I. Bryant. There was a judgment for plaintiff, and from orders denying defendant's motion to set aside an order of court authorizing a levy, and denying a motion to set aside a levy and sale, and denying a motion to declare the judgment satisfied and discharged, defendant appeals. Affirmed.

Goodrich & McCutchen, for appellant. Works & Lee and Chas. T. Howland, for respondent.

COOPER, C. In May, 1894, the defendant was the owner of a promissory note and mortgage made by one Lewis to him for the sum of \$500. The maker of the note was insolvent, and the lands described in the mortgage were of small value, not to exceed \$100. Defendant went to plaintiff, and by false representations in regard to the value of the land mortgaged, and by taking plaintiff and showing her different lands, representing that he was showing the lands mortgaged, succeeded in selling the note and mortgage to plaintiff for its face value, \$500. As soon as plaintiff discovered that she had been deceived and defrauded, she brought the present action in the superior court to rescind the sale, and to recover of defendant the amount paid him, with interest. The judge of the court below found the transaction on the part of defendant fraudulent, fully stating the facts constituting the fraud, and adjudged that the sale be rescinded, that plaintiff recover the amount paid to defendant, with interest and costs, and that the note and mortgage, which had been filed with the clerk of the court, be delivered up to defendant upon his paying the amount so adjudged to be due plaintiff. This judgment was entered October 27, 1897, and has become final. The defendant has never paid the judgment, and it does not appear that plaintiff can in any way obtain satisfaction of the same. On the 11th day of March, 1899, the plaintiff filed a petition setting forth, among other things, that the note and mortgage had been filed as exhibits at the trial, and were in the clerk's office; that the judgment had never been paid, and that the note and mortgage would become barred by the statute of limitations on the 5th day of April, 1899; and praying for an order permitting the sheriff to levy an execution in the action upon the said promissory note, and sell the same thereunder. The court made an order as prayed for in the petition, and authorized the clerk to deliver up the said note and mortgage to the sheriff, for the purpose of permitting execution to

be levied thereon. In pursuance of the order, the sheriff levied upon the note and mortgage, took them into his possession, and after notice sold them to plaintiff, who was the highest bidder therefor. On April 4, 1899, the day before the statute would run against the note and mortgage, plaintiff filed a complaint for the foreclosure thereof, which action is still pending. On April 12, 1899, the defendant made three motions: (1) To set aside the order of court authorizing the levy on the note and mortgage; (2) to set aside the levy and sale, and recall the writ of execution; (3) that the judgment in the action be declared paid, satisfied, and discharged. These motions were each denied, and defendant has appealed from the orders by three separate appeals, which are brought up in the same transcript. The first two motions involve practically the same proposition, and may be considered together.

The main question involved and discussed is as to whether or not the sheriff may levy a writ of execution upon a promissory note, and sell it as personal property capable of manual delivery. If the note could be so levied upon and sold, it is immaterial whether done by order of court or otherwise. The order probably was unnecessary, but it did no harm. There is no question here involved as to the right of the sheriff to take possession of a promissory note in the hands of the judgment debtor. Neither is there any question as to the rights of any other creditor, except the plaintiff, who had the execution issued upon her judgment. The question, then, is simply as to the right of the plaintiff to levy an execution upon a promissory note in such position and custody that the sheriff may peaceably take the actual possession of it. The promissory note was personal property. Code Civ. Proc. § 17, subd. 3. Property may be attached or taken on execution in like manner as upon writ of attachment. Id. § 688. Personal property capable of manual delivery must be attached by taking it into custody. Id. § 542, subd. 3.

In the case of *Davis v. Mitchell*, 34 Cal. 81, the matter was fully considered, and it was held that under the provisions of the practice act, which are similar to the provisions of the Code on the same subject, a promissory note is subject to seizure and sale under execution. This case was cited with approval in *Donohoe v. Gamble*, 38 Cal. 352, and has never been overruled, and we see no reason for changing the rule as therein laid down. This court in *McBride v. Fallon*, 65 Cal. 303, 4 Pac. 19, refers to the case of *Davis v. Mitchell*, supra, and says: "We could not, with our present views, assent to the doctrine of that case;" but the court was discussing the question as to whether or not a judgment could be levied upon and sold under execution as personal property capable of manual delivery. The question here presented was not in any way involved in the case. In *Dore v. Dougherty*, 72 Cal. 235, 13

Pac. 621, it was held that a judgment was not subject to levy and sale under execution as personal property capable of manual delivery. The distinction between a judgment and a promissory note is plain. The judgment is a matter of record. It is the record evidence of the debt due by the judgment debtor. It is not capable of being taken out of the book where it is recorded and personally delivered. The sheriff cannot seize the judgment, take possession of it, and sell it. But a promissory note, negotiable in form, which passes in the commercial world by indorsement and delivery, and is subject to sale, is quite different. The owner of such promissory note cannot refuse to pay a just judgment against him, and claim the note as exempt from execution. If it, in any way, can be found and seized by the sheriff on execution, it may be sold and delivered to the purchaser. A similar statute exists in Louisiana (article 647, Code Prac.), and it is held in that state that promissory notes may be levied upon and sold. *Fluker v. Bullard*, 2 La. Ann. 338; *Stockton v. Stanbrough*, 3 La. Ann. 390; *Nugent v. McCaffrey*, 33 La. Ann. 271. In Iowa an execution may be levied upon a promissory note, and the note sold by the sheriff. *Rev. St. Iowa*, § 3272; *Earhart v. Gant*, 32 Iowa, 483. And so in Indiana. 2 *Rev. St.* 1876, p. 208, § 433; *Bay v. Saulspough*, 74 Ind. 399. In *Freem. Judgm.* (3d Ed.) § 112, the author in stating the rule says: "There are many choses in action which, from their intangible character, seem to be incapable of being made the subjects of direct levy and sale. Of this character are all debts and credits not evidenced by writing, or by something capable of being seized and taken into possession, or in some manner made to bear witness to a change in their ownership." He then enumerates both accounts and judgments as being such property. In a late case decided by the supreme court of New York (*Kratzenstein v. Lehman*, 46 N. Y. Supp. 71), in speaking of the authority given by the Code of New York to levy upon a promissory note, the court said: "While they do not always pass by delivery, but sometimes require an indorsement to transfer a complete title, yet they are usually paid or payable only to the person who has them in his actual possession; and the possession itself is ordinarily required as satisfactory evidence of the right to recover the money which is to be paid by their terms. While they are, in a technical sense, choses in action, yet practically the paper itself is property, is regarded as such, and is dealt with like other tangible personal property." The motions were therefore properly denied. Aside from the main point, the defendant is not in position to complain. He does not appear to have paid the judgment, or to have in any way attempted to get the promissory note and mortgage. He made no attempt to prevent the note from becoming barred by the statute, and when he made

these motions the statute, but for the act of plaintiff, would have run. If the motions had been granted, the promissory note and mortgage barred by the statute would probably be worthless. It seems that defendant intends, as appears by this record, not only to leave plaintiff's judgment unpaid, but to attempt to keep plaintiff from selling the mortgaged lands, which the court found to be what is known as "wash land and worthless." While defendant is entitled to his legal rights, yet his position here certainly does not commend him to the favorable consideration of a court of equity. It follows that the orders, and each of them, should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders, and each of them, are affirmed.

(131 Cal. 51)

ROONEY v. SNOW, City Auditor.
(S. F. 1,629.)¹

(Supreme Court of California. Dec. 21, 1900.)

MANDAMUS—TO CITY AUDITOR—VOLUNTARY PAYMENT—INVALID ORDINANCE.

1. Mandamus will not lie to compel a city auditor to draw a warrant pursuant to an ordinance appropriating money to pay the claim of R., and directing the auditor to draw his warrant in favor of R. for such sum, his duty not being ministerial merely under the city charter providing that every demand shall be presented to him for approval, and that he shall "satisfy himself whether the money is legally due."

2. The voluntary character of a payment to a city for license under the supposition that the place of business is within the city limits is not changed by the subsequent discovery that it is outside; so that an ordinance providing for its repayment is invalid.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Mandamus by Owen F. Rooney against R. W. Snow, auditor of the city of Oakland. Judgment for defendant. Plaintiff appeals. Affirmed.

Reed & Nusbaumer, for appellant. W. A. Dow, for respondent.

VAN DYKE, J. In April, 1898, the city council of the city of Oakland passed an ordinance, the first section of which reads as follows: "The sum of one thousand dollars is hereby appropriated from the general fund of the city of Oakland for the year 1897-98 to pay the claim and demand of Owen F. Rooney for moneys erroneously collected by the city of Oakland from said Owen F. Rooney, and paid by him under protest, as liquor license for the saloon and restaurant kept by said Owen F. Rooney at the end of the Oakland pier." By the second section of the said ordinance the auditor is directed to draw his warrant in favor of said Rooney for the sum of \$1,000, and the treasurer of the city is ordered to pay said

¹ Rehearing denied January 13, 1901.

warrant. The respondent, Snow, as auditor of the city of Oakland, refused to draw his warrant upon the treasurer, as required by said ordinance. Thereupon the plaintiff applied to the superior court of Alameda county for an alternative writ of mandate against said respondent as such auditor, requiring him to show cause why he did not draw a warrant in favor of the plaintiff, as required by said ordinance. The respondent demurred to plaintiff's petition, and the lower court sustained the demurrer. Plaintiff declining to amend, judgment was entered in favor of the defendant for costs, from which judgment this appeal is taken.

The appellant relies upon said ordinance as the foundation of his claim, and maintains that the auditor of said city has no discretion in the matter, but merely a ministerial duty to perform in drawing the warrant in accordance with the ordinance. By section 40 of the charter of the city of Oakland every demand, before it can be paid, must be presented to the auditor to be approved, "who shall satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury of the city is authorized by law, and out of what fund. After such examination he shall approve or reject the claim in whole or in part, and endorse upon such demand his approval or rejection over his signature, together with the date thereof. If it is approved, the fund out of which it is to be paid shall be designated. If the claim is rejected, or any part of it, unless the party presenting it is willing to take in full of the entire demand the sum offered, the auditor shall return it to the council, board or other body which originally authorized it, then if it is allowed by a majority vote of all the members of the council, or of the members of the board or other body authorizing it, and approved by the mayor, it can be audited in the same manner as if it had not been rejected: provided, the said council, board or other body had the authority to make the expenditure out of which the claim arose." St. 1889, p. 531. It is manifest from the city charter that the powers conferred and the duties imposed on the auditor in the premises require the exercise of judgment and discretion, and not merely the performance of clerical or ministerial duties. And this power conferred upon the auditor comes from the same source as that conferred upon the city council, and is of equal rank. The city council has no power to direct the auditor to audit an illegal claim, or to draw his warrant for payment of the same, or one which there is no authority in law to allow; and, if the council should pass such an ordinance, the auditor would not be required to carry out the direction, but it would be his plain duty to refuse to do so,—he must "satisfy himself whether the money is legally due." As said in *Von Schmidt v. Widber*, 105 Cal. 151, 38

Pac. 682: "Powers of a municipality are to be exercised through its legally constituted agents, and the authority of such officer, board, or department to exercise any of the corporate power with which a municipality has been clothed must be distinctly conferred upon that officer, board, or department, or its acts create no obligation against the municipality." The only statement in the petition in reference to the nature of the plaintiff's demand is contained in the said ordinance, which is set out in said petition; and the language of the ordinance is that the claim is for money erroneously collected by the city of Oakland from said Rooney for a liquor license for his saloon and restaurant kept by him at the end of Oakland pier. But the petition does not show how or why the money was erroneously collected. It appears, however, that in *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 160, 50 Pac. 277, this court held that "ship channel," being the western boundary line of the city of Oakland, was the line of ordinary low tide. The end of the Oakland pier, at which point this plaintiff's saloon and restaurant were kept, was discovered not to be within the city of Oakland. The plaintiff and others were supposed to know where the boundary lines of the city of Oakland were as well before as since the decision in question. The charter of the city of Oakland, defining its boundaries, is a public statute, and the lines were not altered or changed by such decision, but simply defined according to the act itself. The payment of the license by Rooney, although it was stated in the ordinance to have been under protest, was, nevertheless, voluntary on his part, and as such cannot be recovered back. "The illegality of the demand paid constitutes of itself no ground for relief. There must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment." *Brumagim v. Tillinghast*, 18 Cal. 271. In *Maxwell v. San Luis Obispo Co.*, 71 Cal. 466, 12 Pac. 484, the plaintiff alleged that "the moneys sued for were exacted and collected by the tax collector without authority of law, and as a condition precedent to the carrying on of business, and by threats, menaces, legal prosecutions, suits, actions, processes, attachments, seizures, confiscations, and sequestrations, which he, the said tax collector, gave out and made for the purpose of causing the payment of said moneys; and that said moneys were all paid under and by reason of said threats and menaces, and would not have been paid but for such threats and menaces." Yet this court in its decision says: "The tax collector had no real or apparent power to execute the threats of seizure, confiscation, and sequestration. The law under which he assumed to exact license taxes authorized him to direct suits to be brought for the recovery of such taxes, and to have attach-

ments issued in such actions;" and adds that the plaintiff was "not liable to anything beyond civil and criminal prosecutions in which the invalidity of the law which authorized the collection of the taxes would have been a perfect defense." Many cases are referred to in support of this view of the court, which it is unnecessary here to quote. It was held in that case that the complaint did not state a cause of action for the recovery of money, and the judgment was reversed, with directions to the court below to sustain the demurrer to the complaint. In *Phelan v. City and County of San Francisco*, 120 Cal. 1, 52 Pac. 38, it is said that, in order to constitute a payment under duress, there must be some coercion or compulsion, or some exercise of authority over the person or property of the party making the payment which controls his action, and which can be avoided only by making the payment. Nor does the payment of the taxes under protest of such party take from the payment its voluntary character unless it is necessary in order to protect his person or property. To the same effect are *O'Brien v. Colusa Co.*, 67 Cal. 503, 8 Pac. 37, and *Grimley v. Santa Clara Co.*, 68 Cal. 575, 9 Pac. 840. The payment of the license tax by the appellant was voluntarily made under the supposition, doubtless, that his place of business was within the city of Oakland. But, because that turns out not to be so, the character of the payment is not altered. In law it is still deemed to be a voluntary payment, and the city is not responsible in the matter, nor required to refund the money so paid. This being so, the ordinance under consideration is without authority of law, and invalid, and the respondent was fully justified in refusing to follow its direction. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(131 Cal. 149)

BLEWETT v. MILLER et al. (Sac. 753.)¹

(Supreme Court of California. Dec. 28, 1900.)

SHERIFFS — LEVY ON EXEMPT PROPERTY — MEASURE OF DAMAGES — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE — DILIGENCE.

1. Where an action is brought against a sheriff for the wrongful sale of exempt property, and the full value thereof is recovered, it is error to refuse a new trial on the ground of newly-discovered evidence on a showing that the owner of the property repurchased it after the sheriff's sale for less than it was worth, since the measure of damages is the sum necessary to compensate the owner as authorized by Civ. Code, § 3333, and not the value of the property as authorized by section 3336, as the latter section does not apply when the property is repurchased.

2. On the trial of an action against a sheriff for the wrongful sale of exempt property, the plaintiff's pleadings did not show that the property had been repurchased after the sale for less than its value, and the plaintiff did not testify to such fact, but a witness testified that

he saw part of the property in plaintiff's possession after the sale. Plaintiff recovered a verdict for the value of the property. *Held* not to show such a want of diligence on the part of defendant as would warrant a refusal of a new trial on a showing of such repurchase.

3. Where a sheriff wrongfully sells exempt property in connection with other property, and all is repurchased by the owner for less than its value, the amount so paid should be apportioned between the exempt and the other property in determining the damage caused by the sale of the exempt property, in an action against the sheriff to recover therefor.

Commissioners' decision. Department 2. Appeal from superior court, Merced county; William O. Miner, Judge.

Action by H. C. Blewett, administrator, against Henry Miller and others, for the wrongful levy and sale of exempt property. From a judgment in favor of the plaintiff, and from an order denying a new trial, the defendants appeal. Reversed.

El. N. Rector and Frank H. Farrar, for appellants. Chas. H. Marks and B. F. Fowler, for respondent.

SMITH, C. The appeal is from a judgment in favor of the plaintiff and from an order denying the defendants' motion for a new trial, but the only point made by the appellants' counsel, and the only point that need be considered, is that a new trial should have been granted on the ground of newly-discovered evidence. The defendant Warfield is sheriff of Merced county, and, it is found, seized under attachment certain property of the plaintiff's intestate that was exempt from execution, namely, a harvester and five gang plows. The other defendants are the sureties on his official bond. The suit was brought to recover damages for this taking. The court found that the harvester was at the time of the taking of the value of \$1,000, and the plows of \$60, and gave judgment for the aggregate amount, with legal interest from the time of the taking. It appears from the affidavit of Warfield that at the sale of the property levied on by him—consisting of the property in controversy and 23 mules and other property—the whole of the property was sold to C. F. Blewett (plaintiff in the attachment suit) for the sum of \$750, who, on the same day, sold the same to the plaintiff's intestate for the sum of \$1,100, and that the mules alone were worth more than that sum. Had this fact been known at the trial, the result must have been different; for the plaintiff—his intestate having recovered the property—was not entitled to recover its full value. The rule is that, "where one recovers his property again which had been unlawfully taken from him, he is considered as having received it in mitigation of damages"; and the measure of damages, in the absence of special damage, is the expense of procuring its return (with interest). 1 *Suth. Dam.* 239. And see 3 *Suth. Dam.* 527, and to same effect 1 *Sedg. Meas. Dam.* § 58. The rule applies generally without regard to the means by which the return

¹ Rehearing denied January 23, 1901.

is secured, whether by purchase or otherwise. "Thus, when plaintiff's property was seized and sold by the defendant [a sheriff], and was repurchased by the plaintiff from one who bought it in at the sheriff's sale, it was held that the measure of damages was the amount paid to repurchase the property." *Id.* The point is directly decided by the court of civil appeals of Texas in *Field v. Munster*, 32 S. W. 417, where the subject is fully discussed, and the above and numerous other authorities cited. The decision was affirmed on writ of error by the supreme court of Texas (*Munster v. Fields*, 33 S. W. 852), the court citing as additional authorities *Kline v. McCandless*, 139 Pa. St. 223, 20 Atl. 1045; *Fields v. Williams* (Ala.) 8 South. 808. The provisions of section 3336, Civ. Code, are to be understood as applying only to cases where the property is not returned or recovered, not as abolishing the rule that the recovery of the property is to be considered in mitigation of damages. In such cases the rule is as stated in section 3333, *Id.*

With regard to the question of diligence on the part of the defendant, I have more difficulty in coming to a conclusion. "The presumption is that the discretion [of the lower court] has been properly exercised." *Heintz v. Cooper*, 104 Cal. 670, 38 Pac. 512. But here the new fact was of such a character that it might have remained undiscovered by the defendant even after the most extraordinary diligence; nor was there anything in the circumstances of the case to put the defendant on inquiry (104 Cal. 671, 38 Pac. 512), unless it was the statement of the witness Houlk that he had seen the harvester on the ranch of the plaintiff's intestate subsequent to the sheriff's sale. But a statement of this kind, made by a witness on the trial, might, under the circumstances of the case, very well escape the notice even of diligent counsel; for the fact—though known to the plaintiff and his attorneys—was suppressed by them, or at least not referred to in the pleadings, and the plaintiff himself as witness, though sworn to tell the whole truth, said nothing about it. This conduct, whether designed to have such effect or otherwise, would naturally tend to mislead the defendant, and the plaintiff cannot complain if it in fact had such effect.

The case has evidently been tried on a wrong theory, and a new trial should be had. On the new trial the whole amount paid by the plaintiff's intestate on the purchase from C. F. Blewett should be apportioned between the property in controversy and the other property according to relative value; and the defendant should be charged only with the amount apportioned to the former, with legal interest from the date of sale, and any special damages, if any, that may be proved. I advise that the judgment and order appealed from be reversed, and the cause remanded for new trial.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for new trial.

131 Cal. 73

MULCAHEY et al. v. DOW et al.
(S. F. 1,719.)

(Supreme Court of California. Dec. 21, 1900.)

INVOLUNTARY TRUSTEE—FRAUD—DECREE OF DISTRIBUTION—EVIDENCE.

1. Civ. Code, § 2224, providing that "one who gains a thing by fraud * * * is * * * an involuntary trustee of the thing gained for the benefit of the person who would otherwise have gained it," if covering property gained by a judicial decree, applies only where the fraud is such as would justify a court of equity in setting aside the decree.

2. A proceeding to secure a decree of distribution being one in rem, the decree therein is binding on one who did not appear, though he had constructive notice only under the statute.

3. A decree of distribution finding the wife of intestate the only heir, and distributing the entire estate to her, cannot be successfully attacked for fraud by general evidence tending in an unsatisfactory way to show merely that several years before her husband's death she knew of the existence of persons who were heirs of his, and that she told the attorney who prepared the petition for letters of administration that her husband had no relatives.

Van Dyke, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; James M. Trout, Judge.

Action by Margaret Mulcahey and others against Hezekiah Dow and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Myrick & Deering, for appellants. H. H. Reid, W. H. Bodfish, Beatty & Beatty, and A. Ruef, for respondents.

GAROUTTE, J. Arthur Waters died intestate in the city of San Francisco, leaving a wife, Elizabeth, here, and a sister and nephews in other states. Administration was had upon his estate, and in due time, and after due notice, a decree of distribution was entered, which found that the wife, Elizabeth, was the only heir of her husband, and all of his estate was thereupon distributed to her. Subsequently she died, and these defendants are her successors in interest. Plaintiffs—a sister of Arthur Waters, deceased, and a certain nephew and niece—brought this action, claiming to be his heirs at law, and asserting that the wife, Elizabeth, under the decree of distribution, held their respective shares of the property as an involuntary trustee. They were nonsuited, and judgment went against them. The sufficiency of the evidence to support the judgment will be the material matter considered upon this appeal.

As a legal foundation upon which to rest their claims, plaintiffs rely upon section 2224 of the Civil Code, which says: "One who gains a thing by fraud, accident, mistake, un-

due influence, * * * or other wrongful act, is * * * an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." For present purposes it will be conceded that this section, in its terms, is broad enough to apply to judgments of courts adjudicating property rights; and here fraud upon the part of the wife, Elizabeth, in securing a judgment, is relied upon to support a recovery. In cases of this character, in order to substantiate the charge of fraud, evidence must be produced which is fully satisfactory to the judicial mind. The rule is clearly stated in *Wickersham v. Comerford*, 104 Cal. 495, 38 Pac. 101, where this court said: "It was necessary for the plaintiff to establish by clear and indubitable proof, to the satisfaction of the superior court, that the order setting apart the homestead had been obtained through some fraud practiced upon that court by the defendant. * * * She cannot be charged with fraud, or any fraudulent imposition upon the court, for merely failing to state in her petition any facts tending to show that the petition ought not to be granted, unless it is made to appear that she knew the import of these facts, and that they were willfully suppressed by her with the intention of deceiving the court, and thereby inducing it to grant her petition." Again, fraud must be shown which is extrinsic and collateral to the cause. It is held in *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, that neither perjury nor subornation of perjury constitute a fraud which will support a cause of action to set aside a judgment based thereon. In *Fealey v. Fealey*, 104 Cal. 354, 38 Pac. 49, this court said: "The fraud which is set forth as the basis of the plaintiff's cause of action relates to the alleged falsity of defendant's statement made in her petition for the order setting aside the homestead, and again repeated in her testimony upon the hearing of such petition, concerning the nature of the title to the land set apart to her as a homestead; but the question of title thus presented and sought to be litigated in this action was necessarily involved in the proceeding to set apart the homestead, and the order or judgment of the court therein was a determination that the allegation of defendant's petition in regard to the nature of the title to the land so set apart was true, and that her testimony relating to the same matter given upon the trial of that proceeding was also true. * * * Under these circumstances that judgment is conclusive upon the plaintiff, and she cannot be permitted to bring into litigation the same matters therein involved, and settled by that judgment." *Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 565, is similar to the case at bar, save that the ground there relied upon for equitable relief was not fraud, but mistake. In that case it was held that the decree of distribution was final and conclusive upon all questions of heirship.

The aforesaid section of the Civil Code relating to involuntary trustees places mistake and fraud in the same category, and, if the reasoning in *Lynch v. Rooney*, be sound, the same reasoning must control here.

In speaking of decrees of distribution, section 1666 of the Code of Civil Procedure reads: "In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled. * * * Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal." The all-important question upon the hearing of a petition for a decree of distribution of the estate of an intestate is, who are the heirs entitled to take the estate? The identity of the heirs being determined, the proportion of each is not a difficult question to decide, for the law itself fixes those proportions; and, if the question of heirship is not settled by the decree of distribution, then nothing is settled by it, and the whole proceeding is a vain and useless thing. And this section of the Code declares in terms that the decree, subject to appeal, is conclusive as to the rights of heirs, legatees, and devisees. Hence it must be the rule that, conceding section 2224 is broad enough to cover property gained by a judicial decree, still it only applies to cases where the fraud is such as would justify a court of equity in setting aside a judgment. We here have a judicial decree that these plaintiffs are not heirs at law of Arthur Waters, deceased,—a decree that has never been assailed, and which, by the very terms of the section quoted, has become final and conclusive. It seems idle to say that the validity of the decree is recognized by the plaintiffs, and that they rely upon its validity in seeking relief. They are only entitled to the relief sought by showing circumstances in the procurement of the decree itself which would justify a court of equity in setting it aside for fraud. If those circumstances are not shown, they secure no relief. They must attack and overthrow the finding of fact in the decree as to the heirship of the wife, Elizabeth,—a finding expressly placed there by direct authority of the statute,—in order that they may show themselves heirs at law of the deceased, Arthur Waters. It therefore seems inevitable that, in order to secure the relief here sought, they must go behind the decree, and falsify the important finding of fact upon which it is based. In view of the decision in *Pico v. Cohn*, supra, and other cases cited, if these plaintiffs had appeared in person at the hearing upon the petition for distribution, and had litigated the question of heirship, and lost their cause, certainly that decree, aside from the question of extrinsic and collateral fraud, would have forever foreclosed them from bringing an action of this character. But now the point is made that plaintiffs only had constructive notice of the hearing, and for that reason a different rule of law applies

to them. The case of *Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, and the authorities cited in that decision, are relied upon to support this contention; but that the rule there declared ever applied to a proceeding in rem we gravely doubt. A proceeding to secure a decree of distribution is essentially a proceeding in the nature of one in rem. It has none of the characteristics of a proceeding in personam, as was the case of *Dunlap v. Steere*, supra. In *Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323, this court, speaking through Mr. Justice Harrison, said: "The distribution of the estate includes the determination of the persons who, by law, are entitled thereto, and also the proportions or parts to which each of these persons is entitled. * * * By giving the notice directed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their right to any portion of the estate; and every person who may assert any rights or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The decree is as binding upon him if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court." In view of this clear and forcible language, emanating from the court in bank, it would seem that the plaintiffs' claim entirely dissolves, to the extent, at least, of the principle of law invoked in *Dunlap v. Steere*, supra.

The nonsuit was properly granted on the evidence. There was no extrinsic or collateral fraud. Fraud must plainly appear from the evidence, and here it does not appear at all. There is some general evidence tending in an unsatisfactory way to show that Elizabeth Waters knew of the existence of these plaintiffs several years prior to the death of her husband. There is also some evidence showing that she told W. H. Metson, an attorney at law, who prepared the petition for letters of administration in behalf of Grant and Pennell, petitioners for letters, that her husband had no relatives; and this is all the evidence of fraud that we can find in the record. The showing made is too weak to stand alone. It would not support a judgment if one rested upon it. The fact that Elizabeth Waters did not inform these relatives, living in different states, of the death of her husband, is not material here. No legal duty devolved upon her to furnish them with that information. There is nothing to indicate that she acted in bad faith at any stage of the administration, or made the statements to Metson with the purpose or design of defrauding anybody, or imposing upon the court. There is no evidence showing that she knew these plaintiffs were entitled to any part of the estate as heirs at law of her husband.

There is no evidence showing that the decree of distribution, wherein it is found as a fact that she was the only heir, was based upon her testimony, or upon any testimony induced by her to be given before the court. If this decree was based upon the testimony of Grant, one of the administrators, as claimed by plaintiffs, there is no evidence but that his knowledge or information upon the subject came from his friend, Arthur Waters, during his lifetime, or from some source other than that of Elizabeth Waters. And, if all of these things had appeared by the evidence, then whether or not they constituted extrinsic fraud would still be an open question. Tried by the test laid down in *Wickersham v. Comerford*, the nonsuit was properly granted. The errors of law relied upon are unsubstantial. For the foregoing reasons, the judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; TEMPLE, J.; HARRISON, J.

VAN DYKE, J. I dissent. The purpose of the proceeding is not to disturb this action of the probate court at all. That court had jurisdiction of the matter in question, and upon the testimony and showing before it the decree of distribution could not well have been different from the one entered. The question here is whether a party who has succeeded in obtaining a thing through fraud can be compelled to yield it to whom it properly belongs, and who would not have been deprived of it excepting through such fraud. Our Code lays down the general rule in such cases in the following language: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." Civ. Code, § 2224. It is alleged in the complaint that the plaintiffs were prevented from appearing and presenting their claims by the fraudulent conduct of Elizabeth Waters, who willfully and intentionally represented to the court that she was the sole and only heir, when she knew the plaintiffs were also heirs of the deceased husband, and entitled to a share of his estate. In Story's Equity Jurisprudence it is said: "In general, it may be stated that in all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained." Story, Eq. Jur. § 885. To the same effect the rule is stated in *Pom. Eq. Jur.* § 1053; *Moore v. Crawford*, 130 U. S. 128, 9 Sup. Ct. 447, 32 L. Ed. 878. In *Wickersham v. Comerford*, 96 Cal. 439, 31 Pac. 360,

it was claimed by defendant, as here, that the facts stated in the complaint did not constitute fraud of which the plaintiff was entitled to complain. The justice, in writing the opinion in that case, says: "The complaint charges a willful suppression of a material truth, and a suggestion of a falsehood by defendant, with intent to deceive and mislead the court, to the prejudice of the creditors of the estate, and avers that such suppression and suggestion had the intended effect, to the injury of the plaintiff, who was one of such creditors. I think this constituted fraud." In *Wingerter v. Wingerter*, 71 Cal. 105, 11 Pac. 853, the defendant had been the administrator upon the estate of his deceased brother, who died in Los Angeles county. The plaintiff was the son of that deceased brother, but resided in the state of Missouri. The defendant, as such administrator, induced the plaintiff, as heir of his deceased father, through false representations, to convey to him (the defendant) his interest in the estate, and afterwards procured the interest to be distributed to him by the probate court. Held, that the defendant was an involuntary trustee for the plaintiff of the property so fraudulently obtained, and that the plaintiff was entitled to the relief sought, to wit, the recovery of the property. See, also, *Lataillade v. Orena*, 91 Cal. 576, 27 Pac. 924; *Dunlap v. Steere*, 92 Cal. 347, 28 Pac. 563, 16 L. R. A. 361; *Bergin v. Haight*, 99 Cal. 52-56, 33 Pac. 760; *Curtis v. Schell* (Cal.) 61 Pac. 951,—where the question is fully discussed. The complaint in this case states a cause of action entitling the plaintiffs to the relief asked, and the evidence at least tended to support the material allegations of the complaint. This was sufficient to prevent a nonsuit. *De Ro v. Cordes*, 4 Cal. 117; *Cravens v. Dewey*, 13 Cal. 40; *McKee v. Greene*, 31 Cal. 418.

131 Cal. 165

GREENE v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. (GINN et al., Interveners; S. F. 2,381).

(Supreme Court of California. Dec. 28, 1900.)
SCHOOLS AND SCHOOL DISTRICTS — TEXT-BOOKS—CHANGING—VALIDITY—RESTRAINING.

A board of education, by resolution, adopted a different system of penmanship than the one then in use, without giving the notice required by Pol. Code, § 1874, subd. 3, providing that at least 60 days' notice of any proposed change must be given by publication in a newspaper published in the county, stating the change proposed, that bids for furnishing books to replace them will be received, and when and where such bids will be opened. Held, that the resolution, and contract for supplying books made pursuant thereto, were void.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by J. C. Greene against the board of education of the city and county of San

Francisco and others. From a judgment in favor of plaintiff and an order denying a new trial, Ginn & Co. appeal. Reversed.

Sheffield S. Sanborn (Wm. B. Bosley, of counsel), for appellants. John H. Dickinson, for respondent J. C. Greene. H. H. Hindry, for respondent H. S. Crocker Co. Franklin K. Lane, for respondent board of education.

COOPER, C. This action was brought by plaintiff, as a citizen and taxpayer, to enjoin the defendants, who are the members of and compose the board of education of the city and county of San Francisco, from using, or causing to be used, until four years after the 9th day of June, 1897, the text-books of the Shaylor system of vertical round-hand penmanship, upon the ground that said text-books have not been legally adopted by the board. The appellants, Ginn & Co., a co-partnership doing business in the state of Massachusetts, were allowed to and did intervene. In their complaint in intervention they alleged that they, as publishers of the said Shaylor system, entered into a contract with defendant board on the 30th day of June, 1899, by which they agreed to supply the public schools of the said city and county with the text-books of said Shaylor system. The case was tried before the court, and findings filed, upon which judgment was entered for plaintiff as prayed for. Appellants made a motion for a new trial, which was denied, and this appeal is from the judgment and from the order denying the motion. It is conceded that in June, 1899, the defendant board passed a resolution regular in form, and, after proper notice as required by statute, adopting as a uniform series of text-books the Shaylor system, and entered into a contract with appellants, whereby they were to furnish at stated prices the copybooks of the Shaylor system to the pupils in the public schools of the city and county of San Francisco. The resolution of the board and the said contract with appellants were valid and legal if the board had power to make them, and this depends upon whether or not the board had, in the month of June, 1897, legally adopted the text-books of the California system of vertical penmanship published by H. S. Crocker & Co. If the California system was legally adopted in June, 1897, the board had no power to change the text-books so adopted until four years from the date of adoption. Pol. Code, § 1874, subd. 1. The main question, therefore, in the case is as to the validity of a resolution passed by the board June 9, 1897, adopting the California system of vertical penmanship. It is provided in Pol. Code, § 1874, subd. 3: "At least sixty days' notice of any proposed change in text books must be given by publication in a newspaper of general circulation, published in the county, if there be one, in which such change is to be made. If there be no newspaper published in the county, then such publication shall be made in

any newspaper having a general circulation in the county. A copy of the newspaper containing such publication, with such notice marked, must, immediately after the first publication thereof, be by the secretary of the board transmitted to the state board of education, and the same, when received, must be filed by the secretary of said state board. Said notice shall state what text books it is proposed to change; that sealed bids or proposals will be received by the board for furnishing books to replace them; the place where and the day and hour when all bids or proposals will be opened, and that the board reserves the right to reject any and all bids or proposals. Said notice shall be published in such newspaper as often as the same shall be issued after the first publication thereof." It is admitted that the board did not comply with the above subdivision of said section, prior to the resolution of June 9, 1897, in regard to the publication of the notice therein required; neither did the board, at any time, comply with the section as to the contract with said H. S. Crocker & Company by publishing any notice prior to making the same. The resolution and contract, as to the California vertical system of text-books, were therefore in excess of the jurisdiction of the board and void. The board, being an inferior tribunal or body, possesses such powers, and such only, as are given it by the statute. The law has prescribed the course to be pursued and the things to be done in order to effect a change in the text-books of the public schools, and the board must follow its mandates. The statute must be substantially followed. If the board could dispense with one of the material requirements of the statute, it could dispense with others, and thus be left with no guide except its absolute will. The board is the agent of the public, and intrusted with the duty of carrying out the mandates of the law in the matter of adopting text-books for the use of the children of the public schools. The evident object of section 1874 is that all parties may have a fair hearing before the board, and that the best text-books may be obtained at the lowest price. The section requires the bids to be publicly opened, and accompanied by sample copies of the books proposed to be furnished. It further provides that no change shall be made except in the months of May or June of the year in which the change is made, and that any books adopted as a uniform series of text-books must be continued in use for not less than four years. The law formerly required six months' notice of any proposed change in text-books, and this court held in *People v. State Board of Education*, 49 Cal. 685, that the board could not make the change without giving the notice. In the opinion it is said: "The authority of the board to effect the change was thereby made dependent upon the giving of the prescribed notice, and its exercise was forbidden except after such notice first given."

The respondents claim that the provisions of the section do not apply, because it does not appear that the attempted change was made as to books "that were in use as a part of a uniform series of books," and that the change refers to a change of a part of a uniform series. We do not think such a narrow construction should be given the statute. Its plain mandate is, "notice of any proposed change in text-books."

It appears from the uncontradicted evidence of the superintendent of the public schools of the city and county of San Francisco that in June, 1897, the Spencerian system was in use in the schools, and that it was the only system in use that was ever brought to his attention, but that they had been experimenting with the vertical system. But if it be conceded that on the 9th day of June, 1897, the Spencerian system and the California system of vertical penmanship were each in use in the public schools, the order adopting the California system would exclude the Spencerian system. This was certainly a change in the text-books in use in the public schools. We do not think the language of the statute applies only to a change of text-books that had been legally adopted. If the Spencerian system was in use in the public schools, whether by legal adoption or by the silent acquiescence of teachers and pupils, the board could not change the text-books so in use without publication as required by the Code. As the plaintiff cannot maintain this action unless the order of the board of June 9, 1897, was valid and is still in force, and as it has been shown to be void, it is not necessary to pass upon the question as to whether or not the plaintiff, as a taxpayer, can maintain the action. We advise that the judgment and order be reversed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

131 Cal. 162

BOVARD v. DICKENSON. (Sac. 760.)

(Supreme Court of California. Dec. 28, 1900.)

BILLS AND NOTES — ASSIGNMENT BY EXECUTRIX—EVIDENCE—FOREIGN LAWS — PRESUMPTION.

1. Where plaintiff claimed to be the assignee of the note sued on, and the assignment was denied, the burden was on plaintiff to prove it.

2. When plaintiff, suing on a note as the assignee, relied on an assignment executed by an executrix in Missouri, and there was no evidence that such assignment was authorized by any court having jurisdiction of the estate, and no evidence as to the laws of Missouri, there could be no recovery, since the Missouri law would be presumed to be the same as Code Civ. Proc. §§ 1517, 1524, declaring that a chose in action belonging to an estate may not be sold save under order of the superior court.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Action by John H. Bovard against G. L. Dickenson. From a judgment in favor of defendant and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

R. W. Dodge, for appellant. Budd & Thompson, for respondent.

GRAY, C. Appeal from a judgment in defendant's favor, and from an order denying plaintiff's motion for a new trial. This action was commenced by filing a complaint on November 5, 1898. In that complaint it is alleged that on June 1, 1885, at Atchison, Kan., the defendant made and delivered his promissory note for \$820 and interest, due 90 days after date, to one J. A. Bovard; and thereafter, on December 30, 1894, and February 4, 1898, at Stockton, Cal., in consideration of the foregoing facts and said indebtedness, the said defendant signed two several writings, whereby he acknowledged the said indebtedness, and promised to pay the same according to the terms of said promissory note. It is also alleged that said promissory note and indebtedness and said writings, and every claim and cause of action thereunder against defendant, were duly assigned and transferred to the plaintiff herein, and ever since said assignment plaintiff has been, and now is, the owner of the same. The answer specifically denied the alleged assignment and ownership, and the four-year statute of limitations was also pleaded therein. From the evidence it appears that the payee of the note, J. A. Bovard, died in Missouri in 1894, and that Lucy S. Bovard, appointed in that state as the executrix of his estate, attempted to assign and transfer to plaintiff by instrument in writing, executed by her as such executrix (presumably in the state of Missouri), all the claim and cause of action of said estate under said two instruments of writing. The said executrix also attempted to assign the said promissory note to plaintiff by a written indorsement on the back thereof, signed by her as executrix. There is nothing to show that this action of the executrix was authorized by any order of the court having jurisdiction of said estate. Nor is there anything to show that the transfer by the executrix to plaintiff was intended merely for the purpose of collection, or for any other purpose than that of an absolute assignment, sale, and transfer to said plaintiff as indicated by the said written transfer. The assignment being denied, the burden was on the plaintiff to prove it. This, we think, he failed to do. There being no evidence as to the law of Missouri, it will be deemed, for the purposes of the case, to be the same as the law of California. In California the personal property of a decedent, including choses in action, passes to the heirs or devisees, and no sale can be had without the order of the court. Sections 1517, 1524, Code Civ. Proc. This case cannot be distinguished in principle from *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, which was

approved as to the question here considered in *Rankin v. Newman*, 114 Cal. 635, 46 Pac. 742, at page 660, 114 Cal., and page 749, 46 Pac.; and on the authority of these two cases we hold that the assignment and transfer of the claim and indebtedness from the executrix to plaintiff without authority of the probate court was invalid, and the finding adverse to said alleged assignment is supported by the evidence. This being so, plaintiff cannot recover, and the other points urged by him are immaterial. We advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(131 Cal. 153)

PEOPLE v. ROSENSTEIN-COHN CIGAR CO. et al. (L. A. 773.)¹

(Supreme Court of California. Dec. 28, 1900.)

CORPORATIONS-DISSOLUTION — FORFEITURE OF CHARTER-INCOMPETENT EVIDENCE-INTEREST OF STOCKHOLDER-MINUTE BOOKS.

1. Where the uncontradicted testimony showed that defendant corporation had organized, elected officers, adopted by-laws and a seal within 30 days after incorporating, commenced and continued business from that date, and legally changed its name thereafter, such evidence was sufficient to support a finding of the trial court that the corporation adopted and used a seal, organized and commenced the business for which it was incorporated immediately after issuance of said certificate of incorporation, and continued the same from that time on, and hence was not liable to forfeiture of its charter, or dissolution, under Civ. Code, § 358, providing that, if a corporation does not organize and commence business within one year from the date of its incorporation, its corporate powers cease.

2. Where the evidence in an action by the people to enforce the forfeiture of defendant's charter showed that the corporation had organized and commenced business within a year from its incorporation, and there was no evidence to show an injury to the public, the trial court's finding that none of defendant's acts were injurious to plaintiff, nor prejudicial to relator, or any of the stockholders or creditors, was correct, and entitled defendant to a judgment.

3. The illegal levy of assessments on the stock of a corporation would be no cause for its dissolution in an action brought by the state for that purpose.

4. In an action by the state to forfeit defendant's charter for not organizing and commencing business within one year after incorporation, a witness was asked what was his interest, as stockholder, on his retirement from the corporation. *Held*, that an objection to the question was properly sustained, since it could throw no light on the issue.

5. Where the state sought to forfeit defendant's charter because it had not begun business within one year from the date of its incorporation, its objection to defendant's minute book was properly overruled, since this would tend to show all the details of the business of the corporation and the time of its organization.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

¹ Rehearing denied January 24, 1901.

Proceeding in the nature of quo warranto by the people against the Rosenstein-Cohn Cigar Company, a corporation, and others, to dissolve the corporation. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Atty. Gen. Ford and Graves, O'Melveny & Shankland, for the People. Dillon & Dunning and A. Heyneman, for respondents.

COOPER, C. This appeal is from a judgment in favor of defendants and from an order denying plaintiff a new trial. The proceeding is in the nature of a quo warranto by the attorney general to deprive the defendant, a corporation, of its corporate charter, and procure its dissolution. The principal ground, as we gather from the complaint, upon which it is claimed the corporation should be deprived of its charter, is that it did not proceed to organize and commence the transaction of business within one year from the date of its incorporation, as provided in Civ. Code, § 358: "If a corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation, its corporate powers cease." It is alleged that on the 19th day of December, 1894, articles of incorporation were filed with the county clerk of Los Angeles county by the M. L. Polaski Company, Limited, which set forth the object and purposes of the corporation, the place of business, the term for which it was to continue, the names of five directors, the capital stock, the number of shares subscribed, and the amount subscribed by each director; that the said articles were subscribed and acknowledged by the five directors, and a certified copy thereof sent to the secretary of state; and that the secretary of state issued to said M. L. Polaski Company, Limited, the usual certificate, under the great seal of the state, showing "that a copy of the articles containing the required statement of facts had been filed in his office." The complaint then proceeds to allege "that no other, further, or different steps in the organization of said corporation were taken, no by-laws were adopted, no officers were elected, no record was kept embracing the acts done or who were present and who absent, no stock and transfer book was kept, and no meetings of the directors were had." It is not alleged that the said M. L. Polaski Company, Limited, did not organize within the year, nor is there any allegation as to when it commenced the transaction of its business. It is further alleged that a petition was filed in the superior court of Los Angeles county on the 24th day of May, 1897, for change of name of the said M. L. Polaski Company, and that "upon proceedings had therein an order was made and entered on June 29, 1897, changing the name of said corporation to the

Rosenstein-Cohn Cigar Company, the present defendant." No attempt is made to allege that the defendant, under its present name, did not organize and commence business within one year after June 29, 1897. On the contrary, it is alleged that after the order so changing the name the corporation "carried on business in the city of Los Angeles, county and state aforesaid, as cigar dealers under the name of Rosenstein-Cohn Cigar Company, claiming to be a corporation." It is further alleged that "the exercise of corporate power by the defendants, or any of them, is contrary to the statutes of the state of California, and each and every exercise of said corporate power subsequent to the lapse of one year from the date of its incorporation has been, as to the people of the state of California, void, and of no effect." The prayer asks for judgment "that said corporation did not organize within one year from the date of its incorporation, and that its corporate powers ceased at the expiration of the said year."

The evident intention of the pleader was to show that the corporation, while using the name M. L. Polaski Company, Limited, did not, within one year from the date of its incorporation, organize and commence the transaction of its business. We may, for the purposes of this case, concede that the complaint so alleges, and that such facts would entitle the plaintiff to judgment depriving the corporation defendant of its charter. But the court found: "The said corporation adopted and used a seal in due form of law. The said corporation organized and commenced the business for which it was incorporated immediately after the issuance of said certificate of incorporation, and by the 21st day of December, 1894, and ever since that time, has continued to operate, and is now operating, the same." It is claimed by plaintiff that the above finding is not supported by the evidence. We have carefully examined the evidence, and find in it sufficient to support the finding. The witness Rosenstein testified that he was secretary of the M. L. Polaski Company, and further said: "We adopted by-laws the same week of the incorporation. * * * The by-laws were in the safe. * * * Right away after the incorporation of the M. L. Polaski Company we organized by electing officers. It was within thirty days, and the by-laws were adopted within thirty days. We transacted business right away. The company had a seal. The corporate meetings were held at the cigar store regularly." The witness Robertson was bookkeeper for the M. L. Polaski Company, Limited, from the time it was incorporated until its name was changed. He testified: "I was there just about the time the articles of incorporation were filed. I started a set of books. * * * From the 21st of December, the date of the incorporation, the business went right along at the old stand, buying and selling tobacco, cigars, and arti-

cles." The witness Polaski testified: "We were conducting business at the same place as a partnership before the corporation was formed. * * * After the incorporation the business went right along as before, so far as the selling of goods was concerned. Q. Did you organize a board of directors then by the election of officers? A. I think so. Q. Did you commence business? A. Yes, sir." The above evidence not only supports the finding, but is uncontradicted, and upon the finding defendants were entitled to judgment.

The court, after certain other findings, found: "That none of their said acts were injurious to plaintiff, nor prejudicial to the interests of the relator, the said defendant E. Cohn, or any of the stockholders or creditors of said corporation." We think, treating the last-named finding as a conclusion of law, that it is correct, and entitles defendants to judgment. The courts treat a franchise as a trust, and the terms of the charter of a corporation are the conditions of the trust. A forfeiture of the charter takes place when some one or more of the essential conditions of the trust are violated. *People v. Dashaway Ass'n*, 84 Cal. 119, 24 Pac. 277, 12 L. R. A. 117. It is said in the above case that cases of forfeiture are divided into two classes: "(1) Cases of perversion; as where a corporation does an act inconsistent with the nature and destructive of the ends and purposes of the grant. In such cases, unless the perversion is such as to amount to an injury to the public, who are interested in the franchise, it will not work a forfeiture. (2) Cases of usurpation; as where a corporation exercises a power which it has no right to exercise. In this last case the question of forfeiture is not dependent, as in the former, upon any interest or injury to the public." In the case at bar it is not pretended that the corporation has usurped a power which it had no right to exercise, and therefore the second class of cases referred to has no application to this case. The evidence shows, and the court found, that the corporation proceeded to carry out the ends and purposes of the grant of its franchise by organizing and commencing business within the year, but, aside from this, there is no evidence in any manner tending to show an injury to the public. The complaint alleges that certain assessments have been levied upon the capital stock of the corporation, and that said assessments were levied "for the purpose of compelling the stockholders thereof to contribute money for the benefit of said corporation." We know of no reason why assessments may not, in proper cases, be levied upon the capital stock for the benefit of a corporation. If we assume that the assessments were illegally levied, this was not a cause for dissolving the corporation. *Burnham v. Manufacturing Co.*, 76 Cal. 24, 17 Pac. 940. It is not necessary to examine the

many specifications of the insufficiency of the evidence to sustain other findings upon immaterial matters. The finding quoted and discussed disposes of the vital issue in the case. The plaintiff called one Polaski as a witness. It appeared from his testimony that he was a stockholder and one of the subscribers of the articles of incorporation of the M. L. Polaski Company, Limited; that he retired May 20, 1897. He was then asked by plaintiff: "Q. What interest in the property was then determined to be your interest?" The court sustained an objection to the question, and it is claimed that the court erred in so doing. We think the ruling correct. The amount of interest of the witness in the property of the corporation was not the subject of investigation. It could not possibly throw any light upon the issue as to whether or not the corporation organized and commenced business within one year after it incorporated. There was no error in overruling plaintiff's objection to the minute book of the corporation. It does not appear that the book was read or considered in evidence, but, if we assume that it was so read in evidence, it was competent. It tended to show the organization of the corporation, its place of business, the nature of the business transacted, the meetings of directors, and other matters as to the good faith of the corporation. There was no question raised as to the identity, genuineness, and regularity of the minutes.

Other objections are made to the overruling of plaintiff's objections to testimony, but counsel have not seen fit to discuss them to any extent, and do not seem to rely upon them. The testimony to which objection was made relates to resolutions, meetings, the adoption of by-laws, who were the stockholders, and the shares held by each. It all tended to show that the corporation was organized and doing business, and was, therefore, competent and material on the issue presented by the pleadings. We discover no error of sufficient importance to justify a reversal of the case. It follows that the judgment and order should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

131 Cal. 146
GREENEBAUM v. DAVIS et al.
(S. F. 1,530.)

(Supreme Court of California. Dec. 28, 1900.)

MORTGAGES — FORECLOSURE — JUDGMENT
THEREIN—CONCLUSIVENESS ON JUN-
IOR LIENHOLDER.

Where plaintiff, who had a lien on defendants' land subject to a mortgage, was made a party to the suit foreclosing the mortgage, but did not answer or set up his claim therein, he is not barred from maintaining an action on his claim against the landowner, since the only

bar raised against him by the decree in the foreclosure suit is on the issue that his claim is subject to the lien of plaintiff therein.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by Emil Greenebaum against John Davis and another to foreclose a lien. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

R. H. Latimer, for appellants. Edw. J. Pringle, for respondent.

HAYNES, C. This appeal is from the judgment upon the judgment roll. Defendant John Davis was the owner of an undivided interest in the Rancho San Pablo. In January, 1885, one Lynch obtained a judgment against Davis for \$2,184.04, and \$19 costs, and in February of the same year the undivided interest of Davis in said rancho was sold to one Waterman for the sum of \$2,300.42, who received a sheriff's deed therefor. Said undivided interest so sold was, however, subject to a mortgage for the sum of \$17,960.25 held by Rudolph Hochkofler, the trustee in bankruptcy, for the creditors of D. Ghirardelli. At the time said deed was executed to Waterman there was a suit pending in the superior court of the city and county of San Francisco, brought by Joseph Emeric against Juan B. Alvarado et al., the object of which was to partition said rancho; and said Davis, Hochkofler, and Waterman, who were made defendants to said action, stipulated therein that all such lands as might, upon final partition, be allotted to Davis in satisfaction of his undivided interest in the ranch, should be decreed to him as owner, that the mortgage of Hochkofler should be a lien upon the lands so set apart to Davis for the amount of his mortgage, with interest, and that Waterman should have a lien, subject to said mortgage, for \$2,300.42 and interest; and this stipulation was confirmed by an interlocutory decree entered in said cause, the claim of said Waterman to become due upon the entry of the final decree, which was March 3, 1894, and which confirmed the interlocutory decree. Hochkofler, in 1888, commenced an action to foreclose his mortgage, and made Waterman a defendant; but this suit was not pressed until after the final decree in the partition case, when John Lloyd, who became trustee after the death of Hochkofler, amended the complaint, and prosecuted the foreclosure suit to a final decree. Waterman did not answer or assert his lien in that action, but made default. The officer making the sale under Lloyd's decree was directed to pay into court any surplus money that might remain after paying the amount due to Lloyd. The present action was commenced by the plaintiff, Greenebaum, the successor in interest of Waterman, on March 2, 1897. His prayer is, in substance, that any portions of the lands not sold to satisfy the prior mortgage be sold, and that any

surplus proceeds paid into court under Lloyd's decree be paid to the plaintiff. These facts are, in substance, alleged in the complaint, and the defendants demurred thereto on the following grounds: (1) That there is another action pending between the same parties for the same cause; (2) that the complaint does not state facts sufficient to constitute a cause of action; and (3) that the court has no jurisdiction of the subject of the action. The demurrer was overruled, and the defendant answered. Upon the trial plaintiff had findings and judgment.

Appellants' principal point is thus stated: "The holder of the note secured by the second mortgage cannot, after foreclosure of the prior mortgage by a suit to which he was made a party defendant, and in which all his rights might have been settled, maintain an action upon the note against the maker." To this point he cites *Brown v. Willis*, 67 Cal. 235, 7 Pac. 682, and *Hefner v. Insurance Co.*, 123 U. S. 747, 8 Sup. Ct. 337, 31 L. Ed. 309, and other cases. In the first of these cases one Aldrich brought suit to foreclose a mortgage executed by one Willis to secure a promissory note. Brown was made a party to that action because he held, as assignee, a subsequent mortgage upon the same premises to secure a promissory note which was due at the time the suit was commenced by Aldrich. Brown answered, and, as said in the opinion, "set up his note and mortgage, and as the note was due, if his pleadings were appropriate as they should have been, the court could and should have ascertained" the amount due to each of the parties, and ordered a sale, and the application of the proceeds to Aldrich and Brown in the order of priority. The case at bar is materially different. Here the plaintiff, though made a party defendant to the foreclosure suit brought by Hochkofler to foreclose a prior lien, did not answer or set up his claim by cross complaint or otherwise, and therefore the plaintiff in this action is precisely within the rule laid down in the case of *Savings Bank of San Diego Co. v. Central Market Co.*, 122 Cal. 28, 34, 54 Pac. 273, where Mr. Justice Temple cited *Brown v. Willis*, supra, and, commenting thereon, said: "I am unable to comprehend the rationale of the decision, unless it was upon the theory that the second mortgagee had made himself an actor in the case,—had put his rights as mortgagee in issue, and had then through his neglect allowed judgment to go against him adjudging that he had no lien or claim upon the premises. The only issue tendered to the junior mortgagee, by merely making him a party to a suit to foreclose brought by the prior mortgagee, is in the allegation that the right or claim of the junior mortgagee is subject to the lien claimed by the plaintiff in the foreclosure suit. As to any possible defense he may have to that issue so tendered, he is concluded by the decree, whether he appears in the case or not. The doctrine

appealed to does not and cannot go beyond that." The question made by appellants having been thus expressly considered and decided by this court, it is not necessary to examine cases decided in other jurisdictions.

The question whether Waterman or the plaintiff is or was a redemptioner does not arise upon this record; and this remark also applies to appellants' contention that the decree in the Hochkofler foreclosure case, ordering that any surplus remaining after satisfaction of the sums due the plaintiff in that action be paid into court, is void. No issue was made as to said surplus, nor does it even appear that there was in fact a surplus, or that a sale had been made under the decree foreclosing the Hochkofler mortgage. No other questions require notice. I advise that the judgment be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

131 Cal. 153

P. A. BUELL & CO. v. BROWN et al.
(Sac. 709.)

(Supreme Court of California. Dec. 28, 1900.)

MECHANICS' LIENS—CESSATION FROM WORK—NOTICE—CLAIM OF LIEN—TIME FOR FILING—EXTENSION—CONTRACT—CLAIM—VARIANCE.

1. Code Civ. Proc. § 1187, declares that the owner of a building for which materials have been furnished to be used must, within 40 days from cessation from labor thereon, file a notice stating the date when such cessation occurred, in the county recorder's office, and that neglect to file such notice shall estop the owner from maintaining the defense that liens were not filed in time; that a material man must file his lien within 30 days from the filing of notice of cessation of work by the owner; that a cessation from work for 30 days shall be deemed a completion; and that all liens must be filed within 90 days from completion. *Held* that, though the owner of property failed to file a notice of cessation from work within the required time, a material man's lien filed more than 120 days after cessation from work was too late.

2. Where the claim of lien made by a material man stated a contract to deliver the material at the reasonable market value, but on trial it appeared that the contract called for certain prices, the variance was fatal.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by P. A. Buell & Co. against James Brown and others to foreclose a material man's lien. From a judgment in favor of defendants Louis and Jane Doe Dondero, and an order denying a new trial, plaintiff appeals. Affirmed.

Woods & Levinsky, for appellant. F. W. Street, for respondents.

COOPER, C. This action was brought to foreclose a lien for material furnished defendant Brown, and used in the construction

of a barn upon the lands of defendant Dondero and wife. Findings were filed and judgment entered for defendants Dondero. This appeal is from the judgment and an order denying plaintiff's motion for a new trial. The findings are not assailed as to the facts therein determined, but the conclusions of law are challenged. It appears from the findings that between the 12th day of September and the 20th day of November, 1897, the plaintiff furnished defendant Brown mill work, lumber, and materials, amounting at the agreed price to \$426.33, to be used, and which were used, in the construction of a barn upon the premises of defendants Dondero; "that said barn or structure has not been completed; that there has been a cessation of labor on said barn or structure ever since the 20th day of November, 1897, and no notice of the completion or cessation of labor was ever filed or recorded in the recorder's office of said Tuolumne county"; that on the 16th day of April, 1898, plaintiff filed and recorded its notice of lien, which stated, among other things, as part of the terms of the contract by which it is sought to charge the premises with a lien, "said claimant to deliver same [said materials, lumber, and mill work] at said property above described, in said county of Tuolumne, state of California, at the reasonable market rate therefor." The claim of lien was filed nearly five months after cessation of labor upon the barn, and the most material question in the case is as to whether or not the notice or claim of lien was filed within time.

It is provided in the Code of Civil Procedure (section 1187) that the owner of property for which materials have been furnished to be used in the construction thereof must, "within forty days after cessation from labor * * * upon any unfinished building, * * * file for record, in the office of the county recorder of the county * * * in which the property, or some part thereof, is situated, a notice setting forth the date when * * * such cessation actually occurred. * * * In case any such owner neglect to file said notice as herein required, within the time herein required, then the said owner * * * shall be estopped, in any proceedings brought to foreclose any mechanic's lien or liens provided for in this chapter, from maintaining a defense therein based on the ground that said lien or liens have not been filed within the time provided in this chapter. Every person, save the original contractor, claiming the benefit of this chapter, at any time after the completion of any building * * * and until the expiration of thirty days after the filing of said notice * * * of cessation by said owner, * * * must file for record with the county recorder of the county * * * a claim * * * which claim must be verified by the oath of himself or some other person: provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, * * * and in all cases * * * cessa-

tion from labor for thirty days upon * * * any building * * * shall be deemed equivalent to a completion thereof for all the purposes of this chapter." The court found that labor ceased upon said building November 20, 1897, and 30 days thereafter, to wit, December 20, 1897, the building was deemed completed for the purpose of filing liens by all lien claimants. Ninety days were thereafter allowed in which to file and record the claim of lien, and the claim, not having been filed within the 90 days, was too late. It is claimed that the effect of the failure of the owner to file and record the notice of cessation of labor was to indefinitely postpone the time within which the claim of lien could be filed. We do not so construe the section. After stating that the owner failing to give notice shall be estopped from maintaining a defense on the ground that the lien was not filed within the time provided for in the chapter, it is expressly provided "that in any event all claims of lien must be filed within ninety days after the completion of said building." The statute then provides what is equivalent to and shall be deemed completion. The proviso should be read in connection with and as a part of the sentence in regard to the owner being estopped to claim that the lien was not filed in time. This construction gives effect to, and makes all parts of the section consistent. It enlarges the time of 30 days, formerly given the material man in which to file his claim of lien, and gives him 30 days after the filing of notice of cessation of labor by the owner, or, in case the owner does not file such notice, then 120 days after such cessation from labor. The construction contended for by plaintiff would prolong the time in which a claim of lien could be filed for years, in case the owner failed to file and record the notice. Such could not have been the intention of the legislature. It is said the owner could give the notice, and thus prevent the time being so extended. In reply it may be said that the material man can file his claim of lien and commence his suit, and thus prevent the bar of the statute. He is the one seeking to collect his claim, and not only seeking to collect it, but seeking to collect it, by force of the statute, from one who never agreed to pay it. The material man in this case did not sell the materials to the owners of the land, but to Brown, who was building the barn. He could charge the lot belonging to the Donderos, not for anything sold to them, or by virtue of any contract with them, but by reason of the statute alone. To charge their property by virtue of the statute, it was necessary for him to comply with the mandates thereof. We are not required to give a strained construction to the statute in order to enable plaintiff to collect its debt from parties who never agreed to pay it, and who never requested the delivery of the materials. The court found that the claim of lien set forth a contract to deliver the materials at the reasonable market rates, but that the con-

tract was an express one, to wit, \$26.50 per 1,000 for lumber and \$2.50 per 1,000 for shingles. This was a fatal variance, and prevents a recovery by plaintiff. *Wilson v. Nugent*, 125 Cal. 283, 57 Pac. 1008, and cases cited.

Plaintiff claims that the court failed to find as to whether or not the owners, within three days after knowledge that the barn was being constructed, gave notice that they would not be responsible for the same, as required by Code Civ. Proc. § 1192. There was no such issue made by the pleadings, and, if there had been, such finding would not be material, in view of what has been said as to the other points. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

6 Cal. Unrep. 621

GIBBS v. TALLY et al. (L. A. 746.)¹

(Supreme Court of California. Dec. 22, 1900.)

MECHANICS' LIENS — BONDS — FAILURE TO TAKE — MEASURE OF DAMAGES — PAYMENT — BURDEN OF PROOF — ASSIGNABLE CLAIM.

1. Under Code Civ. Proc. § 1203, requiring a bond, in case of a building contract, it by its terms to inure to the benefit of persons performing labor and furnishing materials for the contractor, one given to "T. [the owner], legal representatives or assignees," and not in terms inuring to the benefit of any one else, is insufficient.

2. Under Code Civ. Proc. § 1203, requiring a bond, in case of a building contract, in an amount equal to at least 25 per cent. of the contract price, inuring to the benefit of persons performing labor and furnishing materials for the contractor, and providing as limit of damages, in case of a bond, the value of labor and materials furnished, not exceeding the amount of the bond, and declaring that any failure to comply with the provisions of the section shall render the owner and contractor liable to material men and laborers entitled to liens on the property, the measure of damages, in the absence of a bond, is the amount of the claim for labor or material, not exceeding 25 per cent. of the contract price.

3. Under Code Civ. Proc. § 1203, giving action for damages "to any and all material men, laborers and subcontractors entitled to a lien," if bond is not filed where there is a building contract, the claimant who sues first and obtains judgment is entitled to recover up to the limit of the owner's liability, unless other claimants intervene, or, having brought actions, have them consolidated with his.

4. Though a material man, suing the owner of a building for failure to have a bond of the contractor filed, alleges nonpayment of the claim for materials furnished, it is enough for him to prove the debt, and defendant has the burden of proving payment.

5. Under Code Civ. Proc. § 1203, giving action for damages to a laborer or material man against the owner of the property who, in case of a contract to build thereon, does not take a bond for their benefit, and providing that action on the bond, if one is taken, shall not affect the laborer's lien nor any action to foreclose it, except that there shall be but one satisfaction of the claim, action for failure to

¹ Reversed in banc. See 65 Pac. 970, 133 Cal. 373.

take bond is not affected by the bringing of an action to foreclose the lien.

6. A claim under Code Civ. Proc. § 1203, for damages by a laborer against the owner of property who, in case of contract to build thereon, does not take a bond from the contractor, is within Civ. Code, § 1458, declaring "a right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such."

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by William H. Gibbs against Mary A. Tally and another. Judgment for plaintiff. Defendants appeal. Modified and affirmed.

Clarence A. Miller, for appellants. T. M. Stewart, for respondent.

CHIPMAN, C. Action to recover damages from the owner of a building for failure to comply with section 1203, Code Civ. Proc., relating to liens of mechanics and others. Plaintiff had judgment, from which defendants appeal on the judgment roll, including a short bill of exceptions.

1. Appellants challenge the constitutionality of the above section of the Code. The question has been recently decided here adversely to appellants' contention. *Carpenter v. Furrey* (Cal.) 61 Pac. 369.

2. Appellants contend that a sufficient bond was filed. A bond did in fact accompany the contract, and was filed with it. This bond was signed by the contractor, Parsons, and by two sureties, but it was given to the owner of the property being improved, "Mrs. Mary A. Tally, legal representatives or assigns," and was "not by its terms made to inure to the benefit of any and all persons who perform labor or furnish materials to the contractor, or any person acting for him or by his authority," as the statute requires. The bond was not such a one as the law prescribes, and was not available to any one except the owner, to whom it was given, and the result, so far as any laborer or material man is concerned, was the same as if no bond at all had been filed. Under section 1203, as it stood when first enacted (St. 1885, p. 147), the bond would have been available to laborers and material men as well as to the owner, but the section was repealed by Act March 15, 1887 (St. 1887, p. 152), and there was no provision of the Code on the subject until the new section was enacted in 1893 as we now have it (St. 1893, p. 202). Plaintiff could not sue the sureties on this bond, for they are liable only so far as they are bound by the terms of the bond, and the bond does not make them liable to any one but the owner, her representatives and assigns. It must follow that there was no such bond as is required by the Code.

3. It is claimed that, if it be conceded that the bond does not comply with the statute, the action cannot be maintained because of the uncertainty as to what is the measure of damages in such a case. When a bond is

filed, the section provides that "any person shall have an action to recover upon said bond, against the principal and sureties, or either of them, for the value of such labor or materials, or both, not exceeding the amount of the bond," etc. After providing as to filing a bond and its terms, etc., the statute reads as follows: "Any failure to comply with the provisions of this section shall render the owner and contractor jointly and severally liable in damages to any and all material-men, laborers and sub-contractors entitled to liens upon the property affected by said contract."

The statute is plain enough as to the limit of damages where a bond is filed, but is not so plain where it is not filed. It is manifest, however, that the legislature intended that some damages should be recoverable, and the only question is, how much? It would seem reasonable that the damages should not exceed what would be allowed on the bond if filed, namely, 25 per cent. of the contract price, and to this extent, at least, we think the section will sustain the action. The judgment was less than 25 per cent. of the contract price. But appellants claim that it appeared from the findings that there were unpaid claims other than those set forth in plaintiff's complaint, and that it was error to give judgment for plaintiff without proring with the other claimants. The statute gives the action "to any and all material-men, laborers and sub-contractors entitled to liens." Plaintiff was not bound to bring the action for the benefit of all unpaid claimants. The right of action is several, and the claimant who first sues and obtains judgment is entitled to recover up to the limit of the owner's liability. Possibly other unpaid claimants might intervene and ask to share in the recovery, where the unpaid claims exceed the amount for which the owner is liable. Possibly, too, where several different actions have been begun against the owner under section 1203, these actions might be consolidated in order to give to each claimant his proportionate share of the amount for which the owner is liable. But in the absence of any such situation, brought about by other unpaid lienholders, we see no reason why plaintiff should suffer any diminution of his judgment.

4. Finding 8 is to the effect that Parsons, the contractor, has not paid any part of the judgments mentioned in the complaint, nor any of the claims sued on, and that no part of either of said claims has been paid. Appellants challenge this finding as unsupported by the evidence. Plaintiff sues as assignee of seven different claims of as many different claimants, whose liens had been foreclosed and had gone to judgment, and also on a claim personal to himself, which had also gone to judgment. As to each of these claims plaintiff alleged that the contractor, Parsons, "has not, nor has any other person, paid any part of said judgment," ex-

cept a certain sum stated in the complaint in each instance. The answer denies nonpayment, and alleges payment in full of each and all said claims. The only evidence of nonpayment was the testimony of Parsons, the contractor, who testified that he had not paid any of the claims, and that he had no property out of which payment could have been made, and that he cannot now pay any of the claims. Appellants contend that the burden of proof was on plaintiff to prove nonpayment. Even if that were the law, as has been intimated in a few cases, a sufficient prima facie case of nonpayment was shown. But in *Melone v. Ruffino*, 62 Pac. 93, this court reviewed the authorities in this state on the subject, and showed that the rule here is the same as at common law, and that, "where a plaintiff has proved the existence of a debt,—at least, within the period of statutory limitation,—the burden of proving payment is on the defendant"; and that, although an averment of nonpayment is necessary to make the complaint perfect, yet "a negative allegation is to be proved only when it constitutes a part of the original substantive cause of action upon which the plaintiff relies,"—as in cases, for instance, of malicious prosecution, and where the cause of action is the alleged failure of the defendant to do work in a workmanlike manner.

5. Appellants contend that the several claims set out in the complaint were merged in the judgment against the contractor, Parsons, in the suit for the foreclosure of the liens, and that, the lienholders having elected to obtain and accept judgment against him for their claims, they are bound by their election. The pursuit of the remedy of foreclosure given by the statute, in which a money judgment may be taken against the contractor, and a judgment of foreclosure against the owner, will not operate as an extinguishment by merger of the remedy or right of action given under section 1203. It is expressly provided in the section that the action on the bond referred to "shall not affect his [the laborer's] lien nor any action to foreclose the same, except that there shall be but one satisfaction of his claim," etc. We think the converse would be true, that the action for a failure to comply with the section is not affected by bringing the action to foreclose.

6. The judgment includes five assigned claims which were embraced in the foreclosure suit, and it is now contended that they are not assignable, and should not have been included in the judgment. Section 1203, supra, creates an obligation to enforce which is the purpose of this action. It is such an obligation as is assignable under section 954, Civ. Code. "A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such." *Id.* § 1458.

7. Among the claims on which plaintiff sued as assignee was that of one Ware, a subcontractor, for \$182.65; and another of the Los

Angeles Lime Company, for \$30.50, for supplies furnished to said Ware as subcontractor. Plaintiff failed to prove an assignment of the lime company's claim. It appeared that the lime company furnished the material constituting its claim to Ware, and his claim when assigned to plaintiff, and as it figured in the judgment in this action, included the lime company's claim. It is true, as contended by plaintiff, that Ware's claim as subcontractor is distinct from the lime company's claim as a material man, and under some circumstances Ware's claim might be considered independent of the lime company's claim, and judgment be given for it, while defendants would still be liable to the lime company, and thus might possibly be made to pay the same claim twice should the limit of their liability not be otherwise reached. But here plaintiff shows that Ware's claim is made up in part of the lime company's claim, and the complaint alleges, although not sustained by the proof, that the lime company had assigned its claim to plaintiff. It was admitted at the trial that any payments made to the lime company should be credited upon the claim of Ware. It seems to us, in view of the pleadings and the admissions, defendants should not be subjected to the possibility of being called upon twice to pay the lime-company claim. Plaintiff concedes that if it is included in the Ware claim this may happen. In view of all the facts, it seems to us more consonant with justice, as well as in keeping also with the theory on which plaintiff brought action, to disallow this item, and reduce his judgment accordingly. The total judgment, including the lime-company claim, is for \$442.75. The judgment should be modified by reducing it \$30.50, and as thus reduced should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by reducing it \$30.50, and as thus reduced is affirmed.

(131 Cal. 68)

ENOS et al. v. SNYDER et al. (S. F. 1,613).¹
(Supreme Court of California. Dec. 21, 1906.)

DEAD BODIES—RIGHT TO BURY—WILLS.

1. One has no property in his dead body, so that he can dispose of it by will.

2. In the absence of statute, the custody of the corpse and the right of burial belong to the next of kin, and not to the executor or administrator.

3. Pen. Code, § 292, declaring on whom devolves the duty of burying the body of a deceased person, is to be considered in a civil case as determining who has the right to bury the body, and to have the possession thereof for that purpose.

Department 2. Appeal from superior court, Sonoma county; Albert G. Burnett, Judge.

Action by Susie T. Enos and another against Rachel Jane Snyder and another,

¹ Rehearing denied January 19, 1901.

Judgment for plaintiffs. Defendants appeal. Affirmed.

Lippitt & Lippitt (Myrick & Deering, of counsel), for appellants. Haven & Haven, for respondents.

McFARLAND, J. John S. Enos died in Sonoma county on March 30, 1898. The plaintiff Susie T. Enos is his surviving wife, and the plaintiff Gertrude Willis is his daughter. For several years next before his death the deceased had not lived with his wife, but during that time lived at the residence of the defendant Rachel Jane Snyder, where he died. He left a will which contained a direction that the manner, time, and place of his burial should be "according to the wishes and directions of Mrs. R. J. Snyder," the said defendant. After his death the plaintiffs herein made demand of defendant Snyder for possession of his body for the purpose of burying the same, and the demand was refused. Thereupon this action was commenced against Mrs. Snyder for a judgment declaring that plaintiffs are entitled to the possession of the dead body of the deceased for the purpose of burial, enjoining defendant from proceeding with the burial of said body, and directing her to give to plaintiffs the possession thereof. Defendant Snyder answered, setting up the clause in the will above referred to, and also verbal statements to the same effect made by the deceased before his death. Afterwards E. S. Lippitt, the executor named in the will, was, on his own application, made a party defendant, and he filed an answer averring substantially the things set up in the answer of defendant Snyder. Demurrers to both answers were sustained, and judgment was entered for plaintiffs substantially as prayed for in the complaint. From this judgment, defendants appeal.

It is admitted that the record presents the sole question involved in the case, namely, under the law of this state, did the respondents, as next of kin, have the right to the possession of the body of the deceased for the purpose of burying it, as against the appellants, who claim that right under the will? The general English and American authorities on the subject are not very satisfactory,—at least, as to a contest, like the one here involved, between the next of kin and persons claiming under a will. It is quite well established, however, by those authorities, that, in the absence of statutory provisions, there is no property in a dead body; that it is not part of the estate of the deceased person; and that a man cannot by will dispose of that which after his death will be his corpse. There are some expressions in some of the authorities cited by appellants to the effect that the right of burial is in the next of kin, "in the absence of any testamentary disposition," but they were not cases in which the right of testamentary dis-

position was involved. The case which is most directly in point here is *Williams v. Williams*, 20 Ch. Div. 659. It is a recent case (1882), and expresses the law of England on the subject. In that case the deceased had, by his will, directed that after his death "his body should be given to his friend Eliza Williams, to be dealt with by her in such manner as he had directed to be done in a private letter to her." The body, however, was buried in a certain cemetery "by the direction of his widow and one of his sons"; but afterwards Eliza Williams succeeded in removing it from the cemetery, and, having disposed of it in accordance with the direction of the will, she brought the action against the executors to recover the amount of the expenses which she had incurred in so doing. Kay, J., in his opinion, after referring to certain cases, says: "It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body, it is impossible that by will or any other instrument the body can be disposed of. I asked for any authority in conflict with these cases, but none was produced. I have referred to the books of the greatest authority on the question, and I believe there is no authority in the least degree in conflict with these cases. It follows that the direction in this codicil to the executors to deliver over the body to Miss Williams, who is not one of the executors, is a direction which, in point of law, could not be enforced, and was void." The current of American authorities, although there is some conflict, is to the same effect. *Griffith v. Railroad Co.*, 23 S. C. 25, 55 Am. Rep. 1, and cases there cited; in *re Wong Yung Quy*, 6 Sawy. 449, 2 Fed. 624; *Guthrie v. Weaver*, 1 Mo. App. 136. In *O'Donnell v. Slack*, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388, the point was not involved. But as some one must, of necessity, bury the dead, and must have the temporary possession of the dead body for that purpose, in the few cases where there has been any question on the subject equity has been invoked, and courts of equity have assumed jurisdiction and have given the necessary remedies; and it has been generally declared that the right of burial of a deceased wife or husband belongs to the surviving spouse, and in other cases to the next of kin, being present and having the ability to perform the service. *Durell v. Hayward*, 9 Gray, 249; *Fox v. Gordon*, 16 Phila. 185; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471; *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506; in *re Widening Beekman St.*, 4 Bradf. Sur. 503.

The appellant Lippitt in his answer bases his alleged right on the directions given by the deceased in his will and verbally, and not upon his authority as executor, independent of such directions, and the arguments of counsel for appellants rest mainly

on that basis; but there is in their briefs some shadow of contention that an executor or administrator has, by mere virtue of his office, the right to bury the body, and to the possession of it for that purpose. There are expressions to that effect in the English books and particularly in the older ones, and they may also be found in some American authorities, but the current of American authorities is the other way. Those expressions are found generally in cases where there was no contest between executors and next of kin, as in *Williams v. Williams*, supra, where the body had been buried by the executors by the direction of the next of kin. Of course, it is generally provided by statute, as in this state by section 1643, Code Civ. Proc., that executors or administrators must pay "funeral expenses"; but it has certainly been the custom in this country for the next of kin, and not the executor or administrator, to have the custody of the dead body before the funeral, and to bury it. Indeed, under our probate system, it cannot be determined who the executor or administrator is until after the appropriate time for the funeral has elapsed, and the burial of the dead body is not to be found in the statutory enumeration of the rights and duties of executors and administrators. In 8 Am. & Eng. Enc. Law, p. 837, it is said in the text as follows: "In England it has been held that an executor has the right to the custody and possession of the body of his decedent until it is properly buried, but this doctrine has no support in the United States." And the cases cited support the text. In *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249, the court, after an elaborate discussion of the subject and review of the authorities, say: "Our conclusion is that the custody of the corpse and the right of burial do not belong to the executor or administrator, but to the next of kin, and that the courts of this state possess the power to protect such next of kin in the exercise of such rights."

We have considered the subject as presented in the general authorities because appellants contend that there are no statutory provisions here which are determinative of the question involved, but we think that our statutory law does definitely settle the question against appellants' contention. Section 292 of the Penal Code provides that "the duty of burying the body of the deceased person devolves upon the person hereinafter mentioned." Then follow four subdivisions of the section. Subdivision 1 provides that in the case of the death of a married woman the duty of burial devolves on the husband, and subdivision 2 is as follows: "If the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age and within this state, and possessed of sufficient means to defray the necessary ex-

penses." And section 294 provides that "the person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purposes of burying it." It is also provided in another section that, if the person upon whom the duty of burial is imposed neglects to perform it in a reasonable time, he is guilty of a misdemeanor, and is also liable in a civil action to the person who does perform it in treble the expense incurred. These provisions are very clear and explicit, but appellants contend that they should not be considered in a civil action, because they are in the Penal Code. This position is not tenable. We have here a Code system which is, for convenience and partial classification, divided into four Codes, to each of which a name is given; but they are inseparably interwoven with each other, and no one of them is complete in itself, or absolutely confined to a particular subject. Therefore clear enactments of substantive law establishing rights, like section 294, are not to be held inoperative because found in any particular Code. If the provision in one Code were in conflict with a provision on the same subject in another Code, perhaps a consideration of the general purpose of each of the Codes might afford some aid in solving the difficulty; but there is no such difficulty here, for there is no provision in any of the other Codes touching the question here involved. The fact that a penalty for not burying a dead body is also imposed upon the one whose duty it is to bury it does not affect the right of custody which the law gives. If the duty and the right had been declared in some other Code, and the Penal Code had merely provided the penalty, there would be, we suppose, no objection to the appropriateness of the legislation; but there is no reason in law why any part of this legislation is invalid because found in the Penal Code instead of one of the others. It would hardly be contended that the provision about liability in a "civil action" is inoperative because found in the Penal Code. The subject is one peculiarly appropriate for legislative direction, and it may be assumed that the legislature has looked upon the provisions of the Code above cited as sufficiently expressive of the legislative intent. The judgment is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(131 Cal. 45)

TULARE SAV. BANK et al. v. TALBOT
et al. (Sac. 616.)¹

(Supreme Court of California. Dec. 20, 1900.)
CORPORATIONS—LIABILITY ON STOCK—OVER-
ISSUE—SUBSCRIPTION—RELEASE—CON-
TRACT—CONSTRUCTION.

1. Where persons take stock of a corporation from it, pay value therefor, and act in all respect as stockholders during the time debts of the corporation are contracted, it is immaterial, on the question of their liability to creditors for

¹ Rehearing denied January 19, 1901.

any balance due on the par value of the stock, whether they were original subscribers or not.

2. There is not an overissue of stock where there was to be 500 shares of stock, and no more than this was issued, though when the articles of incorporation were drawn, all the stock subscription lists not being at hand, L., the organizer, put himself down in the articles for 183 shares, to make up the full total of 500, he in so doing regarding himself as the agent of the subscribers whose names were not at hand, and the sum of the subscription lists and the amounts set down in the articles exceeded 500 shares, the shares being issued to such subscribers from the amount put down to L., with the acquiescence of him and all the other stockholders.

3. Release of a subscription for stock may be proved as well by the acquiescence of the stockholders, and the fact that the corporation did not regard it as binding, as by the records.

4. In case of ambiguity, an agreement of one taking stock from a corporation to pay \$1 per month, for 34 months, will be held merely to be an arrangement to avoid necessity for calls and assessment, rather than a sale for less than par; the directors not being shown to have authority to so sell.

Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by the Tulare Savings Bank and others against A. P. Talbot and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Wm. H. Jordan and E. T. Cosper, for appellants. C. L. Russell, W. B. Wallace, Richards & Carrier, R. M. F. Soto, Oliver Ellsworth, Hendrickson & Tam, G. W. Zartman, and E. M. Morgan, for respondents.

HENSHAW, J. This action was brought by plaintiffs and interveners, judgment creditors of the Packwood Vineyard & Fruit Company, an insolvent corporation, to compel payment by the stockholders of that corporation of the unpaid portion of their stock. The defendants Pope, Talbot, and Fagan appeal from the judgment given against them, and in support of their appeal Talbot and Pope urge that they were not original subscribers to the stock of the corporation, that they purchased their stock from the corporation under written contract and at the agreed price of \$53 per share, which they had fully paid, and that this purchase was made with the full knowledge of most of the plaintiffs and interveners, who after that knowledge gave credit to the corporation. They contend still further that plaintiffs and interveners, having elected to treat them as original subscribers, must be refused any relief in this action upon a showing that they were not such; and, finally, they insist that the stock which they purchased was an illegal and void overissue, wherefor they are not liable.

The position of the appellant Fagan differs from that of Pope and Talbot only in this: He admits that he was an original subscriber to shares of stock of the corporation to be formed, but asserts that the full 500 shares of the stock of the corporation was taken before the amount for which he

had subscribed was issued to him, and therefore his stock was an overissue and void.

R. Linder was the owner of a tract of land in Tulare county. He conceived the idea of forming a corporation, and selling to it his land, which was to be planted with trees and vines. In furtherance of his idea, he sought subscriptions to the capital stock of the prospective corporation. This capital stock was to be divided into 500 shares, of the par value of \$200 per share. Several subscription papers were circulated, and to them signatures obtained. The corporation was then organized, and in the articles of incorporation the names of Pope and Talbot were inserted for 40 shares each, and Linder was put down as the owner of 183 shares. Pope's and Talbot's names likewise appeared upon one of the subscription papers. Much discussion is devoted to the question whether or not the names of Pope and Talbot were thus placed upon the subscription list and in the articles of incorporation by their authority; but we think, in the light of what was actually done, the determination of this question becomes immaterial; for it is unquestionably true that Pope and Talbot and Fagan took the stock of the corporation, paid value for it, and acted in all respects as stockholders, before and during the time the debts of the corporation to plaintiffs and interveners came into existence. If, then, these appellants were bona fide stockholders and holders of bona fide stock, it would be immaterial whether they be considered as original subscribers or not. Under section 580 of the Code of Civil Procedure, plaintiffs were entitled to any relief consistent with the case made by the complaint, and embraced within the issues. The averments in the complaint are broad enough to justify a recovery against the defendants as holders of the stock, whether they be original subscribers thereto or not.

The contention that the stock of these appellants was an overissue, and therefore void, is based rather upon figures than upon facts; for in truth there was never issued by the corporation a single share more than the 500 authorized by its articles of incorporation. The argument of appellants here is that the aggregate subscription lists showed more than 500 shares; that Linder, in the articles of incorporation, was down for 183 shares; that the subscribers and incorporators acquired rights to this stock of which they could not be deprived without their consent, and without the unanimous consent of the stockholders; and that, casting up the totals of the subscription lists and the amounts set down in the articles of incorporation, the result is a sum far exceeding 500 shares. The facts appear to be that at the time the articles of incorporation were drawn all the subscription lists were not at hand, and that Linder, the organizer and promoter of the corporation, put his name down for 183 shares to make up the full

total of 500. In so doing he constituted and regarded himself as the self-appointed agent of other subscribers whose names were not at hand, and the fact is that no subscriber was refused the amount of stock which he demanded, but such stock was issued to him directly by the corporation, it being taken in some instances from the amount of Linder's 183 shares. In this there was complete acquiescence upon the part of Linder and the other stockholders. While it is true that a contract of subscription may be modified or annulled only by the unanimous consent of the stockholders, or by the board of directors duly authorized thereto (*Fruit Co. v. Coon*, 107 Cal. 452, 40 Pac. 542), such release may be proved not only by the records, but as well by the acquiescence of the stockholders of the corporation, and by the fact that the corporation itself did not regard it as binding. *Stuart v. Railroad Co.*, 32 Grat 146; *Cook, Stocks & S.* § 169. Nor is any formal assignment necessary to substitute one stockholder for another. *Weinman v. Railway Co.* (Pa. Sup.) 12 Atl. 288. There is not the slightest suggestion that Linder was acting or attempting to act in fraud of the rights of any one. Before the organization of the corporation, Pope and Talbot had agreed to take stock in it. The amount had not been definitely decided upon. The stock subsequently taken by Pope and Talbot concluded the agreement, and in this subscription for 183 shares Linder may be regarded as having acted as their agent, as well as the agent of others to whom the stock was afterwards issued. *Water Co. v. Beecher*, 101 Cal. 79, 35 Pac. 349; *Burr v. Wilcox*, 22 N. Y. 551; *Terwilliger v. Telegraph Co.*, 59 Ill. 249; *Bates v. Telegraph Co.*, 134 Ill. 536, 25 N. E. 521.

Coming to consider the further contention of appellants that Pope and Talbot were not original subscribers to the stock, but purchased directly from the corporation at an agreed price of \$56 per share, evidenced by a written contract with the corporation, and that Fagan, though an original subscriber, stands in the same position in this regard as do Pope and Talbot, by reason of the fact that his contract of original subscription was waived by the corporation, which entered into a contract identical in its terms with that of Pope and Talbot, the facts bearing upon this contention are the following: At the time of the issuance of the stock, Pope, Talbot, Fagan, and all the other stockholders as well, signed upon the stub of the certificate book of the corporation a receipt for their stock, acknowledging that it was taken subject to the provisions and conditions of the by-laws, and continuing: "I hereby agree and contract to pay to the corporation on the 15th day of February next the sum of one dollar per share of said stock, and thereafter a like sum on the 15th day of each and every month, for thirty-four months." It is insisted by appellants that this was their contract, and

their only contract, with the corporation; that they were to pay and did pay originally \$20 per share for their stock; and that the 34 monthly payments, of \$1 for each share, were the total amount of the purchase price. It would unduly prolong this discussion to detail at length the evidence supporting the conclusion of the trial court that this receipt and agreement was not a contract of purchase between the corporation and the stockholders. It was merely an agreement, not unusual in such corporations, by which the stockholder stipulated to pay to the corporation a certain monthly amount to defray the operating expenses, until such time as it was estimated it would be self-supporting. It was designed to relieve, and was a convenient method of relieving, the corporation from the necessity of making calls and assessments upon the stock. *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123; *Kohler v. Agassiz*, 99 Cal. 14, 33 Pac. 741; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203. Moreover, no authority on the part of the directors of the corporation to sell the stock for less than par is anywhere shown, and, if it should be conceded that the contract in question is ambiguous, in the absence of evidence of authority it would not be presumed that the construction contended for by the appellants was the true one. As the contract in question, therefore, is not to be construed as a contract of purchase between the corporation and the stockholder, it becomes unnecessary to consider whether the plaintiffs and interveners were charged with knowledge of its character. We can perceive no just ground for complaint that the findings are erroneous and conflicting. As has been said, even conceding that Pope and Talbot are not original subscribers, they were still owners and holders of the stock under circumstances entitling these plaintiffs and interveners to the relief prayed for. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(131 Cal. 169)

LA SOCIETA ITALIANA DI MUTUA BENEFICENZA v. CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 1,701.)¹

(Supreme Court of California. Dec. 28, 1900.)

PUBLIC CEMETERY—GRANT TO PRIVATE CORPORATION—POWER OF SUPERVISORS—BURIAL PERMITS.

1. San Francisco city ordinance, known as "Order 800," which was ratified by the legislature (St. 1867-68, p. 379), provided that a certain tract of land set aside as a cemetery should be deemed absolutely dedicated as such. *Udd*, that a grant of a portion of such cemetery to the plaintiff, which is an incorporated beneficial association, to be used for cemetery purposes, is not within the power of the supervisors, even though plaintiff cared for certain persons who would otherwise be a public charge.

2. The grant was not rendered valid by the fact that the plaintiff gave a bond to secure the erection of fences and other improvements on the portion of the cemetery granted to it.

¹ Rehearing denied January 22, 1901.

and did erect such improvements, as it was bound to know that the supervisors had no power to make such disposition of the land.

3. Pol. Code, § 3035, making it the duty of the health officers of a city to issue a burial permit on receipt of a certificate of the cause of death, does not render an ordinance invalid which prohibits an interment in a certain cemetery as being detrimental to public health, since such statute does not authorize a permit to inter a body in a place prohibited by lawful authority.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Suit by La Società Italiana di Mutua Beneficenza, a corporation, against the city and county of San Francisco and others. From a judgment in favor of the defendants, the plaintiff appeals. Affirmed.

James A. Devoto and Devoto & De Martini, for appellant. G. W. McEnerney and Jas. L. Gallagher, for respondents.

HAYNES, C. Defendants' demurrer to plaintiff's complaint was sustained, and judgment thereon entered against the plaintiff, who appeals from said judgment. The other defendants are the mayor, the board of supervisors, the board of health, and the individuals composing said boards, and the health officer of the city and county of San Francisco; and the principal question involved is the validity of an ordinance of said city passed by the board of supervisors in June, 1897, and approved by the mayor, and which, with the preamble, is as follows: "Whereas, the burial of the dead within the City Cemetery is dangerous to life and detrimental to public health, therefore the people of the city and county of San Francisco do ordain as follows: Burials within the City Cemetery Prohibited. Section 1. It shall be unlawful for any person, association or corporation from and after the first day of January, 1898, to bury or inter, or cause to be buried or interred, the dead body of any person in the City Cemetery of the city and county of San Francisco." The second section declared a violation of this order to be a misdemeanor, punishable by a fine of not less than \$100 nor more than \$500, or by imprisonment not exceeding six months, or by both fine and imprisonment. The time when this ordinance should take effect was afterwards extended to March 1, 1898.

Briefly stated, the complaint alleges the following facts: That plaintiff is an incorporated benevolent society having for one of its purposes the maintenance and care of the sick who are members of the corporation; that since its incorporation, in the year 1867, a large number of deaths have occurred among its members; that of the members so dying a number, averaging about 25 per year, were poor, and their bodies, by reason of their membership or for other reasons, are cared for and by the plaintiff at its expense; that in January, 1879, the said city and coun-

ty, being the owner of a tract of land designated on the official map of said city and county as the "Golden Gate Cemetery," adopted a resolution (No. 13,244, New Series), and thereby granted to the plaintiff blocks numbered 9 to 21, inclusive,—part of said Golden Gate Cemetery,—for burial purposes, "on condition that plaintiff should construct and maintain such walls or fences and make such improvements as might thereafter be designated or required by said board of supervisors on and around the lots so granted as aforesaid"; that plaintiff accepted the said grant and said conditions; that by a subsequent resolution (No. 13,479), adopted in 1879, plaintiff was required to enter into an agreement whereby it undertook, in the sum of \$500, with two good and sufficient sureties, to perform all the requirements of said first-named resolution, and particularly to construct and maintain said walls or fences and to make such improvements as might be required by said board, and also that plaintiff should pay its pro rata assessment for the improvement of the avenues of said Golden Gate Cemetery; that plaintiff has performed all of said conditions, and has used said land for said burial purposes, and has expended a large amount of money in making said improvements, aggregating not less than \$2,000; and that the Golden Gate Cemetery is now known as the "City Cemetery," and is so designated in said ordinance. The prayer is for the annulment of said ordinance, that plaintiff's title be quieted, for an injunction, and other relief.

Appellant contends (1) that said resolution of the board of supervisors was a grant of said lands to the plaintiff; (2) that, even though it be not a grant, the plaintiff is entitled to the relief demanded; and (3) that said ordinance is in conflict with general laws.

Neither of these contentions can be sustained. The tract of land containing 200 acres, and designated originally as the "Golden Gate Cemetery," and afterwards known as the "City Cemetery," included the lands here in controversy, and the whole tract of 200 acres is a portion of the land referred to in the act of congress of March 8, 1866 (14 Stat. 4). After the passage of this act, the supervisors passed an ordinance known as "Order 800," which was ratified by the legislature by an act approved March 27, 1868 (St. 1867-68, p. 379). By the first section of this ordinance, the board of supervisors were authorized and directed to devise and adopt a plan for the subdivision of the outside lands referred to in said act of congress into blocks and lots, "and to select and set apart for public uses such lots and portions of said land as said board may deem necessary." The second section of said ordinance provided that after the adoption of the plan the board of supervisors should cause a map of the lands to be made according to this plan, "and upon said map shall be designated the lots and por-

tions of land set apart for public uses, and the particular use for which each lot or portion of land shall have been set apart." Section 6 of said ordinance further provided that "the tract or portion of land set apart and designated thereon as a cemetery, and lots for a hospital, * * * shall be deemed absolutely dedicated as such." The alleged grant to the plaintiff was made by ordinance in 1879, and, though not set out in full in the complaint, it may be conceded that it was sufficient in form to vest in the plaintiff the rights and privileges contended for, but the board of supervisors had no power to make the grant.

That the city held said cemetery lands in trust for public uses as a cemetery cannot be questioned, and it is equally clear that the plaintiff is a private corporation, and that a grant to its use is not a grant to a public use, even though the corporation uses it only for burial purposes. The fact that some of its members are buried at the expense of the corporation, who, if they were not members of the corporation, would be buried at the expense of the city, does not affect the question. The grant and use, each, were for and to the corporation. The cases of *California Academy of Sciences v. City and County of San Francisco*, 107 Cal. 334, 40 Pac. 426, and *Home for the Care of the Inebriate v. Same*, 119 Cal. 534, 51 Pac. 95, are in point, and conclusive of this case, unless appellant's second or third point makes those cases inapplicable.

Appellant's second contention is based upon the fact that a contract was entered into and a bond executed to secure the erection of walls or fences and other improvements on the lands described in the complaint. It is sufficient to say in reply that the board of supervisors had no power to devote the land to any other than public uses, and the plaintiff was bound to know that they had no such power. The city and county cannot be bound by the unauthorized acts of its agents. In *Hoadley v. City and County of San Francisco*, 50 Cal. 275, it was said of the property there in controversy: "It was granted to the city for public use, and is held for that purpose only. It cannot be conveyed to private persons, and is effectually withdrawn from commerce; and, the city having no authority to convey the title, private persons are virtually precluded from acquiring it;" and private corporations are in the same category. The case above cited was approved in *Sawyer v. City and County of San Francisco*, 50 Cal. 375, and in *Hoadley v. Same*, 70 Cal. 320, 12 Pac. 125, which was affirmed by the supreme court of the United States, upon writ of error, in 124 U. S. 646, 8 Sup. Ct. 659, 31 L. Ed. 553. See, also, *City and County of San Francisco v. Itsell*, 80 Cal. 59, 22 Pac. 74.

Lastly, it is said that this ordinance is in conflict with general laws. It is alleged in the complaint that the board of health of said city, in December, 1897, passed an order pro-

viding that, in compliance with said ordinance, no burials should be permitted in said City Cemetery from and after the time specified by the board of supervisors. Appellant's contention is not very clear, but as we understand counsel that, under section 3035 of the Political Code, the health officer must obtain a certificate of the cause of death, and that upon receiving it it is his duty to issue a permit for the interment. Undoubtedly that is true; but it does not follow that the health officer may grant a permit for interment in a place prohibited by the lawful authority of the city. The judgment appealed from should be affirmed.

We concur: SMITH, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

131 Cal. 175

LAWRENCE v. JOHNSON et al. (L. A. 758.)
(Supreme Court of California. Dec. 28, 1900.)

MORTGAGES—FORECLOSURE—FINDINGS—
SUFFICIENCY—REVIEW.

1. A finding in foreclosure that a cross complainant was not the owner of the mortgage, and had no interest therein, is insufficient, where his cross complaint averred that the mortgage was assigned to him as security for a loan, since the first part of the finding does not negative the fact that the mortgage had been assigned as security, and the latter part is only a conclusion of law therefrom.

2. A finding in foreclosure that there was due a cross complainant a certain sum on a note described in his cross complaint is insufficient, where the facts on which it is based do not appear, as it is merely a conclusion of law.

3. A finding in foreclosure that the allegations of a cross complaint were true is insufficient to establish ownership of the note, where such cross complaint contained no allegation as to ownership.

4. A finding in foreclosure that a cross complainant was not the owner of the mortgage is not supported by the evidence, where there was evidence that the mortgage was assigned to him as security for a loan.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by George W. Lawrence against Isaac Johnson and others. Defendants the Imperial Savings & Loan Society and Henry S. Baldwin by cross complaint sought to foreclose a subsequent mortgage on the same premises executed by defendants Johnson. From a judgment in favor of plaintiff and in favor of defendant the Imperial Savings & Loan Society, Henry S. Baldwin appeals. Judgment as to plaintiff affirmed, and the judgment in favor of said defendant reversed.

E. C. Bower, for appellant. F. W. Burnett, for respondents.

SMITH, C. The suit was brought to foreclose a mortgage executed to the plaintiff by the defendants Johnson May 17, 1893, for \$300, etc. The defendant corporation and the

defendant Baldwin filed cross complaints to foreclose a subsequent mortgage on the same premises, executed by the defendants Johnson to the former, and claimed by the latter to have been assigned to him. The mortgagors made default. Judgment was rendered in favor of the plaintiff for the foreclosure of his mortgage, and in favor of the defendant corporation for the foreclosure of the subsequent mortgage. The defendant Baldwin appeals from the judgment. The appeal is from the whole judgment, but no point is made in the brief of appellant as to the validity of the judgment in favor of the plaintiff; which, indeed, is not open to question. The appeal, therefore, involves only the conflicting claims of the defendant corporation and Baldwin to the junior mortgage. On this issue the findings and judgment are in favor of the former, but it is claimed by appellant that the findings are insufficient, and that they are in fact unsupported by the evidence. Both points, I think, must be sustained.

The cross complaint of the appellant alleges that the note and mortgage executed by the Johnsons to the respondent corporation was assigned and delivered to him by the said respondent as a pledge and security for \$500 loaned by him to the corporation. There is no finding on this allegation. It is found "that the defendant * * * Baldwin is not, and never was, the owner of the said mortgage," etc., "and has no interest in or right to said mortgage, or proceeds thereof." But the first part of the finding does not negative the alleged fact that the mortgage had been assigned to him as pledge or security for a loan, and the latter part is but a conclusion of law, apparently based on the fact found. It is also found "that there is due to the Imperial Savings & Loan Society * * * from said defendants Isaac Johnson," etc., "upon the promissory note described in said cross complaint the sum of \$233.50." But this also is a mere conclusion of law, and the facts upon which it is based do not appear. Hayne, New Trials & App. p. 718 et seq., § 239 et seq. Nor does the finding that the allegations of the cross complaint of the defendant corporation are true touch the issue. There is no allegation in the cross complaint as to the ownership of the note. Nor does it seem that the actual findings are sustained by the evidence, which seems to support the claim of the defendant Baldwin that the mortgage was assigned to him as pledge or security for a loan. It appears, indeed, from appellant's brief, that questions were raised as to the power of the officers of the company to make the assignment; but, as it received and retained the consideration, the objection seems to be met by the authorities cited by appellant. *Main v. Casserly*, 67 Cal. 127, 7 Pac. 426. At least, in the absence of a brief or oral argument on behalf of respondent, we must regard the findings as unsupported by the evidence.

Kelly v. Bradbury, 104 Cal. 237, 37 Pac. 872, and cases cited. The judgment in favor of the Imperial Savings & Loan Society should be reversed, and the cause remanded for a new trial of the issues between it and the defendant Baldwin. The judgment in favor of the plaintiff for the foreclosure of his mortgage should be affirmed, both as to the defendants Johnson and the other defendants.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment in favor of the Imperial Savings & Loan Society is reversed, and the cause remanded for a new trial of the issues between it and the defendant Baldwin. The judgment in favor of the plaintiff for the foreclosure of his mortgage is affirmed, both as to the defendants Johnson and the other defendants.

131 Cal. 125

STEWART v. CALIFORNIA IMP. CO. et al.
(S. F. 1,544.)¹

(Supreme Court of California. Dec. 27, 1900.)
MASTER AND SERVANT—INJURY TO THIRD PERSON—RELATION OF PARTIES.

A street-roller outfit, consisting of a roller, engine, and engineer to operate the same, was hired by a city from the defendant, the owner, for a stipulated price per day. The city's agents, the superintendent of streets and his foreman, only directed how and where the streets should be rolled, and neither of them had the control or management of the engine, which was controlled and managed by the engineer, the servant of defendant, who had selected and employed him for that special purpose, paid him his wages, and had the sole right to discharge him. *Held*, that defendant, and not the city, was liable for injuries to a third person, caused by the engineer's negligence in the management of the engine, since he was an employé of the defendant, and not of the city.

In bank. Judgment in department (61 Pac. 280) reversed, and that of trial court affirmed.

VAN DYKE, J. Action for personal injury. The trial was by the court without a jury. Plaintiff had judgment, from which, and from an order denying their motion for a new trial, defendants appeal.

The court found that defendant Conger was, on the 4th day of March, 1896, employed by the defendant California Improvement Company as engineer to manage a steam roller owned by said company, and used by it in rolling and leveling streets. The said roller was then in the use of the city of Oakland; the same, with the engineer in charge, having been hired by the city of Oakland from the defendant California Improvement Company. At the time that the accident occurred the roller was being used under the direction of the superintendent of streets of the city of Oakland in rolling and leveling Twelfth street where it forms a dam at the lower end of Lake Merritt; and the court

finds that at that time said Twelfth street was the only safe public highway for the passage of vehicles between the eastern and central parts of Oakland, and that the plaintiff was then driving a well-trained, steady, and reliable horse on said street. "While the defendant Conger was in charge of said engine, and standing thereon, and in control thereof, steam escaped from the engine through the safety valve in front of plaintiff's horse. It had been necessary to generate all the steam which the engine could safely carry, and the defendant Conger had wrongfully and carelessly failed and neglected to give any warning of the said letting off of steam, or that there was any danger of its escape through the safety valve, although he (the said defendant) saw the danger to the plaintiff, and had the opportunity and power to give him warning thereof; and the escaping of the steam so frightened the plaintiff's horse that it became unmanageable, and wheeled short around, and tilted over plaintiff's cart, and the plaintiff, without any fault on his part, was thrown out, and dashed violently upon the ground." The main contention on the part of the defendant company was and is that the injury to the plaintiff was not caused by its negligence, but, if it resulted from any negligence, it was upon the part of the city of Oakland. But the court below found that said defendant California Improvement Company had selected the said engineer, and his services were to be paid by said company, and said company had the right to remove him; that the relation of master and servant existed between said defendant company and the defendant Conger, and not between the city of Oakland and defendant Conger. The testimony supports the finding and conclusion of the court below that the injury to the plaintiff was caused by the negligence of the defendants, and not of the city of Oakland. Mr. Miller (at the time superintendent of streets of the city of Oakland), called as a witness on behalf of the defendants, says: "This roller was in the employ of the city of Oakland the day of this accident. It was hired from the California Improvement Company. Mr. Sherman, my foreman, had charge of the work, together with myself." On cross-examination he was asked: "Did Mr. Sherman assume to have such control over the roller as to affect the engine—affect the movements of the engine?" After an objection to such question had been overruled, the witness answered: "I think not. * * * Nothing was said in the lease of the engine to the city about discharging the engineer. I secured the engine under the authority of the board of public works. We had to have a roller, and this was the most available one. I telephoned to the office of the California Improvement Company that we would like to have their roller upon the Twelfth street dam. They replied that they would have the roller there. We said nothing about any-

body to run it, or about the pay. The understanding was that the machine, with the fuel and engineer, should be supplied at so much per day." And being asked whether, as a matter of fact, the roller, while operating upon the street, was not entirely under the direction of himself or foreman, answered: "Yes, sir. We controlled to the extent of notifying what portion of the street we wanted rolled. I exercised the judgment as to when the road was rolled enough and when it was not. I did not stipulate as to any particular engineer." This is substantially the testimony in reference to the terms of the contract between the superintendent of streets and defendant California Improvement Company. The company was to furnish the roller and engineer and fuel for so much a day, and the superintendent of streets was to control the movements of the roller by directing as to what portion of the street should be rolled, and when sufficiently rolled. Neither the superintendent of streets nor his foreman presumed to direct the engineer in reference to the management of the engine in regard to the pressure of the steam, or how or when it should be applied or shut off, or in reference to the escaping of steam through the safety valve. No one not an engineer, or having some knowledge or experience in reference to the management of an engine, would assume to direct the engineer in reference to such matters. As he was the one to know, and not the superintendent of streets or his foreman, whether there was danger in the escaping of steam through the safety valve, the duty devolved upon him to give people warning in case there was such danger; and for injury resulting from negligence in this respect he, and the owner of the engine, who put him in charge of the same, would be responsible.

One who should hire a hack and driver from a carriage company, and in the use thereof should direct on what streets to drive, where to go, and when to stop, and in fact have the entire control of the movements of the carriage, would not thereby become liable for damages resulting from the negligence of the driver in the management of his team. The driver is hired by the carriage company presumably for his fitness in the line for which he is employed, the same as was the engineer in this case by the California Improvement Company. If damages accrue through his negligence or carelessness, such company is liable, and not the one who may have hired and used the carriage. In *Boswell v. Laird*, 8 Cal. 469, the question here presented was thoroughly discussed, and in the opinion there it is said: "The relation between parties to which responsibility attaches to one for the acts or negligence of the other must be that of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power ex-

ists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable. The responsibility attaches to the superior upon the principle "Qui facit per alium facit per se." To determine the responsibility, therefore, it is necessary to ascertain whether the relation existing between the party charged and the party actually committing the injury be in fact that of superior and subordinate, or master and servant." This case was referred to in *Du Pratt v. Lick*, 38 Cal. 691, as laying down the correct rule on this subject. The court there say: "That where there is no power of selection or direction there can be no superior; and that where a man is employed to do the work with his own means, and by his own servants, he has the power of selection and direction; and he, and not the person by whom the work is primarily done, is the superior." In referring to the doctrine as laid down in *Boswell v. Laird*, *supra*, the court say: "We are entirely satisfied with it, and find no occasion to renew the discussion." In *Blake v. Ferris*, 5 N. Y. 48, the court say: "The rule of respondeat superior, as its terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation wherever it exists, whether between principal and agent or master and servant, and to the subjects to which that relation extends, and is coextensive with it, and ceases when the relation itself ceases to exist." In *Coyle v. Pierrepont*, 37 Hun, 379, a stevedore, who was employed to unload a vessel at defendants' docks, hired from the defendants a portable engine, with an engineer to run it, for the purpose of hoisting the cargo from the vessel and lowering it upon the wharf. An employé of the stevedore was injured by the negligence of the engineer, and the court below charged the jury that the defendants, from whom the stevedore had hired the engine, with the engineer to operate it, were responsible for the negligence of such engineer. The appellate court held the instruction correct, and that the defendants were the masters of the engineer, and not the stevedore, in whose employ he was at the time in unloading the vessel. In *Huff v. Ford*, 126 Mass. 24, a wagon and horses and driver were hired by the city from the defendants, and the driver, while thus employed, struck one of the horses a violent blow, causing it to kick a loose shoe through a window. The decision reads: "The driver, employed and paid by the defendants, and who had entire management of the horses as to the manner of driving them, and whose duty it was to see that they were properly shod, was a servant of the defendants in so driving the horses; and for injuries to third persons by his negligence in these respects the defendants were responsible." The cases cited by appellant do not hold that in a case of this kind, where a person has not the control of the conduct

of the other in the particular matter in question, he is liable for the negligence of such other. The test in all these cases is, who conducts and supervises the particular work, the doing of which, or the careless and negligent doing of which, causes the injury or damage? Here the city simply hired the use of the street roller outfit from the defendant company—to wit, the roller, engine, and the engineer to manage the same—for so much a day. The city's agent—foreman of the street superintendent—only directed or supervised how and where the street should be rolled. He did not have the control or management of the engine. This was subject entirely to the judgment of the engineer, the servant of the owner, the defendant company, who had selected and employed him for that special purpose, paid him his wages, and had the sole right to discharge him. We think the conclusion of law deduced by the court below from the facts found that the defendants are liable, and not the city of Oakland, is correct. The judgment and order appealed from are affirmed.

We concur: GAROUTTE, J.; TEMPLE, J.; McFARLAND, J.

131 Cal. 109

McPIKE et al. v. HEATON. (S. F. 1,463.)
(Supreme Court of California. Dec. 27, 1900.)
COVENANTS—OPERATION—INCUMBRANCES—
TAX LIENS.

A covenant in a deed that the land conveyed is free from tax liens is a personal covenant of the same character as a covenant against any other incumbrances, and does not run with the land, or pass to the covenantee's assignee.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Lillian M. McPike and others against Warren D. Heaton. From a judgment for plaintiffs, defendant appeals. Reversed.

Warren Heaton and Davis & Hill, for appellant. Dunne & McPike, respondents.

HARRISON, J. The defendant was the owner of the undivided half of a certain tract of land in Alameda county on the first Monday of March, 1897, and for many years prior thereto, and on March 24, 1897, he made a grant, bargain, and sale deed of his interest in the land to one Jackson. On the next day Jackson conveyed the land to the plaintiffs by a grant, bargain, and sale deed, and the plaintiffs have since remained the owners thereof. The land was assessed to the defendant for the purposes of revenue for the fiscal year commencing July 1, 1897, and taxes were levied thereon for that year by the city of Oakland and the county of Alameda, and on November 29, 1897, the plaintiffs, for the purpose of removing the lien of these taxes from said land, paid the same to the proper officers, amounting to \$424.83. The present action is

brought to recover from the defendant the amount thus paid. Judgment was rendered in favor of the plaintiffs, and the defendant has appealed.

By section 3718 of the Political Code the taxes which were paid by the plaintiffs were a lien upon the land, and attached thereto as of the first Monday of March of that year, and the covenant implied from the defendant's grant of the land that the estate conveyed by him was at the time of such conveyance free from all incumbrances done, made, or suffered by him (Civ. Code, § 1113) embraces the lien of these taxes. Such covenant was, however, a personal covenant of the same character as would be a covenant against any other incumbrance, and the rule is of ancient authority that a covenant that the land conveyed is free from incumbrances, whether express or implied, does not run with the land, or pass to the assignee. *Lawrence v. Montgomery*, 37 Cal. 183. The plaintiffs had no contractual relation with the defendant, and his covenant with Jackson did not pass to them. They could have protected themselves against these taxes, either by assuming their payment as a part of the consideration for the purchase, or by suitable covenants with Jackson; but they have no right of action therefor against the defendant. *San Gabriel Val. Land & Water Co. v. Witmer Bros. Co.*, 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, cited by the respondents, involved a consideration of the relative obligations between a mortgagee and the owner of the land mortgaged by reason of the peculiar provisions of the constitution in reference to assessment and payment of taxes upon these respective interests in the land, and was determined upon the ground that by virtue of these provisions there is a personal obligation upon the mortgagee in favor of the mortgagor for the payment of the taxes assessed upon the mortgage, and that, if these taxes are paid by the owner of the land, he may reimburse himself therefor, either by deducting the amount from the mortgage debt, or in a separate action therefor. There is, however, no personal obligation upon the owner of land for the taxes levied against it, and the payment of these taxes can be enforced only by a sale of the land in the mode prescribed by the statute. The defendant was under no personal liability for the taxes paid by the plaintiffs, and the case cited is not applicable to the present case. The judgment is reversed, and, the appellant having died since the submission of the appeal, the judgment of reversal will be entered nunc pro tunc as of August 24, 1900.

I concur: VAN DYKE, J.

GAROUTTE, J. (concurring). At the oral argument of this case I was impressed with the soundness of respondents' position, but upon further consideration my conclusion has undergone a change. Respondents say: "Sup-

pose Heaton's deed to Jackson had been a mere quitclaim, instead of a bargain and sale, would Jackson's right of recovery, if he had continued to be the owner on the date of the delinquency of the tax, and had then paid it, been lessened in the least?" I am satisfied an affirmative answer to this question must be returned. In the absence of some covenant from Heaton, Jackson, under a quitclaim deed, would take the land just as it was, regardless of the nature of the title, or the number or character of liens resting upon it. If the lien upon the land had been a judgment or mortgage lien, and Heaton had given Jackson a quitclaim deed, Jackson would have had no claim against Heaton; and the fact that the lien here was one for taxes, rather than that of a mortgage, judgment, or attachment lien, cannot affect the principle involved. It seems to be conceded by respondents that they are in no better position than Jackson would be under a quitclaim deed from Heaton; and, as we have seen, Jackson, under those circumstances, would have no recourse against Heaton for liens resting upon the land at the time Heaton gave his quitclaim deed. I concur in the views expressed by Mr. Justice HARRISON, and also in the judgment of reversal.

(131 Cal. 121)

JENKIN v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA. (S. F. 1,641.)¹

(Supreme Court of California. Dec. 27, 1900.)

INSURANCE—ACCIDENT—CAUSE OF DEATH—AFFIRMATIVE PROOF—PRIMA FACIE CASE—DECLARATIONS OF INSURED—HEARSAY.

1. Where no one was present when an insured person received a mortal wound, his subsequent statements to a physician and others as to the manner in which he was wounded were properly stricken out on motion of defendant insurance company.

2. Declarations of an insured person tending to show that he contemplated suicide, not accompanying nor explanatory of any act, were not competent evidence in favor of defendant insurance company against the beneficiary and her assignee.

3. Where a witness testified that the death of the insured made quite a sensation, owing to the question whether it was murder or suicide, such evidence was hearsay, and incompetent.

4. An insurance policy provided that the insurance should not cover death resulting from intentional injuries inflicted by the insured or any other person; also that the claimant under the policy should affirmatively show that death resulted from actual accident according to the policy. The holder of such accident policy died of a gunshot wound received in some manner which was not shown by the evidence. *Held*, that such showing made a prima facie case for recovery under the policy, since the courts would not presume murder or suicide, but would presume that the death was accidental, nothing to the contrary being shown.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Action by John Jenkin against the Pacific Mutual Life Insurance Company of Cali-

¹ Rehearing denied January 24, 1901.

fornia. From an order denying a motion for a new trial, plaintiff appeals. Reversed.

Wilbur G. Zeigler, for appellant. Fox, Kellogg & Gray, for respondent.

GRAY, C. On the trial of this case before the court without a jury the judgment was for defendant, and the plaintiff brings this appeal from an order denying his motion for a new trial.

This action is brought by the assignee of the beneficiary of an accident policy issued by defendant to George Douglas Atcherly Crosbie in the lifetime of said Crosbie. By the terms of the policy the sum of \$10,000 was to be paid to Mrs. Annie Mercer George (grandmother), "after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which alone shall have caused his death within ninety days from the time of the happening of such accident." The agreement under which the policy issued provides that the insurance shall not cover death resulting from "intentional injuries inflicted by the insured or any other person"; also that "the claimant shall establish affirmatively under any claim or proceeding thereunder that the injury or death resulted from actual accident according to the policy." In the specification of particulars in which the evidence is insufficient to support the findings appellant attacks the following finding of the court: "The said George D. A. Crosbie did not, prior to his death, or at the time thereof, receive any accidental injury, and did not die of accidental injury." In his brief, also, appellant's principal contention is directed against this finding. The evidence without conflict shows that the insured died of a gunshot wound some two days after the same was inflicted; that a bullet entered his body from the front between the sixth and seventh ribs, or thereabouts, wounding the pleura and lung. The manner in which the wound was inflicted does not appear from the evidence, except as it may be inferred from the nature and location of said wound. No person is shown to have been present with the insured at the time he received the mortal injury; and his statements to the physician and others as to how he came to be wounded were—properly, we think—stricken out by the court on motion of defendant. Some testimony was elicited on behalf of the defendant to the effect that an indefinite number of days before he was shot insured had made several declarations tending to show that he contemplated suicide. As against the beneficiary and her assignee, these declarations, not accompanying nor explanatory of any act, were not competent evidence, and the court erred in refusing to strike them out on motion of plaintiff. *Yore v. Booth*, 110 Cal. 238, 42 Pac. 808; 2 Bac. Ben. Soc. § 460; *Insurance Co.*

v. Applegate, 7 Ohio St. 292; *Insurance Co. v. Haney*, 10 Kan. 525; *Dial v. Association*, 29 S. C. 560, 8 S. E. 27; *Schwarzbach v. Union*, 25 W. Va. 622; *Griffith v. Insurance Co.*, 101 Cal. 627, 36 Pac. 113. It is also clear that the testimony of Col. Green that Crosbie's death made quite a sensation, "owing to the question which was brought up as to whether it was suicide or murder," should have been stricken out, as requested by plaintiff. This hearsay and incompetent evidence as to the declarations of the insured, and the gossip concerning the cause of his death, should, therefore, be ignored; and all the evidence left us, then, from which to determine whether the wound on the insured was inflicted accidentally or purposely, is the nature and character of the wound itself. The burden is undoubtedly on the plaintiff by the very terms of the contract to show that the wound was inflicted accidentally, but it is not necessary, for him to make out his case, that he should produce the direct testimony of eyewitnesses. If the circumstances placed in evidence, and the inferences to be drawn therefrom, and the presumptions arising thereon, point clearly to an accidental injury, the plaintiff has made out a prima facie case, and is entitled to a finding in his favor. There is nothing, perhaps, in the character or location of the wound to indicate from a mere inspection of it that it was inflicted accidentally, rather than willfully; but when we consider that it is contrary to the general conduct of sane men to take their own lives, and that all the presumptions are in favor of sanity and against crime, we are impelled to the conclusion that the insured must have received his injury as the result of an accident. In the absence of evidence to that effect, it will not be presumed that the insured purposely took his own life, nor that he was murdered; and, if he did not take his own life willfully, and his life was not taken by another under circumstances making it a crime, then, we think, his death must be attributed to accidental causes. *Richards v. Insurance Co.*, 89 Cal. 170, 26 Pac. 762. That the courts will presume that the death was the result of an accident, when nothing more is shown than that it was brought about by a violent injury, and the character of such injury is consistent with the theory of accident, seems to be a rule upheld by the great weight of authority. *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; *Mallory v. Insurance Co.*, 47 N. Y. 52; *Cronkhite v. Same*, 75 Wis. 116, 43 N. W. 731; *Insurance Co. v. Sheppard*, 85 Ga. 751, 802, 12 S. E. 18; *Same v. Thornton*, 40 C. C. A. 564, 100 Fed. 582, 49 L. R. A. 116; *Stephenson v. Association (Iowa)* 79 N. W. 459; *Insurance Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723; *Jones v. Association*, 92 Iowa, 652, 61 N. W. 485; *Conadeau v. Accident Co.*, 95 Ky. 280, 25 S. W. 6; *Konrad v. Surety Co. (La.)* 21 South. 721; *Guldenkirch v. Association*

(City Ct. Brook.) 5 N. Y. Supp. 428. The finding complained of is contrary to the evidence under the rule, and should have been the other way. We therefore advise that the order be reversed.

We concur: COOPER, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

(131 Cal. 132)

McCLAIN v. HUTTON et al. (Sac. 712.)

CONTINENTAL BLDG. ASS'N v. HOLT et al.¹

(Supreme Court of California. Dec. 27, 1900.)

MECHANICS' LIENS—STATEMENT—SPECIFICATION OF MATERIAL—VARIANCE—TERMS OF CONTRACT—SPECIFICATION OF ITEMS—LIEN FOR CONSTRUCTING SIDEWALK—TIME OF FURNISHING MATERIAL—HAULING BRICK—RIGHT TO LIEN—STATEMENT OF NAME OF OWNER—DESCRIPTION OF LAND.

1. Under Code Civ. Proc. § 1184, providing "that, where a contract for labor for which a mechanic's lien is claimed is not filed, the labor should be deemed to have been performed at the personal instance of the owner," a lien was not objectionable because it named the owner as the person by whom the claimant was employed instead of the contractor.

2. Where a claim for a mechanic's lien stated that the materials furnished were used on the building, it was not objectionable because it did not specifically set out the kind of material furnished and the price of the several items.

3. A claim for a mechanic's lien stated that the material was to be paid for within 60 days from the time of the purchase of each item, and if not paid for within such time to draw interest at 10 per cent., and the agreed statement of account read in evidence was the same, except that it omitted the reference to the rate of interest, and the court found that the claim attached to the complaint contained a true statement of the demand. *Held*, that the objection that there was a variance between the claim and the evidence and findings cannot be sustained.

4. Where a claim for a mechanic's lien stated that there was no agreement as to price when the claimant began work, but that it was subsequently fixed at four dollars per day, and the written certificate of the foreman read in evidence was to the same effect, the contention that the claim did not truthfully state the contract was without merit.

5. A claim for a mechanic's lien on a building was not objectionable because it included items for material used in building an adjacent sidewalk, since the walk must be considered a part of the building.

6. Claims for mechanics' liens were not objectionable in not stating the time specified in the contract for the payment of material, since in such a case it will be presumed in law that no time was given.

7. Where claims for mechanics' liens stated the making of the contract, the material furnished, the agreed price, the number of days' labor performed, the rate per diem, or that the usual rates were to be paid, such claims contained a sufficient statement of the terms of the contract.

8. A person who was employed by the agent of the owner to haul bricks for the construction of a building was entitled to a mechanic's lien on the building for his services.

9. The fact that a claim for a mechanic's lien

stated that C. H. and F. H. were the names of the owners of the building, while F. H. had no interest in it, did not affect the validity of the lien.

10. Where a claim for a mechanic's lien gave a correct description of the land on which the building was situated, and the land was triangular in form, the fact that the correct description was followed by the further clause, "together with a certain triangular piece deeded to C. H.," etc., did not invalidate the lien, since such clause may have been another description of the same lot, and, if not, should be rejected as repugnant to the rest of the document.

In bank. On rehearing. Modified.

For opinion in department, see 61 Pac. 273.

Coglan & Harvey, W. H. Jordan, Raleigh Barcar, and Hudson Grant, for appellants. Percy S. King and J. M. Gregory, for respondents.

PER CURIAM. A rehearing of this cause in bank was ordered on the ground, among others, that the work done and materials furnished by the defendants Holt and Chandler were commenced prior to the date of the mortgage of the Continental Building & Loan Association, and not afterwards, as stated in the decision heretofore filed. Hence, assuming the claim of these defendants to be valid, a new trial of the case as to them will be unnecessary. This renders necessary an examination of the validity of these claims, and at the same time we will consider the other claims, omitting that of Waggoner Bros., with reference to which the former opinion will stand.

1. The material objections to the claim of Chandler are, in effect—First, that Mrs. Hutton is named in the claim as the person by whom he was employed, instead of the contractor, Waggoner, with whom the contract was in fact made; second, that an undetermined part of the materials furnished by the claimant were not used on the Hutton Block, but on another building of the owner; third, that "the kind of materials furnished"—whether "iron, stone," etc.—is not stated; fourth, that the claim fails to "state the price at which either lumber or lime was sold," or that the articles were sold at an agreed price; and, finally, fifth, that there was a variance between the claim and the evidence, and between the claim and the finding. None of these objections is well taken. Mrs. Hutton was properly named as the person by whom the claimant was employed. It is expressly provided by the statute that, where the contract is not filed, the labor and materials "shall be deemed to have been done and furnished at the personal instance of the owner" (Code Civ. Proc. § 1184); and there is no objection to the use of this form of statement (Kellogg v. Howes, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588). With regard to the materials furnished, the claim unequivocally states that all of them were used on the building, and, from the stipulation read in evidence, this appears to have been the fact. It was unnecessary to state specifically the kind of materials furnished, or the prices

¹For opinion on motion to modify judgment, see 63 Pac. 622.

of the several items. *Brennan v. Swasey*, 16 Cal. 141; *Seldon v. Meeks*, 17 Cal. 129; *Davis v. Livingston*, 29 Cal. 287; *Jewell v. McKay*, 82 Cal. 150, 23 Pac. 139. The claim is, in effect, a sufficient statement of a special contract to pay for the materials furnished, and would be sufficient as a complaint in *indebitatus assumpsit*, or *debt*. 1 Chit. Pl. 350, notes (f), (g); *Id.* 351, 352. Finally, there is no variance between the claim and the evidence or the finding. In the claim the statement is that the materials were to be paid for "in cash within sixty days from time of purchase of the item, and any item not paid for within that time was to bear interest at the rate of ten per cent. per annum until paid." The agreed account read in evidence agrees accurately with this, and the finding is precisely to the same effect, except that it omits reference to the rate of interest. This, however, is, in effect, found in the finding that the claim—which is attached to the complaint, and the filing of which is not denied—"contained * * * a true statement of [the] demand," etc. The first of the above objections is made also to the claims of Holt, Moore, the Vacaville M. & L. Company, and Dresser, and what is said with reference to it will be understood as applying to those claims. The remaining objections to the claim of Holt are, in effect, that it does not truthfully state the terms of the contract, and that part of the labor was performed, not on the building, but on the adjacent sidewalk. With regard to the former point, the statement of the claim is that at the time of the work there was no agreement as to price, but it was agreed he was to be paid what his labor was reasonably worth, but afterwards the sum of four dollars per day was agreed upon by Holt and Waggoner as a reasonable sum; and the statement is sustained by the written certificate of Waggoner, as foreman, read in evidence. With regard to the other objection, the cement sidewalk must, under the circumstances of the case, be regarded as part of the building. The claims of Holt and Chandler must therefore be regarded as sufficient.

2. The principal objection urged to the other claims is, in effect, that they fail to state, or to state truthfully, "the terms, time given, and conditions of [the] contract." To simplify the question, it may be observed generally that in some of the claims the time of payment is stated; in others, not. In the latter class of cases the presumption of the law is that no time was given. *Hills v. Ohlig*, 63 Cal. 104; *Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139. Also it may be stated that in some of the claims it is said that the contract of employment was made with Mrs. Hutton; in others, that it was made with Waggoner, as contractor and agent. But this, as we have held, is to be regarded as immaterial. The question to be considered relates, therefore, to the sufficiency of the

statement of the terms of the contract in other respects.

In this regard all that can be required is the statement of the fact that a contract was entered into and such a statement of its terms as to show the indebtedness claimed. These conditions are sufficiently complied with in all the claims. In each of them the making of the contract, and the labor performed or materials furnished, are stated. In one of them (that of Trower) the labor was to be performed "at the usual rates," which is but another way of saying, "for what it was reasonably worth" (*Reed v. Norton*, 90 Cal. 596, 597, 26 Pac. 767, 27 Pac. 426), and its value was accordingly stated. In all the other claims the agreed price is stated either in the aggregate, or, in the case of labor, the per diem rate, and the number of days. In this respect, therefore, the claims are sufficient. There are, however, some other objections to be considered.

The claim of Trower was for "the hauling of materials used in the construction of [the] building"; and it is objected, on the supposed authority of *Adams v. Burbanks*, 103 Cal. 646, 37 Pac. 640, that he was not entitled to a lien for labor of this kind. The case cited, however, has no application. There the claimant "was employed by the brick men to haul brick for them, and he had no connection with the contractor, who owed him no liability. His position [was] not different from that of the laborers who made the brick." But the claimant here was directly employed by Waggoner, as the agent of Mrs. Hutton, and his labor was performed on the building in the same sense as that of the men who lifted the brick from the ground to the upper parts of the building. *Malone v. Mining Co.*, 76 Cal. 578, 18 Pac. 772.

The claim of Harrison and that of Hubert each contains the statement "that Charlotte A. Hutton and Fred Hutton are the names of the owners and reputed owners of said premises," and it is objected that the latter has no interest, and that the claims are therefore invalid. The statute requires the statement of "the name of the owner, or reputed owner, if known." "If the names are not known, the claim is sufficient if it is silent on the subject." *Lumber Co. v. Newkirk*, 80 Cal. 277, 22 Pac. 231. The claimant "may not know the owner, and if he is ignorant of his name he is not required to state it." *Corbett v. Chambers*, 109 Cal. 183, 41 Pac. 873. Still less can the validity of the claim be affected by a mistake in attempting to carry out the requirements of the law.

Finally, it is objected to Frick's claim that it does not describe the property "with sufficient certainty for identification." The claim is "for labor and services in the erection and construction of that certain building * * * now upon that certain lot situate," etc., "and described as follows," etc. Then follows a description of the land on which the building was in fact erected, and then the further

clause, "together with that certain triangular piece deeded to Charlotte Hutton by the trustees of the town of Vacaville, situate on the easterly side of Dobbins street." Possibly the latter clause may be but another description of the land on which the building was erected, which is also "a triangular piece * * * situate on the easterly side of Dobbins street"; otherwise, the clause must be rejected as repugnant to the rest of the document, which unequivocally refers to one building built on one lot, and in fact to the building in question. The objections to the claims of these defendants, so far as they refer to defects, or supposed defects, appearing on their face, must, therefore, be regarded as untenable.

With regard to the costs of appeal, they should be apportioned as follows: The costs should be allotted, one-half to the appeals of Mrs. Hutton, and one-half to those of the building and loan association, but a single memorandum of costs to be filed by appellants. The former half of the costs should be paid by the respondents and the appellant Chandler in amounts proportionate to their respective claims, the latter by the respondents—excluding the appellant Chandler—in the same proportion; and it is so ordered. But as the transcript on appeal is unnecessarily voluminous by at least a third, only two-thirds of the expense of printing will be allowed in the costs. Otherwise than as above indicated, we are satisfied with the former decision, which accordingly will be modified by adding thereto the words, "except as to the issues raised by the cross complaints of the defendants I. H. Holt and F. P. Chandler, as to whom the findings will be allowed to stand," and as thus modified will stand as the decision of this court.

139 Cal. 350

In re LEVIN et al. (S. F. 1,304.)

(Supreme Court of California. Dec. 31, 1900.)
INSOLVENCY — MARSHALING ASSETS — MORTGAGE FOR PART OF CLAIM — DEDUCTION — RIGHT OF CREDITORS.

St. 1895, p. 146, provides that, when a creditor has a mortgage securing payment of a part of his debt, he shall be admitted as a creditor in insolvency proceedings against the debtor only for the balance of his debt after deducting the value of the mortgaged property. L. and others, doing business as L. Bros., were adjudged insolvent, and property occupied by L. was set off to him as a homestead. Prior to the insolvency proceedings, appellant procured a mortgage on the homestead, signed by L. and wife, securing a part of the firm's indebtedness to appellant. The members of the firm had no individual creditors. *Held*, that appellant was entitled to be admitted as a creditor in the insolvency proceedings only for the balance of his claim after deducting the mortgage.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Voluntary proceedings in insolvency by Isidor Levin and others, co-partners as Levin Bros. From an order settling the final account of the assignee in insolvency, the Anglo-Californian Bank appeals. Affirmed.

Jesse W. Lillenthal, for appellant. Joseph Kirk and Walter D. Mansfield, for respondents.

VAN DYKE, J. Voluntary proceedings in insolvency were commenced herein on January 7, 1897, and said firm and the individual members thereof adjudged to be insolvent. Prior thereto, to wit, April 20, 1893, the Anglo-Californian Bank, Limited, procured from Isidor Levin and his wife, to secure to it the payment of all sums due or to become due from said Levin Bros., a mortgage on a piece of property owned by said Isidor Levin, individually, and occupied by him and his wife as a domicile, but no declaration of homestead had been filed prior to the commencement of the proceedings in insolvency. Under section 64 of the insolvent law of 1895, the court in such insolvency proceeding, on March 24, 1897, set apart to said Isidor Levin the property so mortgaged as a homestead. The said mortgage which was so held by said bank is of the value of \$6,000, and in the settlement of the final account of the assignee in said insolvency proceedings the court below held that the amount of said mortgage security should be deducted from the claim of said bank. From this portion of the order settling the said final account the bank appeals. The mortgage held by the appellant was not displaced by the homestead, but is superior and paramount thereto. Further, it appears there are no separate creditors of any of the members of said partnership firm. The claims of 182 creditors are approved, ranging in amount from a few dollars to over \$27,000; the largest being the claim of said appellant, after deducting \$6,000 covered by its security. The net amount

to be distributed among these numerous creditors was only \$21,714.82. Section 48 of the insolvency act provides: "When a creditor has a mortgage or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property," etc. St. 1895, p. 146. It is also provided by section 39 of the same act that the assignee shall keep separate accounts of the joint stock or property of the co-partnership, and the separate estate of each member thereof, and the net proceeds of the joint stock shall be appropriated to pay the creditors of the co-partnership, and the net proceeds of the separate property of each partner shall be appropriated to his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors.

It is contended on the part of the appellant that the security held by it is no part of the assets of the partnership, "the debtor," and that such security was upon property excluded from the jurisdiction of the insolvency court. But in section 66 of the insolvency law it is expressly provided that "words used in this act in the singular include the plural, and in the plural the singular, and the word 'debtor' includes partnerships and corporations." The individual members, as well as the partnership, are before the court in the insolvency proceeding, and subject to its jurisdiction. "Each partner owes all the debts of the partnership, and his goods may be taken to pay them." In re Straut, 125 Cal. 417, 58 Pac. 62. The general purpose and policy of the law is to produce equality, as far as possible, among the creditors of the insolvent debtors; and in the marshaling of assets to bring about this result our Civil Code lays down the following rule: "Where a creditor is entitled to resort to each of several funds for the satisfaction of his claim, and another person has an interest in, or is entitled as a creditor to resort to some but not all of them, the latter may require the former to seek satisfaction from those funds to which the latter has no such claim, so far as it can be done without impairing the right of the former to complete satisfaction, and without doing injustice to third persons." Civ. Code, § 3433. See, also, section 2899, Id. This declaration of our Code represents an old established principle of jurisprudence in reference to marshaling of assets. In Kent v. Williams, 114 Cal. 541, 46 Pac. 462, it is said: "The doctrine of the marshaling of assets, under which, if one creditor has a lien on only one of them, the former must first proceed against that upon which the latter has no lien, is not only fully established by general authority, but is also expressly declared in sections 2899, 3433, Civ. Code." We are

of opinion that the court below correctly held that the amount of security in question should first be deducted from appellant's claim, and that it should be allowed to participate in the distribution only upon the balance of such claim. Whatever may have been held to the contrary in other jurisdictions in reference to such proceedings, the statute provisions and our own decisions thereunder must control here. Order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

131 Cal. 211

CONTRERAS v. MERCK et al. (S. F. 1,600.)
(Supreme Court of California. Dec. 29, 1900.)

EJECTIONMENT—MINING CLAIM—COMPLAINT—DEMURRER FOR UNCERTAINTY—HARMLESS ERROR—GENERAL ISSUE—FACTS PROVABLE—JUDGMENT—FINDINGS—SUFFICIENCY.

1. Plaintiff sued for possession of a mining claim, alleging that defendants unlawfully took possession of and ousted plaintiff therefrom, that defendants were engaged in extracting ore, and that the value of the ore wrongfully taken was \$1,000. Defendants demurred to the complaint for uncertainty, objecting that the ouster was alleged to be from only a portion of the mine, and did not describe the portion, that the damages were alleged on information and belief, and that there was no allegation that any cuts had been made by defendants. The demurrer was overruled, and the defendants answered, alleging ownership and right of possession in the whole claim. *Held*, that the overruling the demurrer was not reversible error, since the defendants could not have been misled by the uncertainty in the complaint.

2. In ejectment for a mining claim the complaint contained the usual allegations of plaintiff's ownership and ouster by defendants, but did not allege any forfeiture or abandonment of the claim by defendants; while the answer alleged defendants' ownership of the entire claim. *Held*, that findings that on a given date defendants claimed to own the tract under the United States location laws, but that such location had lapsed, and become void, and the land was at that time vacant public mineral land, and that on that date plaintiff located such claim, thereby becoming the owner, and was such owner at the time of ouster, were within the issues raised by the pleadings.

3. Defendants' contention that such findings were equivalent to a finding of abandonment or forfeiture by defendants, which must be specially pleaded, could not be sustained, since the term "lapsed" in the finding had no well-defined significance in mining law, and might be rejected as surplusage, and the judgment allowed to rest on the finding that the land was vacant public mineral land.

Commissioners' decision. Department 2. Appeal from superior court, Mariposa county; John M. Corcoran, Judge.

Action by T. G. Contreras against Emelie Merck and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Frank H. Farrar, for appellants. Congdon & Congdon and G. G. Goucher, for respondent.

CHIPMAN, C. Action to recover possession of a mining claim, for damages, and for

an injunction. Plaintiff had judgment for possession, for one dollar damages, and perpetually enjoining defendants from trespassing upon the premises in controversy. The appeal is from the judgment on the judgment roll.

1. Appellants contend that their demurrer for uncertainty, ambiguity, and unintelligibility should have been sustained. The complaint alleged ownership and right of possession of plaintiff in and to a certain mining claim known as the "St. Gabriel Mine," and alleged that defendants unlawfully "entered upon and took possession of a portion of said mining claim and premises, and ousted plaintiff from said portion, * * * and are now engaged in wrongfully digging, mining, and extracting gold-bearing quartz, gold specimens, and gold from said mining claims, and converting the same to their own use." The complaint further alleges that plaintiff, being uninformed as to the exact value of said gold-bearing quartz * * * so wrongfully and unlawfully dug, mined, * * * converted by defendants, alleges, on said lack of information and on his belief, that the value thereof is one thousand dollars." Appellants claim uncertainty, for (1) that the complaint alleges unlawful possession by defendants of only a portion of the mine, and does not describe such portion; (2) the allegations of damage are on information and belief; and (3) there is no direct allegation that "any holes or cuts have been made and done" by defendants. The answer claimed ownership and right of possession of the entire premises to be in defendant Merck, and the answer admitted having taken possession, and by the form of denial as to the alleged extracting of ores therefrom admitted having done so, and by the same form of denial admitted an intention to continue extracting ores. In short, the answer put in issue the question of ownership or right of possession of the entire premises, and the resulting right of defendants to occupy the premises, and do with them as they liked. The cause was tried on the issues presented by the complaint and answer, and we cannot see that appellants could have been misled or injured by the form of the complaint. In speaking of the rule where the demurrer is for uncertainty, the court, in *Alexander v. Mill Co.*, 104 Cal. 532, 38 Pac. 410, said: "It must not be mere abstract error, but it must be prejudicial and injurious error, in order to avail appellant; for otherwise he has no cause of complaint." See, also, *Jager v. Bridge Co.*, 104 Cal. 542, 38 Pac. 413.

2. It is contended that the findings are not within the issues. The claim seems to be that the court finds forfeiture as a fact on the part of defendant Merck, whereas there is neither allegation of abandonment nor allegation of forfeiture on her part in the complaint. The finding is "that on the 19th day

of February, 1898, the defendant Emelie D. Merck claimed to hold the tract of land described * * * under the location laws of the United States relative to quartz claims, * * * but the said location had lapsed and become void, and said tract of land was at that time vacant public mineral land." The court then finds that plaintiff was, on February 19, 1898, a qualified mineral locator, and located the premises in question on that day, and thereby became the owner and entitled to possession thereof, and was such owner when subsequently defendants entered upon said premises and ousted plaintiff therefrom. The principal fact at issue was the ownership of the mine. It was not necessary for plaintiff to allege forfeiture or abandonment by defendant Merck. The complaint contained sufficient allegations in an action in ejectment, which defendants concede this to be. As was said in *Harris v. Kellogg*, 117 Cal. 488, 49 Pac. 708: "A mining claim is real estate, and the rules of pleading relative to real estate are applicable to it. In the ordinary action of ejectment it is sufficient for the plaintiff to allege that he was the owner of the land in question. Such an averment carries with it all the facts essential to establish his ownership, and the means by which he became the owner would be only evidence of his ownership, and should not be alleged." The same rule would apply to the defendants in setting up ownership in their answer. In the present case defendants averred ownership in defendant Merck, and the answer is deemed to be denied. It was competent for plaintiff to show that the location under which defendant Merck claimed ownership "had lapsed and become void," and that when plaintiff initiated his claim the land was "vacant public mineral land of the United States." What the evidence was from which the court made its finding we do not know, and we must, on this appeal, presume that it was sufficient. Appellants contend that the finding that the defendants' claim had "lapsed" was equivalent to a finding that it was "forfeited," and this, it is contended, could not be proved under the general issue, but must be specially pleaded. Precisely what the court meant by the term "lapsed" may not be easily conjectured, as it is a term unknown to mining usage or laws; but we have no right to assume that it meant a technical forfeiture. The judgment may rest on the finding that "the land was vacant public mineral land," and the finding that the claim had "lapsed" may be rejected altogether. We advise that the judgment be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

131 Cal. 199

SAN DIEGO COUNTY v. DAUER et al.
(L. A. 789.)

(Supreme Court of California. Dec. 29, 1900.)
COUNTY TREASURER—LIABILITY ON OFFICIAL
BOND—LIMITATIONS.

Code Civ. Proc. § 337, limits the right of action on any contract obligation to four years; and County Government Act, § 87 (St. 1891, p. 318), requires the county treasurer to keep the county funds in his own possession until disbursed according to law. *Held*, that an action in 1896 on a county treasurer's official bond for money lost by him by deposit in a bank in 1891, which was then known to the county, was barred by limitations, though his term of office did not expire until 1893, since the cause of action arose when he lost control of the money, and not at the expiration of his term of office.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrence, Judge.

Action by the county of San Diego against C. R. Dauer and others to recover on his official bond as treasurer. From a judgment in favor of defendants, and from an order denying its motion for a new trial, plaintiff appeals. Affirmed.

Atty. Gen. Ford and T. L. Lewis, for appellant. Sam Ferry Smith, Haines & Ward, McDonald & McDonald, H. E. Doolittle, and Oscar A. Trippet, for respondents.

GRAY, C. Plaintiff appeals from a judgment, and from an order denying its motion for a new trial. The defendant Dauer was the treasurer of San Diego county from the first Monday in January, 1891, to the 2d day of January, 1893. This action is on his official bond, and was commenced against him and the sureties on said bond on the 31st day of December, 1896, to recover the sum of \$24,108.87, which it is alleged in the complaint he received during his term of office, and did not deliver to his successor or leave in the treasury, but converted the same to his own use. Among many other defenses, the defendant pleaded the statute of limitations (section 337, Code Civ. Proc.), limiting the right of action upon any contract obligation or liability founded upon an instrument in writing executed in this state to four years, and also subdivision 1 of section 338, Id., limiting an action upon a liability created by statute to three years. The case was tried on an agreed statement of facts, from which we gather the following: On account of state school money due the said county the defendant Dauer on the 13th day of August, 1891, received from the state three warrants aggregating \$15,987.70, drawn by the state controller upon the state treasurer, and payable to Dauer's order as county treasurer. On the same day Dauer indorsed and delivered these warrants to the California National Bank, and received certificates of deposit therefor from said bank to the extent of \$10,975.70, and the balance, \$5,012, in cash. Dauer entered in his books

the whole amount of said \$15,987.70 as received in cash. Again, on the 2d day of November, 1891, said Dauer, as county treasurer, received from H. W. Weineke, the county tax collector, in making his monthly settlement, certificates of deposit for \$26,114.85, issued by the said California National Bank to said Weineke for county tax collections deposited by him in said bank. At the same time, and on the same monthly settlement, the said treasurer received from said tax collector over \$10,000 in coin, and receipted for the whole amount, including the certificates of deposit, as cash, and so entered it in his books. On the close of business on the 11th day of November, 1891, and while said sums aggregating \$37,090.55 were yet on deposit therein, no demand for the same having been made by Dauer, said bank closed its doors and ceased to do business, and has not since resumed business. Thereafter a receiver of said bank was duly appointed under the provisions of the national banking laws, and a suit was commenced on March 4, 1892, by the said plaintiff herein against said bank and its officers, and such proceedings were therein had that the claim of the said county, plaintiff, was allowed against said bank, and dividends amounting to the sum of \$12,981.68 have been paid thereon to said county, which amount, being credited on the aggregate amount of \$37,090.55 on deposit when the bank closed, leaves \$24,108.87 unpaid, which is the amount sought to be recovered herein. On January 30, 1892, the chairman of the board of supervisors, together with the county auditor and district attorney of said county, made an actual count of the funds of the county treasury in the hands of said treasurer, and found that he had on hand in coin \$139,882.17, and the aforesaid certificates of deposit, representing \$37,090.55, and that he should have had on hand \$176,972.70. Each month thereafter during said treasurer's term of office the said chairman, district attorney, and auditor made a similar count of said funds, and found and certified to the fact of the treasurer having said certificates of deposit on hand, and having an amount in coin less than he should have, in the amount represented by said certificates of deposit. The board of supervisors of plaintiff on December 19, 1892, passed a resolution reciting, in substance, that "whereas, by an official count of the money on hand it appears that Chas. R. Dauer, county treasurer, has certificates of deposit in his possession issued by the California National Bank (which bank has suspended payment) aggregating \$37,090.55; that all of said money is county money, that should be in possession of said official: Therefore, be it resolved that the district attorney be, and he is hereby, instructed and directed to forthwith bring an appropriate action against Treasurer Dauer and the sureties on his official bond to recover the money deposited

by him in the California National Bank at the time of its suspension." In pursuance of the foregoing directions, and on the 20th day of December, 1892, the said district attorney filed a complaint and commenced an action, in which the same parties were plaintiff and defendants, respectively, as in the present action. This complaint was on the said official bond of said treasurer, and sought to recover the said \$37,090.55 from said treasurer and his sureties. On the 31st day of December, 1892, the board of supervisors, by a vote of three to two, directed the district attorney to dismiss the said action they had so recently ordered him to begin, and the said action was accordingly dismissed on said last-mentioned date. It will be seen that the recovery sought in the present action is on account of the failure of said treasurer to turn over to his successor in office at the conclusion of his term that portion of the said \$37,090.55 sought to be recovered in the action of December 20, 1892, which had not been collected from the said bank. The court found in favor of defendants on their defenses of the statute of limitations mentioned above.

It is contended by appellant that the statute of limitations did not commence to run until the expiration of Dauer's term of office, and that the action would not be barred until the expiration of four years from that time, but we think this contention cannot be upheld. Section 87 of the county government act (St. 1891, p. 318) provides: "The county treasurer must keep all moneys belonging to this state, or to any county of this state, in his own possession, until disbursed according to law. He must not place the same in the possession of any person, to be used for any purpose; nor must he loan, or in any manner use, or permit any person to use, the same, except as provided by law; but nothing in this section prohibits him from making special deposits for the safe keeping of the public moneys, but he shall be liable therefor on his official bond." That was the law in force at the time of the acts complained of, and thereunder it was the duty of the treasurer to keep the funds of the county under his own personal control; and when he lost that control by his own neglect of official duty a cause of action arose on his official bond at once, and the statute of limitations began to run against such cause of action certainly as early as that condition of affairs was brought to the knowledge of plaintiff. Certainly the statute began to run as early as the date of the commencement of the first action on the treasurer's bond, December 20, 1892; and, more than four years having elapsed thereafter before the commencement of the present action, the court below was correct in the conclusion that the cause of action was barred. The failure of Dauer to turn over to his successor at the conclusion of his term of office the funds which he had lost some months prior to that

time did not constitute a new or different cause of action on behalf of the county, so as to affect the running of the statute of limitations. Whether the suit were begun before or after the expiration of said term, the judgment must be the same, and the damages in either case would be measured by the amount of money which had been lost by the treasurer and not previously recovered from the bank; and, if a full recovery were had in a suit brought before the expiration of Dauer's term, it would preclude any recovery thereafter, as the amount in which the treasurer was in default could be recovered but once. Under our statutes the treasurer is the mere custodian or bailee of the funds of the county, and his failure to have certain funds in the treasury at the conclusion of his term of office adds nothing to his previous transgression of having allowed the same funds to remain out of the treasury and become lost to the county. It is only because of the original conversion or loss of the funds that suit can be maintained at any date. The continuance of the loss, conversion, or absence of the funds from the treasury can no more be treated as a new cause of action than can the failure to pay a debt on June 1, 1900, that was due a year before, be treated as a new debt for the purpose of fixing the period of limitations.

Appellant cites *People v. Van Ness*, 79 Cal. 84, 21 Pac. 554, to show that the statute of limitations for the breach of an official bond does not commence running until the expiration of the official term, but an examination of that case will show that no breach of official duty occurred therein until the expiration of the official term. This is clearly pointed out in *People v. Weineke*, 122 Cal. 535, 55 Pac. 579, wherein it is said of the former case: "Van Ness was a commissioner of immigration. The question as to whether the statute commenced to run when he converted the funds was not considered, but it was assumed, as the most favorable to defendants, that it did not commence to run until the close of the term of office. When this default arose there was no law requiring the commissioner to pay over to the state treasurer monthly the moneys received by him. Section 2969 of the Political Code, requiring him to do so, was passed March 15, 1883." It is clear that the case cited furnishes us no guide herein. Appellant also cites *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72, and other cases of the same character, holding that, where there is a provision in a note that the same shall become immediately due and payable on default in the payment of any installment of interest, the statute of limitations begins to run from the date of the expiration of the term of credit, and not from the default in the payment of interest. An examination of those cases discloses that they are based on the theory that the stipulation as to default in the payment of interest "is evidently in the nature of a penalty inserted

for the benefit of the creditor, and when he does not properly claim the benefit of such penalty he waives it," and thereafter the rights and obligations continue, without regard to the forfeiture. Of course, no such principle can apply to this case.

There was no prejudicial error in the trial court refusing to exclude portions of the agreed statement as requested by appellant. It becomes unnecessary to determine any of the other interesting questions discussed in the briefs, because the cause of action, as it appears from the agreed statement, is barred by limitations, whichever statute may be held applicable; and this defeats appellant's right to recover, however correct it may be as to other contentions in the case. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(131 Cal. 219)

In re SHAVER'S ESTATE et al. (S. F. 2,421.)¹

(Supreme Court of California. Dec. 29, 1900.)
JUDGMENT—CONSENT—APPEAL AND ERROR—
ESTOPPEL—AFFIDAVITS.

1. Where distributees filed their consent to the settlement and distribution of the estate of a decedent, and accepted the benefits going to them under judgment of final settlement of the administration of the estate, they could not then appeal from such judgment.

2. Affidavits of appellants, tending to show that they consented to the judgment from which they appealed under a misapprehension of fact, will not be considered on a motion to dismiss their appeal, when not presented to the court which rendered the judgment.

Department 1. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

In the matter of the estate of Aaron Shaver, deceased. From a decree of distribution, Annie J. Shaver and Jacob Shaver, distributees, appeal. On motion, the appeals were dismissed.

T. Z. Blakeman, for appellants. Lennon & Hawkins, for respondents.

HARRISON, J. Motion to dismiss the appeal. The executor of the last will and testament of the above decedent presented to the superior court for final settlement an account of his administration of the estate, and at the same time a petition for the distribution of the estate remaining in his hands, setting forth therein the provisions of the will, and the names of the persons entitled to receive distribution, and also the shares of the estate to which they were respectively entitled. After due notice of the time and place appointed for hearing the same, the court heard the testimony and proof submitted in support of the account, made an order settling the same, and thereupon made an order distributing the estate in accordance with the

terms of the petition. The decree of distribution was entered April 24, 1900. June 20th, Annie J. Shaver and Jacob Shaver, two of the distributees named in the decree, appealed therefrom to this court, bringing as the record here the petition and decree, without any bill of exceptions. The respondents have filed herein copies of certain records and papers on file in the superior court in the matter of the administration of said estate, showing that after the above-named petition was filed, and prior to the day appointed for its hearing, the appellants signed their consent to the settlement and allowance of the account, and to the distribution of the estate in accordance with the prayer of said petition, and that the same was filed in court before the hearing upon the said petition; and that on the next day after the said decree of distribution was entered of record, viz. April 24th, the executor paid and delivered to each of said appellants all of the personal property, and the possession of the real estate distributed to them by said decree, and that their voucher therefor was filed in said court, and that thereupon, on April 25th, the court made an order discharging the said executor from all further duties and responsibilities of his trust as such executor. Upon these facts the respondents have moved for a dismissal of the appeals upon the ground that the appellants, having accepted the provisions of the judgment and voluntarily satisfied the same, were not at liberty thereafter to appeal therefrom.

The right to accept the fruits of a judgment, and the right of appeal therefrom, are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is therefore a renunciation of the other. *Bennett v. Van Syckel*, 18 N. Y. 484. The precise question involved herein was presented in *Re Baby's Estate*, 87 Cal. 200, 25 Pac. 405, and upon the motion of the respondents therein the appeal was dismissed, the court saying: "When a judgment has been satisfied it has passed beyond review, for the satisfaction thereof is the last act and end of the proceeding." And upon the authority of that case the motion must be granted.

The appellants have presented herein certain affidavits tending to show that their consent to the settlement of the account and the entry of the decree of distribution was signed by them under certain misapprehension and misinformation of fact, and that they received the property distributed to them and signed their receipt therefor by reason of the same misapprehension. The matters presented in these affidavits cannot, however, be considered upon this motion to dismiss the appeal. Whether they could have been considered upon a motion in the superior court to set aside the decree of distribution need not be determined. If such motion had been made in that court, the affidavits would then have formed a part of its records, and could have been authenticated in a bill of exceptions, and

¹ Rehearing denied January 29, 1901.

would form a part of the record on appeal from the order made upon the motion. No motion of this nature was, however, made before that court, nor was any matter presented for its consideration tending to impair the validity and correctness of the decree, and, while the decree remains as the judgment of that court, this court has no jurisdiction to question its sufficiency or force by reason of any matters which are not of record. The appeals are dismissed.

We concur: VAN DYKE, J.; GAROUTTE, J.

131 Cal. 238

MOHR v. BYRNE et al. (KOWALSKY, Intervener. S. F. 1,843).

(Supreme Court of California. Dec. 31, 1900.)
APPEAL AND ERROR—NOTICE—SERVICE ON ATTORNEY—PROOF—AFFIDAVIT—SUFFICIENCY.

Code Civ. Proc. §§ 940, 1015, 1011, provide that service of notice of appeal may be made on a party's attorney, if personal, by delivery to him, and, if delivery cannot be made, it may be left at his office during his absence, by leaving the notice with his clerk therein, or with a person in charge thereof, or, if no person is in the office, by leaving the notice between the hours of 8 in the morning and 6 in the afternoon in a conspicuous place in the office, or, if the office is not open, by leaving it at the attorney's residence, in charge of some person of suitable age and discretion. The affidavit of service of such a notice stated that a copy of it was left at the office of the adverse party's attorneys, but did not show whether the attorneys were absent therefrom; whether a clerk or anybody else was in charge thereof; whether the office was open or closed; whether the notice was left in a conspicuous place therein, or at what time in the day it was left. *Held*, that the affidavit was insufficient to show service of the notice of appeal, since it did not show compliance with the statutory requirements for service, or the existence of conditions authorizing service in the mode adopted, and therefore the appeal should be dismissed.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Action by Henry Mohr against Kate C. Byrne and others, in which Henry I. Kowalsky intervened. From a judgment in favor of plaintiff, intervener appeals. Dismissed.

W. A. Kirkwood and W. C. Shepard, for appellant. Hepburn Wilkins, Wilson & Wilson, T. J. Crowley, W. H. H. Hart, and Aylett R. Cotton, for respondents.

HARRISON, J. Motion to dismiss the appeal. This action was brought to recover the amount of certain promissory notes executed by the respondent Kate C. Byrne, and held by the plaintiff. A complaint in intervention was filed by Henry I. Kowalsky, in which he claimed an interest in one of said notes. Judgment was rendered in the action in favor of the plaintiff, and against the defendants, and that the intervener, Kowalsky, "take nothing by this action." From this judgment the intervener has taken an appeal.

A motion is now made in behalf of the defendants Kate C. Byrne and John E. Byrne to dismiss the appeal upon the ground, among others, that no notice of the appeal was served upon them.

The only evidence of service of the notice of appeal upon them, or either of them, is contained in an affidavit of Isidore Golden, a clerk of Kowalsky, who states therein that on the 2d day of December, 1898, he prepared typewritten notices of the appeal, and "left a copy at the office of Wilson & Wilson, attorneys for Kate C. Byrne et al." It appears from the record that Wilson & Wilson were the attorneys for the respondents Kate C. Byrne and John E. Byrne. It is not shown that the notice of appeal was ever received by these attorneys.

Section 940, Code Civ. Proc., requires the notice of appeal to be served "on the adverse party or his attorney"; and section 1015 declares that, "in all cases where a party has an attorney in the action or proceeding, the service of papers when required must be upon the attorney instead of the party." Section 1011 provides that, if the service is personal, it is to be made by a delivery of the notice or other paper to the party or attorney on whom the service is required to be made. The section, moreover, provides for service in certain instances where such delivery cannot be made, as follows: "If upon an attorney, it may be made during his absence from his office by leaving the notice or other paper with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving them between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or, if it be not open so as to admit of such service, then by leaving them at the attorney's residence with some person of suitable age and discretion." The affidavit of service must show that all the requirements of the law to effect service have been complied with, and also the existence of the conditions authorizing service in the mode adopted. In the present case the affidavit fails to show whether the attorneys for the respondent were absent from their office, or whether any clerk was present, or anybody in charge of the office, or at what time in the day the copy was left. Neither does it show whether the office was open or closed, and the statement that the affiant left it at the office is consistent with the fact that the office was closed, and that it was left at the outside of the door. If the office was open, the affidavit does not state that the notice was left "in a conspicuous place in the office"; and, as was said in *Doll v. Smith*, 32 Cal. 476: "For aught that appears to the contrary, it may have been put in the stove or some other place where it was not likely to be found." In that case the statement in the affidavit that the affiant "served the within notice on the plaintiff by leaving a copy of the same at the office of J. G. Doll, plaintiff's attorney

in the town of Red Bluff, on the 23d day of July, 1866," was held to be insufficient proof of service, and the appeal was dismissed. In *Gallardo v. Telegraph Co.*, 49 Cal. 510, the statement of the affiant that he "left a true copy of the notice at the office of Crane & Boyd, the attorneys for the defendant," was held not to show service of a notice of the settlement of a bill of exceptions. See, also, *Dalzell v. Superior Court*, 67 Cal. 453, 7 Pac. 910. Under these authorities it must be held that there is no proof of the service of the notice of appeal. The appeal of the intervenor, Kowalsky, is dismissed as to the respondents Kate C. Byrne and John E. Byrne.

We concur: VAN DYKE, J.; GAROUTTE, J.

(131 Cal. 30; 6 Cal. Unrep. 615)

PEOPLE ex rel. SILVA v. LEVEE DIST. NO. 6 OF SUTTER COUNTY et al.
(Sac. 687.)¹

(Supreme Court of California. Dec. 20, 1900.)

LEVEE DISTRICTS—SPECIAL LAWS—VALIDITY.

1. A levee district was organized under Act March 25, 1868 (St. 1867-68, p. 316), providing a method for the organization of such districts, and, such act being declared void as to the method of organization, the legislature, by Act March 30, 1872 (St. 1871-72, p. 734), recognized the existence of such district. *Held*, that such legislative recognition gave legal existence to such district, though it was irregularly created, since the legislature, having power to create such districts, on the law under which it was created being held invalid could give it legal existence by positive recognition.

2. Act March 31, 1891 (St. 1891, p. 235), providing a new form of government for a certain levee district, is not violative of Const. art. 11, § 6, and art. 12, § 1, declaring that neither municipal nor private corporations shall be created by special laws, since such levee districts are neither municipal nor private corporations, but are mere governmental agencies having certain of the attributes and functions of corporations.

3. Act March 31, 1891 (St. 1891, p. 235), providing a new form of government for a levee district, does not contravene Const. art. 4, § 25, subd. 3, forbidding the enactment of local or special laws if a general law can be made applicable, since it was a question for the legislature whether a general law was applicable, and its determination of the necessity for a special law will not be interfered with.

Department 2. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Quo warranto, on the relation of John F. Silva, against levee district No. 6 of Sutter county and others. Judgment for defendants, and relator appeals. Affirmed.

Atty. Gen. Ford, Hart & Aram, and Kirby S. Mahon, for appellant. W. H. Carlin and M. E. Sanborn, for respondents.

HENSHAW, J. This is a proceeding in quo warranto to test the legal existence of levee district No. 6. The other defendants are the officers of the district. The case was heard and determined upon an agreed statement of facts, which are the findings in the

case. Upon these facts judgment was rendered for defendants, and plaintiff appeals.

Levee district No. 6 was organized under the act of March 25, 1868 (St. 1867-68, p. 316). By virtue of that act levee district No. 1 was created, and there was provided a scheme for the organization and government of other levee districts which might thereafter be formed. But section 21 of the act, setting forth the method of organization for such districts, has been declared unconstitutional and void. *Moulton v. Park*, 64 Cal. 183, 30 Pac. 613; *Brandenstein v. Hoke*, 101 Cal. 134, 35 Pac. 562. It follows, therefore, and is conceded, that the organization of levee district No. 6, effected under section 21 of the act of March 25, 1868, was irregular and void. Notwithstanding this fatal irregularity in its organization, the legislature made distinct recognition of the existence of the district by an act approved March 30, 1872 (St. 1871-72, p. 734), and again by acts approved March 31, 1891 (St. 1891, p. 235, and St. 1891, p. 237). The first of these acts of recognition was passed under the constitution of 1849, and the latter two under the present constitution. That they are positive acts of recognition sufficient to invest the district with the functions and attributes which it had assumed to exercise under the law of 1868 may not be doubted, under the authority of *People v. Reclamation Dist. No. 108*, 53 Cal. 346, and *Reclamation Dist. No. 108 v. Gray*, 95 Cal. 605, 30 Pac. 779, unless it can be said that the legislature itself was without power so to validate the existence of a levee district thus irregularly organized. This is the contention of appellant. But legislative action in such matters is only circumscribed by the express limitations of the constitution. It is not questioned but that in the first instance, by direct enactment, the legislature could have carved out levee district No. 6 precisely as it did in the case of levee district No. 1. Where the exercise of a particular power is limited by the constitution, the legislature must act in the mode prescribed. But, where there is no such limitation, if the legislature shall prescribe a mode for its exercise which is, perchance, illegal, it may by subsequent ratification or recognition validate the acts done under the irregular mode. To illustrate, the present constitution forbids the creation of corporations for municipal purposes, except by general law. A special law creating a special municipal corporation would be violative of this constitutional inhibition, and no subsequent act of ratification or recognition by the legislature could validate that which in the first instance it had no power to do. But under the constitution of 1849 corporations for municipal purposes could be created by special law. If, then, the legislature, acting under that constitution, should so by special law create a municipal corporation, and for some reason the law lacked validity, the legislature, having the power thus to create the corporation, could

¹For opinion in bank, see 63 Pac. 676.

by ratification or recognition of its corporate existence erect it into a valid municipality. If, then, levee district No. 6 be considered as a corporation (a matter inviting later attention), it was a corporation created for municipal purposes, and, notwithstanding this irregularity of its creation, the legislature could, as it did, give it a legal existence by its positive acts of recognition.

But appellant still further contends that levee district No. 6 was a corporation for municipal purposes under the act of 1868 and the act of 1872 recognizing its existence; that a new and distinct organization was perfected for it under the act of March 31, 1891, passed under the present constitution; that the district elected to come under this act, and to exercise the corporate functions provided for by the act; that the act itself is void; and that therefore the district is improperly exercising corporate functions, from using which it should be restrained. Since levee district No. 6 was a legal entity before the passage of the act of March, 1891, if that act be itself void it would not interfere with the legal existence of levee district No. 6; and the utmost which the court could do would be to require it to exercise the powers which it had theretofore enjoyed under the act of 1868, and the acts amendatory thereto, and restrain it from exercising any new rights or powers under the act of 1891. But, upon the other hand, respondent insists upon the validity of the act of 1891, and upon its right to exercise the powers conferred upon it by that act, and thus a further consideration of the question is demanded.

Appellant's argument against the validity of the act of March 31, 1891, is that levee district No. 6 is a corporation for municipal purposes; that, under the constitution, corporations for municipal purposes shall not be created by special laws; and that the act of March 31, 1891, dealing as it does with levee district No. 6 alone, and providing a new form of government for it, is a special law. Article 12, § 1, of the constitution, having reference to private corporations, provides that they may be formed under general laws, but shall not be created by a special act. Article 11, § 6, of the constitution declares that corporations for municipal purposes shall not be created by special laws. The act of 1891 is unquestionably a special law. If levee district No. 6 be a corporation, it is certainly not a private corporation, and must come under the designation of article 11, § 6,—“a corporation for municipal purposes.” And if it be a corporation for municipal purposes, within the meaning of that article and section, then, indubitably, the act of March, 1891, forcing upon a levee district a new, distinct, and different organization, is special and inhibited legislation. But is levee district No. 6 a corporation for municipal purposes, within the meaning of the constitution, or is levee district No. 6, in strictness, a corporation at all? Expressions will be found in the cases

where such organizations have been designated “corporations for municipal purposes,” or “public corporations,” or “corporations for public purposes,” but these were convenient phrases of designation and description, rather than judicial declarations as to the nature and character of these agencies. The first question propounded is conclusively answered by *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016. It is there held that a reclamation district, conceding it to be a corporation, is not a corporation for municipal purposes within the meaning of the constitution. But, as such levee districts or reclamation districts are distinctly not private corporations, it must follow that, if they be corporations, they are corporations in a class by themselves; and the general powers of the legislature for their creation, organization, and control are in no wise limited by the constitution of the state. The second question is likewise answered in *People v. Reclamation Dist. No. 551*. This court there said, speaking through Mr. Justice Temple: “These districts, in my opinion, belong to neither of these classes [public or private corporations]. They are special organizations, formed to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated. They are described by Dillon in his work on *Municipal Corporations* (sections 24–26). He calls them quasi corporations. Perhaps it would have been more accurate to say that they are not corporations at all, but are so classed because many of the presumptions and rules which apply to corporations have been made applicable to them. They are public agencies, which would cease to exist when the policy of the state has changed so that they are no longer required, or when there is no further function for them to perform. And there is nothing in the constitution relating to municipal corporations which would prevent the state from so changing its policy as to put them out of existence.” We think that what was thus tentatively expressed in the above quotation is a strict and accurate definition of the character of these organizations. The designation of them by Dillon as quasi corporations is, in itself, a distinct denial that they are corporations. They are governmental agencies—mere mandatories—having certain of the attributes and functions of a corporation, but, in strictness, not corporations at all. They are created to perform certain work for lands districted, for the benefits to be received. Their work accomplished, they cease to exist. They have grown up out of our new conditions and progressive civilization. It is concluded, therefore, upon this point, that levee district No. 6 is not a corporation, and that the constitutional inhibition against creating corporations, private or municipal, by a special law, has no applicability. Nor can it be perceived how the act

of 1891 contravenes the provisions of article 4, § 25, subd. 3, which forbids the legislature to pass local or special laws in cases where the general law can be made applicable. We would not overthrow the act of a co-ordinate branch of the government under this provision unless it clearly appears that a general law could be made applicable. Considering the nature and duties of such districts, it might well be that, for the proper performance of their work, the powers to be conferred or duties imposed upon one would have no value if imposed upon another, or, if imposed upon all, might work injury to the many, while conferring benefits upon the few. It is a case, as was that of *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, where the legislative determination of the necessity for a special law will not here be interfered with. The judgment appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

131 Cal. 210

HERMAN v. PACIFIC JUTE M. CO. (S. F. 1,564.)

(Supreme Court of California. Dec. 29, 1900.)
TRIAL—DISMISSAL OF ACTION—LACHES—SHAM ANSWER.

Where an affidavit of plaintiff shows that the defendant has admitted having no defense to the suit, and that the answer on file is a sham, and false, and was filed for the purpose of delay, and no counter affidavit is filed, it is error to dismiss the case for plaintiff's laches in failing to prosecute the action.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action on a note by Alexander Herman against the Pacific Jute M. Company. From a judgment dismissing the case for failure of prosecution, the defendant appeals. Reversed.

Wm. B. Sharp, for appellant. Wilson & Wilson, for appellee.

PER CURIAM. Appeal from a judgment dismissing the case for failure of prosecution. The suit was brought by the plaintiff, as assignee, to recover the amount due on a note made to plaintiff's assignor by the defendant April 20, 1881. The sole issue raised by the answer was as to the plaintiff's ownership of the note. The motion was made October, 1897, on the "records, files, and entries" in the case, from which it appears that the complaint was filed June 6th, and the answer October 31, 1883. From the affidavit of the plaintiff—besides matter in excuse of delay, which need not be passed on—it appears, in effect, that the defendant had no defense to the action, and that the answer was a sham or false answer, known to be such to the defendant and its attorneys; and that it was in fact filed under a resolution of the board of directors (which is

set out in the affidavit), referring to a letter of its attorneys advising that the case be allowed to go by default, but instructing him to file the answer. The attorneys referred to are the same that now represent the defendant. There was no affidavit in rebuttal. Without discussing other questions raised by appellant, it is sufficient to say that, conceding the power of a court to dismiss a case for laches, there was an abuse of discretion in the case at bar in exercising that power in favor of a defendant who admittedly has no defense, and has filed a sham answer for purposes of delay. The judgment appealed from is reversed.

131 Cal. 178

BANK OF VISALIA v. CURTIS. (Sac. 832.)
(Supreme Court of California. Dec. 29, 1900.)

APPEAL—JUDGMENT—CONSTRUCTION—
DISMISSAL.

Where an issue raised by a pleading was struck out, and no evidence was offered to sustain it, the judgment entered on the other issues is not appealable for the court's refusal to render a judgment covering the issue stricken.

Department 1. Appeal from superior court, Tulare county; W. B. Wallace, Judge.

Action by the Bank of Visalia against William M. Curtis, administrator, etc. From a judgment for plaintiff for less than the relief demanded, plaintiff appeals. Dismissed.

Chas. G. Lamberson, for appellant. Bradley & Farnsworth, for respondent.

HARRISON, J. Motion to dismiss the appeal. Judgment was rendered in this action in favor of the plaintiff for a specified amount of money, and declaring the same to be a lien upon certain lands, and also upon a certain water ditch. Thereafter the plaintiff served and filed a notice of appeal "from all that portion of the judgment whereby the court refused to order, adjudge, and decree that five shares of the capital stock of the Wutchumna Water Company were mortgaged by the terms of the mortgage set out in paragraph 6 of the complaint." The respondent now moves to dismiss the appeal upon the ground that it is not taken from the judgment, or from any part thereof. The action is for the foreclosure of a mortgage, and the judgment follows the terms of paragraph 6 of the complaint. The judgment does not in terms "refuse" to decree that the shares of stock referred to in the notice of appeal were mortgaged by the terms of the mortgage set forth in the complaint, but is silent upon that subject; and it does not appear in any part of the record that such shares of stock were mortgaged. The complaint, as originally presented, after setting forth the mortgage in *hæc verba*, contained an averment that the defendant was the owner of five shares of the capital stock of the said water company, and that

said five shares "was intended to be and was in fact included in the said mortgage, and was thereby mortgaged" as security for the promissory note. Upon the motion of the defendant the court ordered that this averment be struck out of the complaint, and it thereafter formed no part of the record, and the cause was tried upon the remaining averments of the complaint. The court does not find that the stock was included in the mortgage, nor does it appear that any evidence was offered at the trial tending to show that fact. The plaintiff could have had the action of the court in striking out this averment reviewed through a motion for a new trial, but he is not entitled to appeal from a judgment rendered upon findings which cover all the issues in the action, upon the ground that the court has refused to render judgment upon issues which were not presented to it or tried. There is no authority for an appeal from the refusal of a court to render judgment upon matters which are supported by neither averment nor evidence. The motion is granted, and the appeal is dismissed.

We concur: VAN DYKE, J.; GAROUTTE, J.

131 Cal. 180

In re TAYLOR'S ESTATE. (S. F. 1,691.)

(Supreme Court of California. Dec. 29, 1900.)

APPOINTMENT OF GUARDIAN—JURISDICTION—
RESIDENCE OF MINOR—APPEAL—BILL
OF EXCEPTIONS—CONTENTS.

1. Code Civ. Proc. § 1747, declares that a minor must be a resident of the county in which the appointment of guardian is made. Civ. Code, § 228, declares that, after the adoption of a child, the person adopting and the child shall sustain to each other the relation of parent and child. Pol. Code, § 52, subd. 4, provides that the residence of the father is the residence of an unmarried minor child. *Held*, that where, pending the application of a sister of a minor for appointment as his guardian, he was properly adopted in proceedings before the superior court of another county by persons residing in such county, an order thereafter made in the county of the sister's residence, appointing the sister guardian, was improper.

2. On appeal it is to be presumed that the bill of exceptions contains all the evidence relative to the specifications and exceptions of the appellant.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Application by Maud Taylor for appointment as guardian of the person and estate of Ralph Russell Taylor, a minor. From an order granting the application, W. E. Parkhurst and another appeal. Reversed.

A. P. Catlin, for appellants. D. W. Burchard and H. F. Dusing, for respondent.

COOPER, C. This appeal is from an order of the superior court of Santa Clara county appointing a guardian of the person and estate of Ralph Russell Taylor, a minor. It

appears from the bill of exceptions that the said minor was born in October, 1890, in Santa Clara county; that being the place of residence of his parents. His mother died shortly after his birth, and in December, 1890, the infant was sent by his father and placed in the care and custody of W. E. Parkhurst and Hannah E. Parkhurst, his wife; the latter being the maternal aunt of the child. The father requested the Parkhursts to take the child, stating that if they did not take it he would have to send it to an orphan asylum. They first agreed to take it for a year only, but they have furnished it a home, kept it, and it has continuously lived with them in their care and custody up to the present time. The Parkhursts at the time lived in Eldorado county, but moved to Sacramento city in 1891, and have ever since continuously resided there. The father of said minor was poor, but assisted the Parkhursts to support the child at sundry times up to the time of his death, by contributions in money and clothing; the amount of money so contributed being \$115. On June 15, 1897, Maud Taylor, a sister of the minor, filed a petition in the superior court of Santa Clara county, which petition was accompanied by the written request of Samuel Taylor, the father, asking to be appointed guardian of the person and estate of said minor. On July 18, 1897, before action on said petition, the father died. After the death of the father, and in October, 1897, by proceedings in the superior court of Sacramento county the said minor was adopted by the Parkhursts, who entered into and executed the agreement required by the Code in such cases. The record is silent as to whether or not the Parkhursts at the time of the proceedings for adoption had any notice of the application of Maud Taylor to be appointed guardian. On the 19th day of March, 1898, the said Parkhursts filed a written answer and contest to the petition of Maud Taylor, in which they denied that the minor was a resident of Santa Clara county, and alleged that he was at the time of filing the petition, and continued to be, a resident of Sacramento county, and further alleged the proceedings of adoption, showing that said minor was adopted by them in October, 1897. After hearing the evidence, and upon the facts herein stated, the court made an order appointing Maud Taylor, the sister, guardian of the person and estate of the said minor.

A minor must be an inhabitant or resident of the county in which the appointment of a guardian is made, in order for the court to have jurisdiction to make the appointment. Code Civ. Proc. § 1747; In re Raynor, 74 Cal. 424, 16 Pac. 229; Rodg. Dom. Rel. § 848; Harding v. Weld, 128 Mass. 589; Schouler, Dom. Rel. p. 424. There is no different principle laid down in Re Danneker, 67 Cal. 645, 8 Pac. 514. In fact, in that case it is said: "Letters will be issued, if necessary, by the court of the county where it may be

legally determined the child resides." After the minor was adopted in October, 1897, his residence was that of the Parkhursts, who adopted him. Civ. Code, § 228; Pol. Code, § 52, subd. 4; Jacobs, Dom. §§ 247, 248; Younger v. Younger, 106 Cal. 379, 39 Pac. 779; Washburn v. White, 140 Mass. 569, 5 N. E. 813. We think the bill of exceptions purports to give all the evidence upon which the court acted. After giving certain evidence and facts, it is recited therein, "Upon the foregoing facts in evidence, and the testimony of Maud Taylor, hereinafter set forth, the said matter was on the 25th of March, 1898, submitted to the court for its decision." Then follows the testimony of Maud Taylor. In the specifications and exceptions it is stated that by the adoption the child became, to all intents and purposes, the child of the parents adopting it, and that the evidence shows that at the time of hearing the petition the child was a resident of Sacramento county. It is presumed that the bill of exceptions contains all the evidence relative to the above-specified points. Association v. Willard, 48 Cal. 619.

It follows that the order should be reversed.

We concur: SMITH, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

131 Cal. 215

RAISCH v. SAUSALITO LAND & FERRY CO. (S. F. 2,458.)

(Supreme Court of California. Dec. 29, 1900.)
COURTS—JURISDICTION—APPEAL AND ERROR
—TITLE TO LAND—MATTER OF RECORD.

1. Where defendant, in an action before a justice of the peace for a money demand less than the amount necessary to give the circuit court original jurisdiction, failed to raise the issue of title to realty, and have the case certified to the circuit court, as required by Code Civ. Proc. § 838, but judgment was had, and defendant appealed to the circuit court on questions of law and fact, where the case was tried without its being made to appear of record that title would be involved, the jurisdiction of the circuit court was appellate, and not original, as where the case is certified by the justice; and hence, under the constitution, giving the supreme court jurisdiction to review judgments of the circuit court only where its jurisdiction is original, the judgment rendered by the circuit court was final, and the supreme court was without jurisdiction to review it.

2. Statement of counsel, made for the purpose of having the evidence taken down, that the case involved title to land, cannot be accepted as a substitute for matter of record to show that title was involved, from which the jurisdiction of the court is to be ascertained.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by A. J. Raisch against the Sausalito Land & Ferry Company. From a judgment of the circuit court affirming a justice's judgment in favor of plaintiff, defendant appeals. Dismissed.

Robt. Harrison, for appellant. D. H. Whittemore, for respondent.

HARRISON, J. Motion to dismiss the appeal. The plaintiff brought this action in the justice's court to recover from the defendant the sum of \$299, alleging in his complaint that his assignor had entered into a contract with the defendant for the doing of certain work in improving a street in Sausalito, and that the defendant had agreed to pay the above sum therefor. The defendant answered the complaint by a general denial, and also pleaded as a separate defense a former judgment in its favor upon the same cause of action. The cause was tried in the justice's court, and judgment rendered in favor of the plaintiff, from which the defendant appealed to the superior court upon questions of both law and fact. Upon the trial in the superior court judgment was rendered in favor of the plaintiff, from which the defendant has appealed to this court. The plaintiff now moves to dismiss the appeal upon the ground that this court has no jurisdiction to entertain the same; that, the amount of his demand being less than \$300, the justice's court had jurisdiction of the case, and the judgment of the superior court upon the appeal therefrom is final. The motion is resisted by the appellant upon its claim that the case is one wherein the title or possession of real estate is involved.

The constitution gives original jurisdiction to the superior court and appellate jurisdiction to this court in all cases at law in which the title or right of possession of real estate is involved, but denies such jurisdiction in those cases at law in which the demand, exclusive of interest, is less than \$300. The appellate jurisdiction of this court over the judgments of the superior court is limited to the cases in which that court is entitled to exercise original jurisdiction, and does not extend to a review of its action in which it exercises only an appellate jurisdiction. If the plaintiff's demand is less than \$300, the superior court will have no original jurisdiction to try the case, unless it appear upon the record before it that it involves a question of which the constitution has given it original jurisdiction. The jurisdiction of a court over any subject-matter that is not included within its general jurisdiction must appear upon the record of its proceedings. A plaintiff may invoke the jurisdiction of the superior court when the title or right of possession of real estate is involved, irrespective of the amount of his money demand, by alleging that fact in his complaint, and setting forth the matters out of which the question arises (Holman v. Taylor, 31 Cal. 338; Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256); but, when his demand is for less than \$300, and he brings an action therefor in the justice's court without showing that such question is involved, if the defendant would invoke the jurisdiction of the superior court he must

comply with the procedure authorized therefor (*Boyd v. Railway Co.*, 126 Cal. 574, 58 Pac. 1046). The mode in which the jurisdiction of a court may be invoked by a litigant is regulated by the legislature, and in this state is defined in the Code of Civil Procedure. Section 838, Code Civ. Proc., declares that the parties to an action in the justice's court cannot give evidence upon any question which involves the title or possession of real property, and that that court cannot try any issue presenting such question. It also provides that, "if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property," the justice must suspend all further proceedings in the action, and certify the pleadings to the superior court. Under this section the justice has no authority to certify the pleadings to the superior court, nor will the superior court obtain jurisdiction of the case by his certifying them to it, unless the defendant shall have presented in the justice's court an answer, verified by his oath, that such question is necessarily involved in the determination of the action. When the case is thus certified to the superior court, the jurisdiction exercised by it is not an appellate jurisdiction, but is the original jurisdiction given it over this question by the constitution. *Arroyo Ditch & Water Co. v. Superior Court of Los Angeles Co.*, 92 Cal. 47, 28 Pac. 54. Section 838, Code Civ. Proc., declares that in such case "the superior court shall have over the action the same jurisdiction as if it had been commenced therein." Over its judgment, therein rendered, this court has an appellate jurisdiction.

In the present case it in no respect appeared from the pleadings in the justice's court that the title or right of possession of real estate was involved in the action. The complaint is merely a money demand, alleged to be due upon a personal contract. The defendant did not file a verified answer, nor does it appear that any evidence was offered in the justice's court upon any question which involved the title or possession of real property. The justice had no authority, therefore, and was not asked, to transfer the case to the superior court; but the parties proceeded to a trial before him, in which judgment was rendered in favor of the plaintiff. From this judgment the defendant appealed to the superior court upon questions of both law and fact. The jurisdiction of the superior court to try the case was, therefore, an appellate, and not an original, jurisdiction, and it proceeded to try the case *de novo*, as required by section 976, Code Civ. Proc. No amendment of its answer was asked by the defendant, nor was it made to appear to the court by any matter of record that the determination of the case would present any question involving the title or possession of real property. It is recited in the statement of the case that at the opening of the trial

the attorney for the plaintiff stated that, "as the case involved the title or possession of real property, he desired that the evidence be taken by the reporter, and that the usual findings be made"; but the statement of counsel, made, as it appears, for that special purpose, is not the equivalent of, nor can it be made a substitute for, matter of record, from which the jurisdiction of the court is to be ascertained. Although the proceedings at the trial in a matter in which the court had only appellate jurisdiction cannot be considered for the purpose of determining whether it might not have had original jurisdiction if it had been properly invoked, yet we have examined the statement of the case, and do not find that evidence was offered by either party upon any question which involved the title or right of possession of real estate, or that the determination of the case involved such question. As it, therefore, appears from the record on appeal that the superior court was merely in the exercise of its appellate jurisdiction, it follows that the appeal from its judgment therein to this court is unauthorized. The appeal is dismissed.

We concur: VAN DYKE, J.; GAROUTTE, J.

131 Cal. 231

PEOPLE v. ARLINGTON. (Cr. 647.)

(Supreme Court of California. Dec. 29, 1900.)

CRIMINAL LAW—CREDIBILITY OF WITNESSES—REASONABLE DOUBT—INSTRUCTIONS.

1. Under Code Civ. Proc. § 2061, subd. 3, authorizing the court to instruct that a witness false in one part of his testimony is to be distrusted in others, it is not error for the court, after instructing in the language of such subdivision, to add that, if the jury find that any witness has willfully testified falsely to any material matter, they have a right to entirely disregard his testimony.

2. Under Code Civ. Proc. § 2061, subd. 3, authorizing the court to instruct that a witness false in any part of his testimony is to be distrusted in others, the court cannot single out a particular witness, and apply such section to him.

3. A contention that the court erred in its instruction, as not based on evidence, cannot be sustained where the bill of exceptions does not bring up all the evidence.

4. The court's instructing that the accused was presumed to be innocent, and was not required to prove himself innocent until the prosecution had proven his guilt beyond a reasonable doubt, does not deprive accused of the presumption of innocence at some time in the trial, where it was further stated that the presumption abided with accused throughout the trial of the case, until the evidence convinced the jury to the contrary beyond all reasonable doubt.

Department 2. Appeal from superior court, Alameda county; S. P. Hall, Judge.

A. Arlington was convicted of grand larceny, and from the judgment and an order denying his motion for a new trial he appeals. Affirmed.

J. E. McElrath, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. Defendant was charged with the crime of grand larceny and of two prior convictions for the like offense. He was found guilty by the jury, and the court sentenced him to imprisonment in the state prison during his natural life. The appeal is from the judgment and from the order denying defendant's motion for a new trial. There is no brief for respondent. Appellant's points relate exclusively to the instructions of the court.

1. The point first presented arises on the following instruction: "I instruct you, gentlemen of the jury, that a witness false in one part of his or her testimony, as the case may be, is to be distrusted in others. *And if you find that any witness in this case has willfully testified falsely to any material matter in the case, you have a right to entirely disregard and cast aside the testimony of such witness.*" The first part of the instruction is in the language of section 2061, subd. 3, of the Code of Civil Procedure, and is not objected to; but the latter part, in italics, is urged as prejudicial to defendant, because it tended to confuse the jury, and prevent them from giving proper consideration to the facts of the case; and, besides, is erroneous as embodying any part of the law of this state. Appellant's counsel review at some length the decisions in which this provision of the Code has been commented upon, and concludes that much confusion exists as to its meaning; and the learned counsel insists that the rule was laid down in *People v. Paulsell*, 115 Cal. 6, 46 Pac. 734, to the effect that the language of the statute should be followed without amplification or modification. We do not so understand that case. The trial court had used the phrase "may be distrusted," instead of "is to be distrusted," and it was with reference to this change in phraseology that it was suggested as safer and better to follow the language of the statute. That the trial court may amplify the Code rule substantially as was done in the present case was decided in *People v. Flynn*, 73 Cal. 511, 15 Pac. 102, and that it should be so is laid down in *People v. Plyler*, 121 Cal. 160, 53 Pac. 553. The instruction there read as follows: "If you are satisfied that any witness has willfully testified falsely in regard to any one person, or any one particular fact in the case, then you are authorized to distrust his or her testimony in all particulars; that is, you may reject it entirely, if you choose to do so, or you may reject it in part and receive it in part, as you find it contradicted or sustained by other testimony, as you are satisfied of its truth or falsity." See, also, *People v. Clark*, 84 Cal. 573, 24 Pac. 313, where a similar instruction was upheld; and the rule is sustained by what was said with considerable amplification in *People v. Sprague*, 53 Cal. 491, quoted approvingly in *White v. Disher*, 67 Cal. 402, 7 Pac. 826.

2. The defendant requested and was re-

fused the following instruction: "If you believe that the prosecutrix testified falsely about being in San Francisco on the night of April 14, 1899, she is to be distrusted in other parts of her testimony." The court did not err. The instruction first above considered applied to all the witnesses in the case, and, besides, it would have been improper to single out a particular witness, and apply to him or to her the rule in question. *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315.

3. The court charged the jury as follows: "Before you can find him [defendant] guilty of grand larceny, you must be satisfied beyond all reasonable doubt that he stole from the prosecuting witness, Minnie M. Smith, of her personal property, money in excess of the value of fifty dollars; but if you find that he stole such money, but are not satisfied that the amount thereof exceeded fifty dollars, you can only find him guilty of petit larceny." Section 678, Pen. Code, provides that, "wherever in this Code the character or grade of the offense, or its punishment, is made to depend upon the value of the property, such value shall be estimated exclusively in United States gold coin." The court elsewhere in its instructions referred to the indictment as charging defendant with having stolen "two hundred and fourteen dollars, of the value of two hundred and fourteen dollars, in lawful money of the United States"; and again reference is made to some of this money as "bills of currency of the United States," or as "greenbacks," or as "fifty-dollar bills," but the court does not tell the jury in estimating the value of these greenbacks or bills that they are to "estimate their value in gold coin of the United States." The evidence was that the money stolen consisted of two \$50 greenbacks, five \$20 greenback bills, a \$10 piece of gold, and \$4.85 in various denominations of silver coin. The contention is that there was no testimony offered to show the meaning of the word "greenbacks," or instruction that their value was to be estimated in gold coin. The bill of exceptions does not bring up all the evidence, and what appears is stated in the bill to bear only "upon the defendant's exceptions hereinafter to be stated." We find no exception on the point now raised, and, as the presumption is that there was evidence to meet the requirements of the law, it was incumbent on defendant to show affirmatively that there was no such evidence. The question now raised is not necessarily involved by the appeal.

4. The court charged the jury as follows: "The charge in the information puts upon the prosecution the burden of proving that he is guilty of the charge laid in the information beyond all reasonable doubt. In other words, gentlemen, the defendant at the outset of this trial is presumed to be an innocent man. He is not required to prove himself innocent, or to put in any evidence at all upon that subject until the prosecution has proven

to your satisfaction and beyond all reasonable doubt that he is guilty. Now, in considering the testimony in the case, you must look at that testimony, and view it in the light of that presumption which the law clothes him with, that he is innocent, and it is a presumption that abides with him throughout the trial of the case, until the evidence convinces you to the contrary beyond all reasonable doubt." It is claimed that the effect of this instruction was to deprive defendant of the presumption of innocence at some time throughout the trial, before the jury should, by their verdict, determine to the contrary; that the jury were, in effect, told that when the prosecution closed its evidence, and the defendant was called upon to put in his defense, at that point of time the presumption of innocence with which the defendant was clothed ceased to operate. There is no doubt but that the presumption of innocence continues not only during the taking of the testimony, but during the deliberations of the jury, and until they reach a verdict (*People v. McNamara*, 94 Cal. 509, 29 Pac. 953); and, if it could fairly be said that the instruction deprived the defendant of the full operation of this rule, we should not hesitate to hold the error to be prejudicial. But we cannot so interpret the meaning of the instruction. The court told the jury that "it is a presumption that abides with him throughout the trial of the case," and we do not think the language "until the evidence convinces you to the contrary beyond all reasonable doubt" conveyed the impression that the presumption ceased to operate at the close of the evidence of the prosecution, or at any time before the jury had finally determined upon a verdict. The court meant, and we think must have been by the jury understood to mean, that the presumption remained to the last with defendant, and until in their deliberations upon the evidence they became convinced of his guilt. When the jury reached that conclusion on the whole evidence, and beyond a reasonable doubt, of course the presumption disappeared, and should disappear. The judgment and order are affirmed.

131 Cal. 263

BLANCHARD v. HARTWELL et al.
(L. A. 1,018.)

(Supreme Court of California. Dec. 29, 1900.)

MUNICIPAL CORPORATIONS—CHARTER—ADOPTION—AMENDMENT.

1. Const. art. 11, § 8, authorizes a city to frame a charter for its own government by causing a board of freeholders to be elected to prepare a charter, which may be adopted by a majority vote of the electors and by the legislature, and provides that the charter may afterwards be amended at intervals of not less than two years, by proposals submitted by the legislative authority of the city. *Held*, that the payment of the expenses of a board of freeholders elected by a city already having a freehold charter, to prepare a new charter, will be enjoined, since such city can only change the

charter by the procedure provided for making amendments.

2. Pol. Code, § 1188, prescribing the methods of nominating candidates for office, does not authorize proceedings to elect a board of freeholders, for the purpose of preparing a city charter, to be instituted by citizens of the city, as Const. art. 11, § 8, authorizing the election of such a board, requires that they be caused to be elected by the city, which can act only through its council.

Henshaw, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Extended opinion. For original opinion, see 62 Pac. 509.

M. L. Graff, for appellant. R. H. F. Variel, for respondents.

TEMPLE, J. This action is by a taxpayer to enjoin the city treasurer of Los Angeles and the city from paying the expenses of a certain board claiming to be a board of freeholders elected to prepare a charter for the city. The city of Los Angeles already had a freeholders' charter, which was approved by the legislature in January, 1889. In that year a board of freeholders was again elected, which formed a new charter, which was submitted to the inhabitants of the city for their approval, but was rejected. In July of the present year another board was elected, and formally qualified, and is proceeding to prepare a new charter. The case was submitted upon the stipulated facts. The defendants had judgment, and plaintiff appeals.

The constitutional provisions bearing upon this matter are contained in section 8, art. 11. So far as material here, it is as follows: Any city having the requisite population may frame a charter for its own government by causing a board of 15 freeholders to be elected to prepare a charter, which, in the mode specified in the section, shall be submitted to the qualified electors of the city; and, if approved by a majority of them and by the legislature, it will become the charter of said city and the organic law thereof, and supersede any existing charter and amendments thereof, and all laws inconsistent with such charter. It is then provided, as to amendments: "The charter so ratified may be amended at intervals of not less than two years by proposal therefor, submitted by the legislative authority of the city to the qualified electors thereof, at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature as herein provided for the approval of the charter. In submitting any such charter, or amendments thereto, any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others." In *People v. Gunn*, 85 Cal. 238, 24 Pac. 718, the provisions of this section in regard to the mode of framing and adopt-

ing a freeholders' charter in the first instance were discussed, and it was held that the procedure prescribed must be strictly pursued. This conclusion was based largely upon the ground that the procedure was, under constitutional provisions, expressly declared to be mandatory and prohibitory, and it is said, "Under such provisions the mode is the measure of the power." Upon this point the decision has never been questioned, so far as I am advised. Since a procedure for the amendment of such a charter is expressly provided, the presumption would be (independently of the declaration that all the provisions of the constitution are mandatory and prohibitory unless the contrary is expressly stated) that such mode is exclusive. Under such a constitution this seems indisputable. The one mode of amendment is commanded, and all others are prohibited. But every feature of the prescribed mode indicates that it is exclusive. It can be amended only once in two years. This would be a vain restriction if nevertheless the charter can be amended by framing a new charter (as remarked at the argument) every 60 days. Here is a clear and positive constitutional policy, calculated to insure some degree of permanency and to prevent frequent changes. Such is the prescribed policy. People may differ as to its wisdom. It certainly is the law. In the second place, it prescribes a different notice from that required upon the adoption of the charter in the first instance, and provides that alternate propositions may be submitted for the choice of electors. These are both important matters, not only providing for greater deliberation, but enabling the electors to decide by direct vote between different proposed policies, thus bringing local self-government nearer to the individual voter. No one should be permitted to deprive the electors of this privilege by compelling them to vote upon a different proposition, to wit, whether they will adopt a new scheme as a whole or not. I regard the right to submit specific amendments as a matter of great importance, but, whether important or not, such is the constitutional scheme. In the third place, the amendment must be approved by a majority of three-fifths of the qualified electors. A charter may be adopted by a majority vote of such electors. This is also a provision favoring permanence, and against changes made under temporary excitement. What a fatuous limitation or requirement this would be, if the policy thus clearly indicated could be defeated by adopting a new charter once in 60 days by a mere majority vote! A new charter, if it could be framed, would be but an amendment of the charter it displaced. In the mode provided, every section of an existing charter could be radically changed. A newly-framed charter could adopt all sections of the old, save one. If it was thought desirable to change but one simple provision, and doubts were entertained whether a three-fifths vote could be obtained,

schemers, if the power existed, could accomplish their purpose by framing a new charter. In view of such a proposition, how foolish this carefully prepared provision for amendments, with its limitations, which has been three times adopted by the people of the state, becomes! The principle here declared has been approved in numerous cases,—among them, in *City of St. Louis v. Dorr*, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686; *State v. Chase*, 5 Ohio St. 523; *Argenti v. City of San Francisco*, 16 Cal. 283; *Zottman v. City and County of San Francisco*, 20 Cal. 102; *French v. Teschemaker*, 24 Cal. 550; *Gas Co. v. Toberman*, 61 Cal. 199; *Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3.

Reeves v. Anderson, 13 Wash. 17, 42 Pac. 625, is not altogether in point. A freeholders' charter there was like ours only in name. The legislature, which could amend such charters *ad libitum*, provided a mode in which the city councils could be compelled to call an election to elect a board of freeholders to frame "a new charter for said city by altering, changing, revising, adding to or repealing their existing charter." Since the legislature could do all these things itself, the most important question was whether this was an improper delegation of legislative power. The court held that it was not, and this really settled the case. The chief justice took that view, and did not concur in the opinion upon the point here involved. As to that point the opinion, which was not by a majority of the court, merely states, without argument or citation of authority, that the grant of power to frame a charter is a continuing right. The provisions of the constitution of the state of Washington are not declared to be mandatory and prohibitory, and the charter was at the mercy of the legislature; and, when it is added that the opinion was not by a majority of the court, it has not much value as authority. But there a mode was provided by which the council could be compelled to call an election upon a mere petition. Here the movement can only be initiated by the city council,—the legislative body of the city. The constitution provides that the city shall cause the election to be held. The city can only act through its legislature. Counsel asserted at the argument that the people could initiate the movement under section 1188 of the Political Code, but did not stop to show how under those provisions it could be done. There is no mode provided in that section or in any other, and, as to the city having a freeholders' charter, it is at least doubtful if such a law could be enacted, even though it were held that the right to frame a charter is a continuing right. Nor is it true that to hold that this constitutional mode of amendment is exclusive restricts to any extent the power of the people to cause desired amendments to be proposed, except that this can only be done once in two years. It would

seem as easy to induce the council to submit desired amendments as to induce them to call an election for a board of freeholders, supposing them to have that power. Judgment of reversal was entered at the October term, 1900, at Los Angeles.

We concur: HARRISON, J.; McFARLAND, J.; VAN DYKE, J.

HENSHAW, J. I dissent, under the conviction that the constitutional power to frame a freeholders' charter is a continuing one, not exhausted by its single exercise.

(131 Cal. 240)

PEOPLE v. RODLEY. (Cr. 643).¹

(Supreme Court of California. April 3, 1900.)

PERJURY—EVIDENCE—SUFFICIENCY—COMPETENCY—INDICTMENT—JURY—PANEL—LIST—SELECTION—INSTRUCTIONS—CONSPIRACY—CO-CONSPIRATOR.

1. Defendant, at the probate of a will, swore that he signed in the presence of the other witness and the testator, at testator's request, who declared that he had signed it. The other witness pleaded guilty to perjury, and testified that he and defendant signed the will several months after testator's death; that defendant persuaded him to do so, because there was \$5,000 in it for each of them. Another witness told of defendant's attempt to get him to sign the will after testator's death, and that he would get \$3,000 for so doing. Another testified that the principal beneficiary, who also wrote the will after testator's death, offered him \$5,000 to witness it, saying that she was to pay defendant that amount for being the other witness. Defendant, whose character was good, denied this testimony, but was uncorroborated. The will was admitted to probate, but was afterwards declared invalid. *Held* sufficient to sustain a conviction for perjury.

2. Where an indictment for perjury alleged that the statements made by defendant were then and there false and untrue, and known by him to be so, in the absence of a demurrer it is a sufficient assignment of perjury, within the requirement of Pen. Code, § 966, that the indictment contain proper allegations of the falsity of the matter in which perjury is assigned.

3. The allegation in the indictment that the testimony alleged to be false was then and there material to the issue and matters being heard in said proceeding is a sufficient allegation as to materiality.

4. Where the grand jury presented a true bill against defendant for perjury on a petition for letters testamentary, but, after retiring for further deliberation, and on the same day, they returned into court, changing the indictment found to conform to the fact that the petition in the probate proceedings called for letters of administration with the will annexed, on which amended indictment defendant was arraigned and tried, there was nothing of which defendant could complain, he not having been arraigned on the indictment before amendment, since such a mistake may be corrected at any time before the prisoner has pleaded and the jury been discharged.

5. Where defendant filed an affidavit for trial before another judge because of prejudice, as authorized by Code Civ. Proc. § 170, and counter affidavits of the judge were filed, and considered by the court in determining whether the judge was disqualified, without objection of defendant, it is too late to make such objection on appeal from conviction.

6. Under Code Civ. Proc. §§ 206, 211, providing that the list of jurors shall contain the number ordered by the court to be selected from the wards and townships in proportion to the number of inhabitants, and the lists to be kept separate, and that the names of persons remaining in the grand or petit jury boxes at the end of the year who have not been drawn, and have not served as jurors during the year, may be placed on the list for the succeeding year, though the number fixed in the order cannot be increased by the names left in the jury box at the end of the previous year, it was proper for the supervisors to select such as possessed the necessary qualifications, and had not served the previous year, as part of the list for the current year.

7. Under Code Civ. Proc. § 206, authorizing the list of jurors to be selected from the wards or townships of a county in proportion to the population therein as nearly as can be estimated by the persons making the lists, it was not improper for the supervisors, in making the list, to estimate the population by the number of votes cast in each district at the last preceding election.

8. Where the clerk testified that the 75 ballots drawn from the jury box were folded, so as to conceal the names therein written, the objection that the name of one of the jury was not properly concealed was untenable, and challenge to the panel was properly overruled.

9. In a prosecution for perjury in proving a will, the affidavit of the publication of notice of hearing of the petition for probate and letters was properly admitted in evidence as part of the record of the matter in which the perjury was charged to have been committed, and was competent evidence of the matter therein stated, under Code Civ. Proc. §§ 2010, 2011, providing that evidence of publishing of a notice required by law may be given by the printer's affidavit, which shall be prima facie evidence of the facts stated therein.

10. Where a will had not been signed by witnesses until after testator's death, in a prosecution of defendant for perjury in swearing that the will was duly witnessed by him it was proper to admit in evidence the testimony of the beneficiary of the will and the other subscribing witness as to its being duly witnessed, given at the hearing of the probate matter, since such acts and declarations, in connection with defendant's acts and declarations, tended to show that the three were each working to accomplish one criminal purpose, which tended to establish a conspiracy to rob testator's estate.

11. It having been shown that the will had been written by the beneficiary, and that defendant had been endeavoring by improper means to secure a witness to the will after the death of testator, the conversation of the beneficiary with the party wherein she attempted to persuade him to subscribe the will of the already deceased testator for \$5,000 was properly admitted in evidence, since there was sufficient proof of conspiracy between defendant and the beneficiary to make her acts in carrying out the common criminal purpose competent against him.

12. In a prosecution of a witness to a will for perjury in swearing that he duly witnessed it, there was no error in permitting evidence of a conspiracy between the beneficiary and subscribing witnesses to defraud the estate, after the admission of the declarations of the beneficiary that she had offered to pay another witness the amount she was going to pay defendant, where, taking all the evidence together, it established the conspiracy, since the order of proof rested in the sound discretion of the court.

13. In a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, testimony by a witness of declarations of the beneficiary tending to

¹ Rehearing denied January 23, 1901.

show a conspiracy to defraud testator's estate by establishing a fraudulent will being properly admitted, it was not error to admit evidence of declarations in the same conversation by her tending to show that defendant was a party to such conspiracy, over an objection to strike out the whole testimony.

14. An instruction, given at defendant's request, that the jury should not consider the declarations of the beneficiary to the party whom she tried to induce to sign the will that she had agreed to pay defendant for so signing, unless they first found that there existed a conspiracy to which defendant and the beneficiary were both parties, was equivalent to granting a motion to strike out the portions of the declarations as to defendant.

15. Where, in a prosecution of a witness to a will, which was in the beneficiary's handwriting, for perjury in swearing at the probate thereof that it was duly witnessed, it was claimed that there was conspiracy between the beneficiary and the witnesses to defraud the estate by a false will, testimony by a witness of a conversation in which the beneficiary tried to get him to not testify before the grand jury, that she had offered him \$5,000 to sign the will as a witness, was properly admitted.

16. In a prosecution of a witness to a will for perjury in swearing that it was duly witnessed, it was proper to sustain an objection to defendant's answering a question as to whether he stated, after testator's death, that there was such a will, and when and where he made such statements, since they were self-serving declarations.

17. In a prosecution of a witness to a will for perjury in swearing that it was duly witnessed, evidence of declarations by deceased that he intended to remember the principal beneficiary named in the will offered was properly excluded, since such declarations are not admissible on questions pertaining solely to the formal execution of the will.

18. In a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, it was proper to refuse to instruct that defendant's testimony was not material to the matter before the probate court, the decree of that court being to the effect that the will was holographic, and was executed as a nonolographic will should be.

19. In a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, whether or not he was sworn in the usual form at the probate proceedings makes no difference, under Pen. Code, § 121, providing that it is no defense to a prosecution for perjury that the oath was taken or administered in any irregular manner.

20. In a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, it was proper to refuse to instruct that there was no evidence that the probate court had jurisdiction of the proceeding in which the perjury was committed, where the decree admitting the will to probate showed that the court had jurisdiction in the matter.

21. Where the other witness to the will testified to facts and circumstances tending to show defendant's guilt other than the direct evidence he gave of the falsity of the testimony charged to be perjury, since Code Civ. Proc. § 1968, requires direct evidence only as to the falsity of the testimony charged to be perjury, and as to which sufficient instructions had been given at defendant's request, it was not error to refuse to instruct that, if the jury did not believe such witness' testimony, they must acquit defendant, as they might believe his direct evidence while disbelieving the other.

22. Where two instructions as to evidence of defendant's good character were as favorable as defendant could reasonably ask, it was not error to refuse to add a third instruction on

that subject, everything stated in it being plainly implied in the other two.

23. Where an erroneous instruction cautioning the jury against testimony of verbal admissions was given, it was not error to refuse defendant's other requested instructions that the jury view with caution testimony of a witness as to oral admissions by defendant, and also the testimony of another witness as to oral admissions of the beneficiary of the will, between whom and defendant there was alleged to be a conspiracy to defraud the estate, since the subject of such instructions had been treated in the first one, of which defendant could not complain, he having requested it.

24. It was not error to refuse an instruction that defendant could not be convicted unless each of the jury was satisfied from the evidence that he was guilty beyond all reasonable doubt, and in determining such question it was the duty of each juror to decide the matter for himself, and not to compromise or sacrifice his views or opinions of the case in deference to the views or opinions of others.

25. Where, in addition to instructions that the burden of proof was on the prosecution, and that the jury must be entirely satisfied of defendant's guilt before they could convict, an instruction was given that if, on the proof given, there was a reasonable doubt, the accused was entitled to an acquittal, and the evidence must establish the truth of the charge to a reasonable and moral certainty, it was not error to refuse to instruct that a preponderance of evidence would not be sufficient to justify a conviction.

26. It was proper to amend defendant's offered instruction as to the corroboration necessary in perjury cases by striking out the word "strong" before "corroborating circumstances," to make it accord with Code Civ. Proc. § 1968, requiring perjury to be proved by the testimony of one witness and corroborating circumstances.

27. An instruction was given containing the definition of perjury in Pen. Code, § 118,—that every person having taken an oath that he will testify truly before a competent tribunal, who willfully, and contrary to such oath, states as true any material matter known by him to be false, commits perjury. Another instruction was given that the jury were required to determine whether or not the testimony was false, and known by defendant to be false at the time delivered, and given willfully, and contrary to the oath taken. *Held*, that it was not error to refuse to instruct that defendant could not be convicted unless they found beyond reasonable doubt that he gave the testimony with a criminal intent, and, if they had reasonable doubt that he had a specific criminal intent, he should be acquitted.

28. An instruction was given that there must be direct testimony of at least one credible witness, directly contradictory of defendant's oath, and, in addition thereto, there must be testimony of another witness, or corroborating circumstances established by independent evidence, and of such character as to overcome defendant's oath and the presumption of innocence. Another instruction was that the additional evidence must be at least strongly corroborative of the accusing witness. *Held*, that it was proper to refuse an instruction that there must be something in the corroborative evidence which makes the facts sworn to by defendant not true if the corroborative evidence be true, but, if the corroboration does not go to that extent, defendant must be acquitted, since the former instructions were sufficient on corroboration.

29. A judgment of conviction will not be reversed because of instructions given at defendant's request.

30. Where, in a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, when it

was not witnessed until after testator's death, it was conceded that the will was bogus, and the evidence showed that the will was not valid, a remark of the district attorney to the jury that the jury in the will contest, within an hour after retiring, brought in a verdict that it was not a valid will, though improper, was not prejudicial to defendant.

Commissioners' decision. In bank. Appeal from superior court, Butte county; John C. Gray, Judge.

J. Ellis Rodley was convicted of perjury, and from such conviction and an order denying a new trial he appeals. Affirmed.

George D. Collins, for appellant. Tirey L. Ford, Atty. Gen., for the People.

GRAY, C. The defendant was convicted of perjury, and sentenced to imprisonment in the state prison for the term of 12 years. He appeals from the judgment and from an order denying his motion for a new trial.

The transcript on appeal contains a bill of exceptions. The defendant was a practicing physician, and for at least a portion of the time covered by the evidence he was the mayor of Chico. The theory of the prosecution is that the defendant committed the crime charged to assist the purpose of a conspiracy entered into between himself, Mrs. Houseworth, and J. M. Garner, to the end that Mrs. Houseworth might succeed to the estate of one A. Fuller, deceased, by means of a false and forged will. The perjury is charged to have been committed by defendant, as a pretended subscribing witness, at the probate of the will. The alleged will was shown to be in the handwriting of Mrs. Houseworth, and she was, by the terms thereof, to have received all the property and estate of deceased except \$1,000; said estate being about \$32,000 in value. The accomplice, Garner, pleaded guilty to the charge of perjury, and thereafter, at the trial of defendant, he testified, in substance, that he and defendant signed the will together in the presence of each other, and without the request or presence of Fuller, in the summer of 1898, and several months after the death of said Fuller; that defendant persuaded him to sign by saying there was \$5,000 in it for each of them; and that, after they had both signed, defendant wrote the attesting clause in above their signatures. The following is a copy of the said alleged will and the attestation thereto, to wit:

"June 9th, 1897. I desire that Mrs. Minnie Houseworth have all my property at my death, except I reserve one thousand dollars to be equally divided between the legal heirs to my estate. A. Fuller.

"Signed as witnesses, after being requested to do so by A. Fuller, he declaring this to be his will and that he had signed it. We therefore, in his presence, and in the presence of each other, signed our names as witnesses, Aug. 3, 1897. J. E. Rodley. J. M. Garner."

It is shown that Fuller died on or about October 18, 1897, and that defendant testi-

fied at the hearing in the matter of the probate of said alleged will that he signed the will as a subscribing witness on August 3, 1897, in the presence of Fuller and Garner; and that Fuller then and there declared that he had signed the will, and requested defendant and Garner to sign as witnesses. H. T. Batchelder, county clerk of Butte county, testified that in February, 1898, he had two conversations with defendant; that in the first one defendant asked him if he was acquainted with Fuller's signature, and, on his replying that he thought he was, defendant asked him if he would be willing to certify to it if he knew it to be Fuller's signature. Defendant did not at that time exhibit any document, but said, "If you could be certain that it is his will, it would be to your interest in the sum of three thousand dollars." In the second conversation, had also in February, 1898,—the date of which is fixed by a letter from defendant,—the defendant exhibited the identical will which was subsequently filed for probate, and concerning which defendant gave the alleged false testimony. The witness read the same over once or twice. The defendant asked him if he thought that was Fuller's signature, to which he replied, "I think not, doctor." The defendant then said, "You wouldn't be willing to sign it as a witness?" and Batchelder answered that he would not; that he had signed but few wills, and those always upon invitation. The defendant was the family physician of the witness Batchelder, and they were on friendly terms at the time of the occurrences narrated. The defendant, as a witness, squarely denied that he had ever exhibited any will to Batchelder, or had ever asked him anything about Fuller's signature, and reaffirmed the truth of the testimony given by him at the probate of the will. On cross-examination the defendant was asked if, on the 25th day of October, 1899, in a conversation with S. H. Wilson, the sheriff, he (the defendant) did not use the following language: "There is nothing in that Batchelder matter that has been before the grand jury. I did go down to Biggs on the 15th day of February, 1898, and I had witnessed a will for Alfred Fuller, and it was lost; so I made a copy of it, and took the copy down with me, and showed it to Batchelder, and asked him if he thought he would sign that as a witness or not, and he told me he wouldn't have anything to do with it; so I put on my overcoat, and went out, and on the road home I tore the copy up." In reply the defendant said, "I think I did make that statement," and, when asked if the statement was correct, he said, "I think so; yes, sir." Later in his cross-examination, when the same matter was reverted to and he was asked concerning it, he replied: "I don't recollect saying anything of the kind." Subsequently said S. H. Wilson was called by the prosecution, and testified, in substance, that the defendant did make the statement substantially

as quoted in the question above. It appeared from the evidence that Mrs. Houseworth and said Garner were also witnesses at the probate of the will; that the testimony of the latter as to the facts surrounding the witnessing of the will was substantially the same as that of the defendant. Mrs. Houseworth presented the will for probate October 19, 1898, in her petition stating that she believed it was in the handwriting of the deceased, Fuller, and at that hearing she testified that she had received the will from one H. Carmack on October 17, 1898, and that she never saw the document before that date. In May, 1898, as testified at the trial by one J. B. Swearingen, Mrs. Houseworth stated to him that she had a will that Mr. Fuller had left her, and she had received it in a letter handed her by a Mr. Fimple; that it did not have any witnesses to it, and the lawyers told her it needed two witnesses; "and so all they will have to do is to write on a piece of paper that they had signed it at Fuller's request, and sign their names to it, and attach it to the will." "Now," she said, "I want you to sign as one of the witnesses. Dr. Rodley has agreed to sign it for one, and I have agreed to give him five thousand dollars to sign it, and I will give you the same. I would not offer you any less than I agreed to pay Mr. Rodley." On this appeal a great many points are made, the more important of which we will take up and dispose of in the order in which they are presented in appellant's brief.

1. The indictment is in the following language: "J. Ellis Rodley is accused by the grand jury of the county of Butte, state of California, by this indictment, of the crime of perjury, a felony, committed as follows, to wit: That on the 23d day of November, 1898, and before the finding of this indictment, at the county of Butte, state of California, in the superior court of the said county of Butte, and state of California, Honorable John C. Gray, judge presiding therein, there was pending and on trial before the said superior court of the county of Butte a certain proceeding, to wit, the matter of the probate of the alleged will of one Alfred Fuller, deceased, and the petition of Mrs. Minnie Houseworth for letters of administration with the will annexed; and said superior court as aforesaid had competent jurisdiction then and there to hear, decide, and determine said matter and proceeding according to the law of the state of California, and was then and there fully empowered to administer the law in said matter and proceeding. The said J. Ellis Rodley was then and there called as a witness in said matter, and then and there took an oath before the said superior court, and under the direction of said superior court of the county of Butte, state of California, in due form of law, that he, the said J. Ellis Rodley, would then and there testify truly as a witness in the matter and proceeding then and there being heard by said su-

perior court, as aforesaid; said oath having been then and there administered by one C. F. Belding, who was then and there a duly appointed, qualified, and acting deputy county clerk of said county of Butte, state of California, then and there an officer authorized by law to administer oaths, and to administer an oath to said J. Ellis Rodley as a witness in said proceeding then and there pending as aforesaid. He, the said J. Ellis Rodley, did then and there, and being so sworn, at said county of Butte, state of California, and in said proceeding aforesaid, in a matter material to such issue then and there being heard by said court as aforesaid, he, the said J. Ellis Rodley, having so taken such oath as aforesaid, willfully, unlawfully, corruptly, falsely, feloniously, and contrary to such oath by him, the said J. Ellis Rodley, then and there taken, and he, the said J. Ellis Rodley, then and there knowing the same to be false and untrue, state, declare, make oath, swear, and testify the truth to be in substance as follows, to wit." Then follow some nine or ten folios of the testimony, both question and answer, of the defendant, given at the hearing of the said probate proceeding, and after that the indictment continues as follows: "All of which was then and there material to the issue and matter being heard in said proceeding, and that said statements made as aforesaid by said J. Ellis Rodley were then and there false and untrue, and were then and there, at the time of making them by said J. Ellis Rodley, known by said J. Ellis Rodley to be so false and untrue. Whereby he, the said J. Ellis Rodley, did then and there, as aforesaid, willfully, corruptly, and contrary to his oath, and knowing his testimony to be false, swear falsely, and feloniously commit willful perjury, contrary," etc. There was no demurrer to the indictment, but on arraignment the defendant pleaded not guilty.

The objections urged to this indictment are: (a) It omits the requisite "assignment of perjury"; (b) there is no adequate averment showing the materiality of the testimony. The requirement of the law as to "assignment of perjury" is found in section 966 of the Penal Code, and requires only that there be "proper allegations of the falsity of the matter on which the perjury is assigned." The allegations to the effect that the statements made by defendant were then and there false and untrue, and known by him to be so false and untrue, are, we think, in the absence of a demurrer, a sufficient "assignment of perjury" under the Code provision above cited. This precise question has never been decided by this court, so far as we have been able to ascertain. In *People v. Ah Bean*, 77 Cal. 12, 18 Pac. 815, and *Same v. De Carlo*, 124 Cal. 462, 57 Pac. 383, the indictment was in each instance in substantially the same form, so far as the "assignment of perjury" is concerned, as it is in this case. But in neither of those cases was any

question made as to the sufficiency of the indictment in this respect. However, it seems plain here that the indictment states facts constituting an offense, and the worst that can be said of it is that it is not as specific and certain as it should have been in its allegations as to the falsity of the numerous statements of defendant charged to have been perjurious; and perhaps the indictment for that reason does not conform to the requirements of sections 950, 952, Pen. Code. But an uncertainty of such a character would be waived by the defendant's failure to demur. He cannot, under our system, lie by until he shall see the result of a trial of his case on its merits, and then be permitted to take advantage of a mere uncertainty in the indictment by motion in arrest of judgment. Sections 1004, 1012, 1185, Id.; *People v. Swenson*, 49 Cal. 388; *Same v. Chuey Ying Git*, 100 Cal. 437, 34 Pac. 1080; *Same v. Mesa*, 93 Cal. 580, 29 Pac. 116; *Same v. Villarino*, 66 Cal. 228, 5 Pac. 154. It is specifically alleged in the indictment that the testimony alleged to be false "was then and there material to the issue and matter being heard in said proceeding." This is a sufficient allegation as to materiality. *People v. De Carlo*, 124 Cal. 462, 57 Pac. 383, at page 467, 124 Cal., and page 385, 57 Pac. The other objections to the indictment are based on false premises, and will each disappear on a careful reading of that document.

2. It appears that the grand jury made a partial report, and presented a true bill against defendant for perjury on December 15, 1899, and the clerk was directed by the court to file the same, and issue a bench warrant thereon for the arrest of defendant; and his bail was fixed at the sum of \$5,000. The jury then retired for further deliberation. At 3 o'clock p. m. of the same day the grand jury returned into court, and, after being called, the court stated and the jury responded as follows: "The indictment which was presented this forenoon in the case of *The People of the State of California vs. J. Ellis Rodley*, Defendant, was resubmitted by the court to the grand jury from the district attorney to correct an error that appeared upon the face of the indictment, in this: that it appeared from the indictment presented that the matter before the court at the time that *J. Ellis Rodley* was sworn was a petition for letters testamentary in the estate of *Alfred Fuller*, deceased, whereas the fact was, and it is in the knowledge of the court, that the petition called for letters of administration with the will annexed. Q. Have you now, Mr. Foreman, the indictment corrected in that respect? A. Yes. Q. Has it been submitted and voted upon after correction? A. Yes. Q. And it is now returned to this court as the correct indictment? A. Yes." The clerk was thereupon directed to file the indictment, and that the record show that it had been resubmitted. A bench warrant was ordered to issue for the arrest of

said *J. Ellis Rodley*, with bail fixed at \$5,000. It was upon the indictment as amended that the defendant was arraigned, pleaded not guilty, and was thereafter tried. He was not arraigned on the indictment prior to its amendment. It appears from the foregoing that there must have been a variance between the indictment as originally presented to the court and the evidence upon which the indictment was found. There is nothing in the law that will prevent the correction of a mere mistake like this, the result, no doubt, of an inadvertence. The defendant is injured in no way by the correction. "There is no doubt that, with leave of the court, an indictment may be amended by the grand jury at any time before the prisoner has pleaded, and before they are discharged." *Thomp. & M. Jur. p. 704*; *Lawless v. State*, 4 Lea, 173; *State v. Creight*, 1 Brev. 169. In the case of *Terrill v. Superior Court (Cal.)* 60 Pac. 38, the question for determination was whether the court, after demurrer sustained to the indictment, could resubmit the case to the same grand jury that had found the first indictment. It was held that this could not be done under the Code provision cited therein; but the judge who delivered the opinion of the court in the course thereof remarked: "Perhaps, before the defendant has been arraigned, the indictment could be withdrawn, and by leave of the court sent back to the jury for amendment." This is what seems to have been done in the present case, and we can see nothing in it prejudicial to any right of defendant, and nothing of which he can be heard to complain.

3. The defendant made and filed his affidavit, intending to thereby invoke the provisions of section 170, Code Civ. Proc., and have his case tried before a judge other than the regular judge of the court in which the same was pending. The counter affidavits of the district attorney and of the judge before whom the defendant objected to being tried were also filed. The court decided, after reading all said affidavits, that the regular judge was not disqualified to try the case, and refused to secure the services of another judge for that purpose. In this we cannot see that the court erred. There was no objection made by defendant at the hearing to the court considering the affidavit made by the judge as to the condition of his own feelings towards the defendant and his case. It is too late to object to it for the first time on appeal. *Higgins v. City of San Diego*, 126 Cal. 303, 58 Pac. 700.

4. The challenge to the panel was properly overruled. The number of jurors fixed in the order of the court is not to be increased by the names left in the box at the end of the previous year, but the supervisors are at liberty to select from such names as many as possess the necessary qualifications of jurors and have not served the previous year, and make them part of the list for the current year. Sections 206, 211, Code Civ.

Proc. There was no impropriety in the supervisors estimating the population by the number of votes cast in each district at the last preceding election. We cannot say that this was not the most accurate basis they possessed for such estimate. Section 206, Id. The clerk testified that the 75 ballots or slips drawn from the jury box were folded so as to conceal the names of the persons thereon written. John S. Henrison being one of these names, it follows that his name was duly concealed. There was no substantial departure from the forms prescribed by law in respect to the drawing and return of the jury.

5. The affidavit of the publication of notice of hearing of petition for probate and for letters was properly admitted in evidence as part of the record of the matter in which the perjury is charged to have been committed, and was competent evidence to prove the matters therein stated. Sections 2010, 2011, Code Civ. Proc.; *Heflin v. State* (Ga.) 14 S. E. 112, 30 Am. St. Rep. 147. The other affidavits used in the probate proceeding were admissible for the same reason.

6. It was competent to put in evidence the testimony of Mrs. Houseworth and Garner, given at the hearing of the probate matter, as well as the conversation of the former with the witness Swearingen, wherein she attempted to persuade said Swearingen for \$5,000 to subscribe as a witness the alleged will of the already deceased Fuller, for the reason that all these acts and declarations, taken in connection with the acts and declarations of defendant, tended strongly to show that the defendant, Mrs. Houseworth, and Garner were each working to accomplish one common criminal purpose. Such concert of action on their part would be evidence tending to establish a conspiracy between them by the circumstantial method, which is usually the only way a conspiracy can be established. *People v. Bentley*, 75 Cal. 407, 17 Pac. 436. Before it was sought to put in evidence the conversation of Mrs. Houseworth with Swearingen, it had been shown that the will was false and fictitious, and had been written by Mrs. Houseworth, and that she was, according to its terms, the beneficiary thereunder, and that the defendant had been endeavoring by improper means to secure a witness to the will after the death of the pretended testator. This was sufficient proof of conspiracy between the defendant and Mrs. Houseworth to make the declarations and acts of the latter done in course of carrying out the common criminal design competent evidence against the former. *People v. Lovern*, 119 Cal. 88, 51 Pac. 22, 638. Much evidence tending to establish the conspiracy was introduced after the declarations of Mrs. Houseworth, and, taking all the evidence on this subject together, the conspiracy is made to appear beyond any doubt. The order of the proof was in the sound discretion of the trial court,

and we see no abuse of such discretion. *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *Same v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678. It is particularly urged that the conspiracy could not be proved by the declarations of Mrs. Houseworth; reference being had, doubtless, to her declaration that the defendant was to receive \$5,000 for witnessing the will. There was no objection made to the particular portion of the conversation referred to above, but the objection was general to the whole of it. Much of the conversation was competent evidence beyond any question, and if defendant desired those portions of it which tended only to show that the defendant was a party to the conspiracy excluded he should have moved to strike out those portions. The motion that the testimony of Swearingen be stricken from the record was certainly too broad. However, an instruction was given at the request of defendant which perhaps had the same effect as would the granting of a proper motion to strike out as to this evidence. This instruction reads as follows: "You are instructed that the alleged declarations of Mrs. Houseworth to the witness Swearingen cannot be considered by you unless you first find from the evidence, and beyond all reasonable doubt, that there existed a conspiracy to which both defendant and Mrs. Houseworth were parties." In view of this instruction, and the failure to object in the proper time and manner, it is not necessary for us to here determine whether any portion of Mrs. Houseworth's declarations were hearsay evidence of the part that defendant was taking in the conspiracy or not. That portion of Swearingen's testimony wherein he details a conversation with Mrs. Houseworth in which she sought to induce him not to testify before the grand jury that she had offered him \$5,000 to sign a will as a witness was properly admitted, because the conspiracy and its purpose were not then accomplished. The object of the conspiracy was to "loot" the estate of the deceased, Fuller. The perjury of defendant and the others in the probate proceeding was only one step to this end. It had been necessary before this to fabricate a will, and it was still necessary for the conspirators to avoid detection, keep themselves out of the state prison, and keep up the deception that they were practicing on the probate court, in order to realize anything from their crimes; and it was with these ends in view, no doubt, that Mrs. Houseworth approached Swearingen on the subject of his testimony before the grand jury. We think, therefore, that what she said and did in that connection was in furtherance of the purpose of the conspiracy, and does not come within those cases which exclude the acts and declarations of one conspirator, done and made after the "common criminal design" is accomplished or abandoned, as against his co-conspirator. *Carter v. State*, 32 S. E. 347, 106 Ga. 372;

Byrd v. Same, 68 Ga. 661; Scott v. State, 30 Ala. 503; People v. Opie, 123 Cal. 294, 55 Pac. 989. See, also, People v. Ward, 77 Cal. 113, 19 Pac. 373; Same v. Winters, 125 Cal. 325, 57 Pac. 1067; O'Neal v. State, 14 Tex. App. 582; McFadden v. State, 28 Tex. App. 241, 14 S. W. 128; Allen v. State, 12 Lea, 424.

7. The defendant, while on the witness stand, was asked by his counsel the following question: "After the death of Mr. Fuller, did you make a statement to any one that this document was in existence; and, if you did, how soon after, and to whom, did you make such statements?" to which the witness answered: "Well, I made the statement to several people. I think I told Mr. White. I told several people right after he died." Following this answer, and without any motion to strike out, the prosecution objected to the evidence as irrelevant, immaterial, and incompetent. After argument, and a recess of the court, this objection was sustained. Waiving the question of whether the evidence is shown to have been excluded, the defendant had already testified to the existence of the will from a time prior to the death of Fuller, and we cannot see how his testimony as to a statement made by him after the death of Fuller, showing the existence of the will, can add anything to the force of his evidence. Certainly, such testimony is inadmissible under the general rule excluding self-serving declarations, and no exception to this rule has been called to our attention under which it might be admitted. For all that appears to the contrary, the defendant may have had the same motive and purpose to manufacture evidence the day after Fuller died that he and his confederates had at any later date to manufacture a will. To make it admissible at all, it must be shown that the corroborating statement sought to be put in evidence was made at a time when defendant had no motive or interest to fabricate such statement. Here, however, there is nothing to show when the criminal design was first conceived. *Mason v. Vestal*, 88 Cal. 396, 26 Pac. 213; *People v. Doyell*, 48 Cal. 85.

8. That the deceased, Fuller, in his lifetime, declared an intention to remember Mrs. Houseworth for the kindness she had shown him, was not competent evidence in this case. The defendant is charged with false swearing as to the execution of the will. The declarations of the deceased are not admissible on questions pertaining solely to the formal execution of the will.

9. The petition for the probate of the will sets forth that petitioner believes the will "to have been wholly written, dated, and signed by said testator." It also states facts showing that the will was executed and attested as wills other than olographic are required by law to be executed and attested. The decree of the court was, in effect, that the will was olographic, and also that it was execut-

ed as a nonolographic will should be. Therefore, whatever view we may take as to the sufficiency of the allegation of the petition to show that the will was olographic, the defendant's testimony in the probate court was material to the matter before it beyond any question, and the court at the trial herein properly refused to instruct the jury that it was not material.

10. The defendant was sworn in the probate proceeding in the usual form, as shown by the evidence; but, were it otherwise, it would be no defense in this action. *Pen. Code*, § 121.

11. The record of the probate proceeding is the evidence upon which we must rely to determine whether the court had jurisdiction. 2 *Bish. New Cr. Proc.* § 933b. The decree admitting the will to probate was placed in evidence, and it contains all the necessary recitals to show that the court had jurisdiction in the matter. *Whart. Cr. Ev.* § 602a. The petition for probate, filed, as it is shown to have been, gave the court jurisdiction of the subject-matter of the action; and, even if it be admitted that the affidavit of publication of the notice of hearing was defective, the court had the power to hear the evidence as to the will, and permit a new affidavit of publication to be filed thereafter, if necessary. In *Smith v. State*, 31 Tex. Cr. R. 315, 20 S. W. 707, the jury had not been sworn at the time of the alleged perjury, and it was held that the correct rule is "that, if the court has jurisdiction of the subject-matter of the suit, and the oath is required by law, irregularities in the proceeding will not prevent perjury." The court properly refused to instruct that there was no evidence that the court had jurisdiction of the proceeding.

12. The court refused to give defendant's requested instruction No. 11, which reads as follows: "If you do not believe the testimony given by the witness Garner, or if you are not convinced beyond all reasonable doubt of the truth of what he has testified to, you must acquit the defendant." The witness Garner testified to facts and circumstances tending to show the defendant's guilt, other than the direct evidence he gave of the "falsity of the testimony charged to be perjury." The rule laid down in section 1968, *Code Civ. Proc.*, requiring direct evidence in perjury cases, means that there must be direct evidence only as to the falsity of the testimony charged to be perjury. 2 *Bish. New Cr. Proc.* § 929. Therefore, if the jury believed the direct evidence of Garner given on this point, they might doubt his testimony on other points, and still be entirely satisfied from all the evidence in the case that the defendant was guilty, and thus be warranted in convicting him. The rule in respect to the matter, stated as broadly as could properly be asked, was given by the court in defendant's requested instruction No. 9. We can see no error, therefore, in the refusal to give the offered instruction

No. 11. The same may be said of instruction No. 15, refused by the court, which reads as follows: "If you distrust the testimony of the witness Garner, you must acquit the defendant." The court had already told the jury that "there must be the direct testimony of at least one credible witness, and that testimony, to be sufficient, must be positive, and directly contradictory of the defendant's oath," etc. Here the word "credible" is added to the statute at the request of defendant. Surely, he ought to be satisfied with this. It is not a rule of law that an accomplice is never to be believed, nor is it the rule that he can never be the one witness giving the direct and positive evidence required by section 1968, Code Civ. Proc., in cases of perjury. His credit and the weight of his testimony are questions for the jury (*People v. Gibson*, 53 Cal. 601) in such cases as in others, except that there is a positive rule of law that the direct evidence of one witness must always be corroborated in perjury cases to warrant conviction.

13. The two instructions given by the court as to the evidence of the defendant's good character were as full and favorable to defendant as he could reasonably ask, and there was no error in refusing to add the third instruction on that subject. Everything stated in the rejected instruction was plainly implied in the two given.

14. The defendant requested the court to instruct the jury that the testimony of the witness Wilson as to certain oral admissions of defendant ought to be viewed with caution, and also that the testimony of the witness Swearingen as to alleged oral admissions made by Mrs. Houseworth ought to be viewed in the same way. These two instructions were refused; but the court did give, at the request of defendant, as the record shows, an instruction embodying practically the whole of section 200 of 1 Greenleaf on Evidence, cautioning the jury against testimony of verbal admissions and statements. An instruction in effect the same as the one last referred to was held by this court in *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124, to have been given in disregard of "the provision of the constitution that 'judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.'" The decision referred to was undoubtedly correct, and an instruction of that kind should not be given for the reasons stated in that case. If any instruction is given on the subject of oral admissions, it should be confined as nearly as possible to the language of subdivision 4, § 2061, Code Civ. Proc. However, the defendant cannot be heard to complain of the instruction here, for the reason that it was given at his own request; and, having been so given, it covered the subject treated of in the two instructions refused, and rendered them unnecessary. The defendant is not entitled to an instruction directed to the

evidence of a particular witness, and naming him, where a general instruction has been given covering the point sought. *People v. Patterson*, 124 Cal. 102, 56 Pac. 882. The defendant complains of the instruction, and seems to treat it as having been given of the court's own motion; but a careful inspection of the transcript will show the defendant's mistake.

15. The jury were instructed at some length as to the defendant's right to the benefit of the presumption of innocence in the second and third of the unnumbered instructions and in the tenth and thirty-fifth of the numbered instructions, and the subject did not need the amplification found in the instructions numbered 33 and 34 and refused by the court.

16. The court refused to give the following instruction: "You cannot convict the defendant unless each of you is entirely satisfied from the evidence before you that defendant is guilty beyond all reasonable doubt. In determining the question it is the duty of each juror to decide the matter for himself, and not to compromise or sacrifice his views or opinions of the case in deference to the views or opinions of others." There was no error in refusing this instruction. Juries are impaneled for the purpose of agreeing upon verdicts if they can conscientiously do so. They are admonished at each recess of the court not to form an opinion as to the merits of the case until it shall be finally submitted to them, and when it is so submitted it is the duty of jurors to deliberate and consult together with the view of reaching an agreement if they can without violence to their individual understanding of the evidence and instructions of the court. They should not be lectured by the court to make them strong and steadfast in their individual opinions; neither should they be exhorted to reach an agreement; and, while it is probably true that "each juror must decide the matter for himself," yet he should do so only after a consideration of the case with his fellow jurors; and he should not hesitate to "sacrifice his views or opinions of the case" when convinced that they are erroneous, even though in so doing he defer "to the views or opinions of others." There is a marked distinction between this instruction and the one discussed in *People v. Dole*, 122 Cal. 495, 55 Pac. 881.

17. Defendant complains that the jury were not instructed, as requested in instruction 39, that a preponderance of evidence would not be sufficient to justify a conviction. Besides instructions given that the burden of proof is on the prosecution, and that the jury must be entirely satisfied of defendant's guilt before they can convict, we find the following in the fourth unnumbered instruction: "If, upon such proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal; for it is not sufficient to establish a probability, though a

strong one, arising from the doctrine of chances that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty," etc. This is a very plain statement, many times approved, and certainly it is the equivalent of an instruction that no mere preponderance of evidence would warrant a conviction; and, while the instruction 39 was undoubtedly sound, and ordinarily should be given when requested by the defendant, yet, in view of the very full instructions which were given, substantially covering the important points contained in that instruction, we see no error in its refusal.

18. It was proper to amend defendant's offered instruction 44, as to the corroboration necessary in perjury cases, by striking out the word "strong" before the words "corroborating circumstances." The amendment placed the instruction in accord with the statute. Section 1968, Code Civ. Proc.

19. The court refused to give instruction 45 requested by defendant, which reads as follows: "The defendant cannot be convicted if you do not find from the evidence before you, and beyond all reasonable doubt in your mind, that when he gave the testimony set forth in the indictment he did so with a criminal intent. If, after considering all the evidence in this case, you entertain a reasonable doubt as to whether defendant did give such testimony with a specific criminal intent, then you must return a verdict that he is not guilty." In the fifth unnumbered instruction the court gave the definition of perjury contained in section 118, Pen. Code, and in instruction 50 the jury were told: "But you are required to determine whether or not such testimony was false, and known by the defendant to be false at the time it was delivered, and that said testimony was given willfully, and contrary to the oath he had taken." The words "a specific criminal intent" would need some defining to make them perfectly intelligible to a jury in the connection in which they are used in the rejected instruction. We understand that the "intent to swear falsely" is the "specific criminal intent" that must be shown to establish the crime of perjury. 2 Bish. New Cr. Law, § 1048. If the testimony was "known by the defendant to be false at the time it was delivered," and it "was given willfully, and contrary to the oath he had taken," it would certainly be given with "intent to swear falsely." We think the instructions given on the subject rendered the rejected instruction unnecessary.

20. The court gave two instructions on the subject of corroboration in perjury cases. In instruction 9 the jury was told: "There must be the direct testimony of at least one credible witness, and that testimony, to be sufficient, must be positive and directly contradictory of the defendant's oath. In addition to such testimony, there must be either an-

other such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence; otherwise, the defendant must be acquitted." In instruction 17 the court said to the jury: "The additional evidence must be at least strongly corroborative of the testimony of the accusing witness in this case, the witness Garner." In addition to these two instructions, the defendant requested the following: "You are instructed that there must be something in the corroborative evidence which makes the facts sworn to by defendant not true if the corroborative evidence be true also. If the corroboration does not go to that extent, the defendant must be acquitted." There was no error in refusing the instruction last quoted. The former instructions were sufficient on the question of corroboration.

21. Instructions 50, 50½, and 52 are complained of, but the case cannot be reversed on account of the giving of these instructions for several reasons, the first being that the record shows them to have been given at the request of defendant; and we think we should be guided by this record in the matter notwithstanding that in the briefs of both parties these instructions are treated as if not given at defendant's request. Again, the last instruction mentioned is free from error. *People v. Dolan*, 96 Cal. 315, 31 Pac. 107. And there is nothing in either of the other instructions on which the case should be reversed, if it is read and construed in connection with all the other instructions given. *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021.

22. The verdict is not contrary to the instructions, nor is it unsupported by the evidence; but, on the contrary, the case made against the defendant was a strong one, as may be seen by a reference to the brief summary of the evidence of the prosecution contained in this opinion. Against this evidence the defendant was compelled to rely almost exclusively on his own uncorroborated testimony and his good character. The jury were the judges of the weight of the evidence, and we see no reason to interfere with their verdict.

23. The defendant excepted to the remark of the assistant district attorney to the jury, which reads as follows: "The jury in the will contest over people's Exhibit A, within an hour after they had retired, brought in a verdict that people's Exhibit A was not a valid will." This statement was improper, and should not have been made; but still we cannot see how the defendant could be injured by it when it was virtually conceded by him at the trial that the will was bogus. When it was sought to be shown that the will was not in the handwriting of the deceased, Fuller, the defendant admitted the fact; and of course this admission involved the signature to the instrument. In addition

to this, it was shown by the evidence, without conflict, that the will, including the signature, was in the handwriting of Mrs. Houseworth. This, with the other evidence tending in the same direction, established the fact that "Exhibit A was not a valid will" beyond any question; and the assertion that a jury had so found could add nothing to defendant's burden.

24. Several other exceptions were taken to statements of the prosecuting attorneys in their arguments to the jury, but we see nothing in any of them calling for special notice. It is deemed sufficient to say that they are free from prejudicial error under the recent decision of this court in *People v. Molina*, 126 Cal. 505, 59 Pac. 34.

25. A number of objections to the action of the court in refusing instructions have been ignored in this opinion for the reason that, after a careful examination of them, the conclusion was reached that they were entirely devoid of merit. It should not be a matter of great surprise that, where upwards of 50 instructions are requested, some of them should be refused. The judgment and order should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

131 Cal. 279

ELLEDGE v. SUPERIOR COURT OF LASSEN COUNTY et al. (Sac. 547.)

(Supreme Court of California. Dec. 31, 1900.)

CERTIORARI—ORDER MODIFYING JUDGMENT—REVIEW.

Code Civ. Proc. § 1068, denies a review by writ of certiorari where an appeal may be taken. Section 939 provides that an appeal may be taken from a special order made after judgment. Plaintiff recovered judgment, and defendants afterwards filed a cost bill, which was stricken out because the judgment made no provision for such costs, and the court then made an order deducting an amount equal to such costs from plaintiff's judgment. *Held*, that certiorari would not lie to review such order, since it was a special order after final judgment, from which an appeal could be taken.

Department 1.

Certiorari by Grace Elledge against the superior court of the county of Lassen and others. Writ discharged.

Goodwin & Goodwin, for petitioner. Spencer & Raker and H. D. Burroughs, for respondents.

PER CURIAM. In an action brought by the petitioner against D. W. Ridenour et al., in the superior court of Lassen county, judgment was entered in his favor for the amount of \$290 damages. Thereafter the defendants therein filed a memorandum of costs, amounting to \$92. Plaintiff thereupon moved

the court to strike this memorandum of costs from its files, upon the ground that, as the judgment made no provision regarding costs, the defendants were not entitled to recover their costs. The court granted this motion, but immediately thereafter, of its own motion, made and caused to be entered the following order: "Ordered that the judgment entered herein be reduced the full amount of defendants' cost bill herein, to wit, ninety-two dollars." The plaintiff has obtained a writ of review for the purpose of having this order annulled, upon the grounds that it was without the power of the court to make it.

The order sought to be annulled was a special order made after final judgment, in direct terms modifying the judgment previously given, and by express provision of the statute is made appealable. Code Civ. Proc. § 939. Although the cost bill is referred to as the basis of its action, the order of the court applies to the judgment, and not to the cost bill. The order could have been reviewed, either upon an appeal taken directly therefrom, independent of an appeal from the judgment, or its correctness could have been determined upon an appeal from the judgment as modified in accordance with its terms. Being an appealable order, it cannot be reviewed upon a writ of certiorari. *Id.* § 1068. This subject has recently been very fully considered in *Southern California Ry. Co. v. Superior Court of San Diego Co.*, 127 Cal. 417, 59 Pac. 789, and this rule is there specifically declared. The writ is discharged.

131 Cal. 236

GREEN v. BURR. (L. A. 751.)

(Supreme Court of California. Dec. 29, 1900.)

TROVER AND CONVERSION—TAKING BY SHERIFF—LIABILITY—OWNERSHIP OF PROPERTY—EVIDENCE—SUFFICIENCY—PLEADING—AMENDMENT TO CONFORM TO PROOFS—WHEN ALLOWED.

1. Plaintiff furnished money at the request of H., made through plaintiff's agent, to pay the creditors of a restaurant company, and took a bill of sale of the restaurant property, giving H. a 15-days option to purchase it. H. went into possession as plaintiff's agent, and while he was in possession, and before the expiration of the 15 days, the property was seized by defendant, as sheriff, in attachment against H. by one of his creditors. The party procuring plaintiff to advance the money had been acting for her in investing her money, and she gave him special authority as her agent to purchase the property, and look after her interests in the matter. H. had made declarations that the property belonged to him. *Held*, in an action against the sheriff to recover the value of the property seized, that plaintiff owned it, and was, therefore, entitled to recover.

2. Where defendant did not move to amend his answer to conform to the proof until after submission of the case to the court,—whether before or after decision not appearing,—and it did not appear that any evidence was excluded because of any defect in the answer, or that he was injured by the want of anything therein, it was not error to refuse his request.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by L. A. Green against John Burr. From an order denying a new trial, defendant appeals. Affirmed.

Dillon & Dunning, for appellant. Geo. D. Blake, for respondent.

GRAY, C. The defendant appeals from an order denying a new trial. The action is to recover the value of the furniture and contents of a certain restaurant in the city of Los Angeles, alleged to have been wrongfully converted by defendant. The defendant denies plaintiff's title, and justifies the taking, as sheriff, under a writ of attachment issued in a cause entitled "G. C. De Garmo vs. George F. Harvat," and alleges that the defendant in that action is the owner of the property in controversy. The appellant contends that the findings in favor of plaintiff as to the ownership of the property are not sustained by the evidence. The evidence shows that the property in dispute belonged to a certain restaurant company, of which Harvat was a creditor in a small amount. He assigned his claim to one Clark, who brought suit thereon, and attached the said property. Harvat then, fearing the restaurant owners would be thrown into insolvency, desired to purchase the property in controversy for enough to pay the other creditors of the restaurant 50 per cent. of their claims, which they had agreed to accept in full satisfaction thereof. For lack of funds, Harvat was unable to do this, and so, through his assignee, Clark, who seems to have been a mere agent in the matter, he applied to the plaintiff herein, and she consented to and did put up the money, about \$500, to pay the creditors, and took a bill of sale of the property from the owners of the restaurant. The plaintiff then gave Harvat a 15-days option to purchase the property from her for \$600. The constable who had the property under attachment and Clark, the plaintiff in the attachment suit, then placed said property in the possession of Harvat as the agent of the plaintiff; and while the property was so in the possession of Harvat, and before the expiration of the 15-days option, the defendant, as sheriff, seized the goods as the property of Harvat in an attachment suit brought against him by one of his creditors. It further appears from the evidence that Clark had previously been acting for the plaintiff in the investment of her money, and she gave him special authority as her agent to purchase the property in question from the restaurant company, and look after her interests in the matter. At the time of the seizure of the property by defendant, Harvat was running the restaurant, and was in possession of the property in litigation herein. The creditors of the restaurant company were settled with, and they are making no claim with reference to the property. The foregoing facts were proven without substantial conflict in the testimony, except that there was evidence tend-

ing to show that Harvat, while in possession, had made some declarations of his proprietorship in said property. On the evidence as presented the court was fully warranted in finding that plaintiff was the owner of the property at the time it was seized by defendant. There was nothing tending to show that Harvat, the debtor in the attachment suit, was the owner of the property, except his own declarations to that effect, which seem to have been received in evidence without objection made thereto. As against the other undisputed facts showing that plaintiff had bought and paid for the property, these declarations could have little weight.

The remaining contention of appellant is that the court erred in refusing to allow the defendant to amend his answer to conform to the proofs. It appears from the record that the request to be permitted to amend the answer was not made until after the case was submitted to the court for decision. How long after such submission, or whether the request to amend was made before the case was decided, does not appear. But, aside from this, it does not appear that any evidence was excluded at the trial on account of any defect in the answer. Nor can we see how any prejudice or injury accrued to defendant for want of anything in his answer, or how his situation might be bettered if his answer were in any way changed. The defendant appears to have lost his case for want of evidence, and not on account of any defect in his answer. The order appealed from should be affirmed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

131 Cal. 205

FRANZ v. MENDONCA. (S. F. 1,672.)

(Supreme Court of California. Dec. 29, 1900.)

EASEMENTS—RIGHT OF WAY—DOMINANT ESTATE—NATURE—STATUTE OF LIMITATIONS—INTERRUPTION—NEW TRIAL—WEIGHT OF EVIDENCE—FINDING OF FACT.

1. Where plaintiff pre-empted government land, his right of sole possession and use was sufficient estate in him, without a patent, to start the statute of limitations running as to a right of way claimed in behalf of such lands over lands of another.

2. Where a landowner claimed a right of way over lands of another, the fact that a lessee of the dominant estate was at the same time the lessee of the servient estate did not interrupt the running of the statute of limitations in favor of the dominant estate.

3. Where, in an action to enjoin defendant from obstructing plaintiff's right of way across defendant's lands, there was a finding that plaintiff's use of the right of way was permissive only, and the court granted a new trial on the ground that such finding was against the evidence, the order granting a new trial will not be disturbed on appeal, since the question whether the use was adverse was one of fact, and the trial court, not being bound by

the rule as to a conflict of evidence, is bound to grant a new trial when a finding of fact is against the weight of evidence.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Sebastian Franz against Francisco A. Mendonca. From an order granting a new trial, defendant appeals. Affirmed.

John D. Whaley, for appellant. Reed & Mesbaumer, for respondent.

HAYNES, C. Plaintiff brought this action to enjoin the defendant from obstructing his private way across the defendant's land and for damages. Upon the trial defendant had findings and judgment. Plaintiff moved for a new trial, his motion was granted, and the defendant appeals from the order granting said motion. Plaintiff in 1858 settled upon and entered a certain quarter section of government land, situate in Washington township, county of Alameda, and in August, 1870, obtained a patent therefor. Subsequently he acquired several other contiguous parcels, and plaintiff's said lands in part adjoin the land of defendant, over which said private way is claimed to exist. Defendant's land is part of a Mexican grant known as the "Vallejo Grant," for which a patent was issued by the United States to Vallejo in 1862; and in February, 1863, Vallejo conveyed the same to Jonas G. Clark. On December 18, 1884, Clark conveyed to Jorgenson, who reconveyed to Clark November 28, 1890, and Clark conveyed to defendant March 22, 1893. Plaintiff's lands lie about a mile and a half northerly from the county road leading from Haywards to Niles, and defendant's land, consisting of a tract of about 300 acres, part of said Mexican grant, lies between plaintiff's land and said highway. The court found that "at various times during the period of thirty-seven years next preceding the commencement of this action, plaintiff has used and traveled over said private road in order to reach his lands from said highway, and return therefrom, for agricultural and pasturage purposes; but said use and travel over said private road by plaintiff was not continuous or with claim of right during said period of thirty-seven years, or during any period of five successive years thereof, but was with the permission of defendant's grantors." The foregoing finding is the only one that need be quoted or specially noticed. Plaintiff's motion for a new trial specified said finding, among others, as not supported by the evidence, and also specified that the decision was against law. The plaintiff testified, in substance, that he lived on the land he entered from 1858 to 1872; that he did some work on the road in 1858, and on the Mendonca land in 1862 and 1863; that from 1862 until he left in 1872 he had to fix the road every spring; that during those years he traveled over it

with a team,—two horses and a wagon; that he hauled his grain to Alvarado over this road; that after Decoto station was established he hauled his grain there, and made two trips a day, and could make three; that during all these years he used this road to take his produce out; that the division fence was built between himself and the Mendonca lands a year or two before he left; that "when they built the fence they came up to my house and asked me where I wanted the gate, and I went with them down, and they showed me the gate; and they leave the board on the side, and I fix the gate." He further testified that since 1872 he leased the land every year, and went up there every year four or five times, and followed that road, and that he was first prevented from going over the land in April, 1895.

1. Appellant contends that an adverse use of the way over the Mexican grant would not set the statute in motion until the grant was confirmed and the patent issued; but, as the patent issued the same year the road was made, it may be conceded that the statute did not begin to run in plaintiff's favor prior to 1862.

2. But it is also contended that a way appurtenant to plaintiff's land could not be initiated by adverse use until plaintiff's patent for the dominant estate was issued, which was not until 1870. It is conceded that plaintiff pre-empted his first tract in 1858; that is, his title under the government was initiated that year, and he then had a right of possession, cultivation, and use, good against all, and that was sufficient.

3. It is also contended that in 1866 the plaintiff leased defendant's land and cultivated it for two years, ending in 1868, and that such leasing, possession, and control stopped the running of the statute, and that, if plaintiff now has a prescriptive right, it must have been reinitiated after his tenancy terminated, and continued thereafter for the full term of five years. This may be conceded; but said tenancy ceased in 1868, while the use of the way continued down to the date of the interruption in 1895, so that a new period commenced in 1868, and we do not see that any interruption to the running of the statute occurred afterwards. Certainly the fact that Turkelson, who was plaintiff's tenant in 1877 to 1879, was also the lessee of the servient estate at the same time, could not affect the plaintiff's right. Besides, the period from 1868 to 1877 was more than sufficient for the running of the statute, and to give a prescriptive title, if the other requisite conditions existed.

4. The principal question, however, is suggested by the finding that plaintiff's use of the road "was not with claim of right, * * * but was with the permission of defendant's grantors." In *American Co. v. Bradford*, 27 Cal. 361, 367, Mr. Justice Curry, speaking for the court, said: "In order that

the enjoyment of an easement in another's land may be conclusive of the right claimed, it must have been adverse in the legal sense of the term; that is, the right must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted. The burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor." This case was cited and followed in *Water Co. v. Hancock*, 85 Cal. 226, 24 Pac. 645. In *Thomas v. England*, 71 Cal. 460, 12 Pac. 493, it was said: "To perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open, peaceable. It must be adverse, and under claim of legal right so to do, and not by the consent, permission, or indulgence merely of the owner of the alleged servient estate. This is quite obvious in cases where the consent, permission, or license is expressly given. But it is no less true where the permission or license is implied, as it may well be from facts and circumstances under which the use was enjoyed. The question is one for the jury, or for the court sitting as such, to determine as a fact in the light of the relations between the parties and all the surrounding circumstances." As to the facts which are essential to the creation of an easement by prescription there is no controversy. It is upon the facts to be inferred from the use under the circumstances detailed by the witnesses that the battle is waged. In *Washb. Easem.* (4th Ed.) p. 156, it is said: "And if there has been the use of an easement for twenty years, unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained." To this statement the author cites a large number of cases from different states. In *Cox v. Forrest*, 60 Md. 79, the court, in an action to recover damages for obstructing a private right of way, said: "By 'adverse' is meant a user without license or permission, for an adverse right of an easement cannot grow out of a mere permissive enjoyment; the real point of distinction being between a permissive or tolerated user, and one which is claimed as a matter of right. Where one, however, has used a right of way for twenty years, unexplained, it is but fair to presume the user is under a claim of right, unless it appears to have been by permission." Mr. Justice Story, in *Ricard v. Williams*, 7 Wheat. 105, 5 L. Ed. 409, in speaking of the inference to be drawn from possession, said: "Possession per se evidences no more than the mere fact of present occupation by right, for the law will not presume a wrong. From the very nature of the case, therefore, it must depend upon the collateral circumstances what is the quality and extent of the

interest claimed by the party, and to that extent only will the presumption of law go in his favor." These cases lay down the general principles by which the question whether the use was adverse should be determined. The question is one of fact for the trial court, and it is the duty of the judge of the trial court to grant a new trial whenever he is satisfied that the verdict or finding is contrary to the weight of the evidence. The rule as to the conflict of evidence does not apply to the trial court. *Curtiss v. Starr*, 85 Cal. 376, 24 Pac. 806; *Bjorman v. Redwood Co.*, 92 Cal. 500, 28 Pac. 591. The order appealed from should be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

131 Cal. 222

BRYAN v. ABBOTT et al. (L. A. 784.)

(Supreme Court of California. Dec. 29, 1900.)

LIENS—IMPROVEMENTS—REPUTED OWNER—NOTICE—INCONSISTENT—AMBIGUOUS—MUNICIPAL CORPORATIONS—JUDICIAL NOTICE.

1. A recorded notice of a lien which stated that "S. A. is the name of the reputed owner of the premises," sufficiently named the owner, where S. A. owned the premises, since he could not have been misled by being described as "reputed owner."

2. Where the notice of a lien stated that no time was specified for the commencement or completion of the work, payment to be made upon completion or as required during its progress, and the complaint alleged that no time for said payment was or is stated or set forth in said contract, the complaint was not demurrable for uncertainty or ambiguity, since the law would require payment on completion of the work.

3. Where the lien complaint, to which was attached a diagram of the premises, stated that a contract was for the construction of a sidewalk "in front of and adjoining the lot" described, and the contract stated that the sidewalk was to be constructed "around the premises," etc., a demurrer on the ground of ambiguous description should not be sustained, since defendant, being the owner and occupier of the premises, could not have misunderstood such description.

4. As under Code Civ. Proc. § 1875, the court is authorized to take judicial notice of the incorporation of a city, a complaint for a mechanic's lien for building a sidewalk, describing the property as situated in a certain city, is not defective, in not stating that said property is in an incorporated city; Code Civ. Proc. § 1191, providing for a lien for improving streets or sidewalks in front of any lot in an incorporated city.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by Solon Bryan against Seth Abbott and Frances Bill. From a judgment for defendants, plaintiff appeals. Reversed.

A. D. Jordan and Eugene Daney, for appellant. Sam Ferry Smith and McDonald & McDonald, for respondents.

HAYNES, C. Action brought to enforce a lien for work and materials in laying cement sidewalk and curb, and constructing cement steps on the sidewalk leading up to the doorways. Defendants severally demurred to the second amended complaint, the demurrers were sustained, and, plaintiff failing to amend, judgment of dismissal was entered, and plaintiff appeals. The contract was made, the work performed, and notice of lien filed by William McDonald, who assigned his claim and demand to the plaintiff. The demurrer is general and special.

1. The notice or claim of lien stated "that Seth Abbott is the name of the reputed owner of said premises, and caused and requested said Wm. McDonald to perform said labor and furnish said materials"; and the complaint alleges "that at all the times herein mentioned said defendant Seth Abbott was the owner and reputed owner and in possession of, and personally occupied, the following described real property" (describing it). Respondent contends that the recorded notice of lien is insufficient because it does not state the name of the owner of the premises sought to be charged with the lien. It is sufficient if the name of the reputed owner only is given. *Corbett v. Chambers*, 109 Cal. 178, 184, 41 Pac. 873. The case of *Pavement Co. v. Lyons*, 117 Cal. 212, 43 Pac. 1097, cited by respondent, does not either directly or indirectly hold that the recorded notice of lien must state the name of the owner; but the reasoning of the case and the conclusion reached is entirely consistent with *Corbett v. Chambers*, supra, where it was said: "The provision therein that the claimant shall give the name of the owner or reputed owner, if known, implies that, if he does not know the name of the owner, he may state this fact, and perfect his lien without naming an owner (*Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231), and also that, if, in good faith, he gives the name of a reputed owner, he shall not lose his lien if he shall afterwards ascertain that some other person was the owner." Here the demurrer admits that Seth Abbott, who was described in the notice as the "reputed owner," is the "owner" of the premises sought to be charged with the lien; and if Seth Abbott, as owner, examined the records in the recorder's office, as the law presumes he did, the false description, "reputed owner," could hardly lead him to doubt his identity.

2. The notice of lien, after describing the work, stated there was "no time specified for the commencement or completion of the work; * * * payment to be made in U. S. gold coin upon completion of the work, or as required in its progress." Attached to the complaint, and made part thereof, is a copy of the notice of lien, and in the complaint it is alleged "that no time for said payment was or is stated or set forth in said contract or agreement." It is contended that the allegations of the complaint are inconsis-

ent with the notice of lien attached as an exhibit, and that the complaint is therefore demurrable for uncertainty or ambiguity. I think no one could be deceived or misled in this particular. The allegation in the complaint is that no time for payment was or is "stated or set forth" in the contract. That is literally true, though the law construes the contract to require payment upon the completion of the work, and therefore the time of payment; though not the date, is fixed.

3. The complaint states that the contract was for the construction of a cement sidewalk and cement curb "in front of and adjoining the lot" described, while the contract set out in the claim of lien was to construct a sidewalk and curb "around that certain premises," etc.; and respondent makes the point that the complaint is uncertain in this respect. A diagram of the property is attached to the complaint, showing the curb and sidewalk along the side and across the end of the property, being all of it that bordered on any street. We would not like to say that the defendant, the owner and occupier of the property, misunderstood the expression "around" as here used, or had any doubt as to its meaning. The defendant had personal knowledge of the work done, and cannot avail himself of a demurrer upon the ground that the description of the work is ambiguous. *Doe v. Sanger*, 78 Cal. 150, 20 Pac. 366.

4. Section 1191, Code Civ. Proc., provides for a lien for improving the street or sidewalk, etc., in front of "any lot in any incorporated city or town," and it is objected that in the notice of lien and complaint it is not stated that said property is in an "incorporated city or town." The property is described as "situate in the city of San Diego, county of San Diego, state of California," and the court will take judicial notice that the city of San Diego is incorporated. Code Civ. Proc. § 1875; *Diggins v. Hartshorne*, 108 Cal. 157, 41 Pac. 283. The judgment should be reversed, with directions to the court below to overrule the demurrer.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to overrule the demurrer.

131 Cal. 267

MARR v. RHODES. (S. F. 1,562.)

(Supreme Court of California. Dec. 31, 1900.)

VENDOR AND PURCHASER—CROPS—ESCROWS—
SET-OFF AND COUNTERCLAIM—AMEND-
MENT—CONTINUANCE.

1. Defendant contracted with plaintiff to exchange his fruit farm for certain real estate belonging to plaintiff, and deeds were made out and delivered in escrow, to be delivered to the parties when the title to the properties should

be made satisfactory. Thereafter defendant recommended to plaintiff that the person then in charge of the orchard was a competent person to continue in charge thereof, and informed such person that thereafter he would be working for plaintiff instead of defendant; and bills for the expense of carrying on the orchard were sent to plaintiff directly or through defendant, the bills being paid by plaintiff. Thereafter, and prior to the delivery of the deeds, a crop of prunes growing on the orchard were prepared for market and sold by defendant, who refused to pay over the proceeds to plaintiff. Subsequently the deeds were delivered. *Held* that, the delivery of the deeds relating back to the date of their execution, and plaintiff having been put in possession of the premises and having defrayed the expense of the crop, he was entitled to the proceeds thereof.

2. Where, during trial, it appeared that defendant was entitled to a set-off which he could not avail himself of under his plea, the court should have permitted an amendment.

3. If, by reason of an amendment to defendant's plea during trial, plaintiff is taken by surprise, and requires further time to prepare to meet the defense, a continuance may be granted, or such terms may be imposed as are reasonable under the circumstances.

Department 1. Appeal from superior court, Santa Clara county; A. S. Kittredge, Judge.

Action by Ben. C. Marr against M. G. Rhodes. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

C. D. Wright, for appellant. Archer & Archer, for respondent.

VAN DYKE, J. Prior to September 10, 1895, the appellant was the owner of a tract of land in Santa Clara county containing about 20 acres on which there was a fruit orchard, and respondent was the owner of some improved property in Riverside county under rental, and some unimproved property in Los Angeles county. At that time the parties agreed upon the exchange of their properties, the appellant selling his tract of land in Santa Clara county to the respondent, and the respondent selling his Riverside and Los Angeles property to the appellant, and also assigning to appellant certain certificates of mining stock, and a payment in cash of \$750, as the difference between the properties; and a written agreement was entered into between the parties, and at the same time the lease of the Riverside property was assigned to the respondent. Deeds were made by the respective parties conveying the respective pieces of property according to said agreement, which deeds were left in the hands of C. D. Wright, to be delivered when the title to said respective pieces of property should be made satisfactory. After the execution of the papers and the delivery of the deeds in escrow, the parties on the same day went upon the property in Santa Clara county, and the appellant pointed out and explained to the respondent what he should know concerning the orchard property in question, as the respondent did not live in California, but in Illinois. The appellant also

at the same time recommended one Rose, who had previously cultivated and cared for the orchard under his (appellant's) employment, as a good and competent man to look after and cultivate the place for the respondent; and it was agreed by the parties at the time that appellant was to pay the taxes on the Los Angeles and Riverside property, and respondent was to pay the taxes and expenses on the Santa Clara property, which was done. The expenses of cultivating and caring for the orchard were to be paid by the respondent. Shortly after this, the appellant saw Rose, the man whom he had recommended, and informed him of the exchange of properties, and that thereafter he would be working for Mr. Marr, and not for himself, and directed him (Rose) to attend well to the orchard, and that expenses would be paid by Mr. Marr. From that time Rose understood that he was working for Marr, and not for Rhodes; and the bills for the expense of caring for the orchard were sent to Marr, either directly or through Rhodes, which bills Marr paid. Some hitch occurred, causing delay in passing the title of the properties sold to the appellant, so that the deeds were not delivered to the respective parties until December 24, 1896. In the meantime a crop of prunes, grown on the orchard in question, were prepared for market, and in November, 1896, were sold by appellant for \$1,089.95, and, on refusing to pay over this sum to the respondent, this action was brought to recover the same. The answer denies that the plaintiff was the owner or in possession of the prunes in question, and avers that the defendant had said crop of prunes on hand, which was the product of the orchard for the year 1896, which crop he sold for the sum stated; but denies that he received said sum to or for the use or benefit of the plaintiff, or to or for the use of any other person than said defendant. The court found in favor of the plaintiff, and judgment was entered accordingly, from which judgment, and from the order denying defendant's motion for a new trial, defendant appeals.

When all the conditions of the agreement between the parties had been complied with, and the deeds delivered, they related to the day of their execution, and the rights of the parties existed just as if the deeds had been fully delivered on the day of their date. *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499. Besides, here the plaintiff was put in possession of the premises on which the prunes were grown, and defrayed the expenses of caring for and gathering the crop. The court, therefore, correctly held that the plaintiff was the owner of the crop of prunes, and entitled to the proceeds thereof.

It developed during the progress of the trial, by the testimony of the defendant, that he had paid out for labor and supplies in raising the crop of prunes the sum of \$278.64, and the defendant sought to have this considered as an offset against the amount of the

proceeds of the sale of said prunes. The court held that under the pleadings the defendant could only deduct such expenses as he was put to in marketing the prunes, but the claim for labor and materials in connection with raising the prune crop could not be considered, inasmuch as the answer contained no plea of such offset or counterclaim; whereupon counsel for defendant moved the court for leave to amend the answer of defendant by setting up an offset in his favor against the plaintiff. This motion the court denied, to which ruling the defendant duly excepted. We think the court should have allowed the defendant to amend his answer to enable him to prove facts which would have constituted an offset or defense to plaintiff's demand, as proposed; and if, by reason of such amendment, the plaintiff would have been taken by surprise, and required further time to prepare to meet the defense, the case could have been continued, or such terms imposed as might seem just under the circumstances. *Stringer v. Davis*, 30 Cal. 321; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786. In the latter case the court, in its opinion, says: "It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues, or properly presented by his pleading." See, also, *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86. The judgment and order denying a new trial are reversed, and the cause remanded.

We concur: HARRISON, J.; GAROUTTE, J.

131 Cal. 192

PALLETT et al. v. MURPHY. (L. A. 806.) (Supreme Court of California. Dec. 29, 1900.)
IRRIGATION — CONTRACT — CONSTRUCTION — BREACH — MEASURE OF DAMAGES.

1. Defendant, in consideration of being allowed to construct an irrigation ditch across plaintiffs' lessor's lands, contracted to allow them the use of water on the lands on the most favorable conditions that they allowed the use to others, which contract was recorded. Plaintiffs' lease gave them all water rights of the lessor, and the amount of water flowing in the ditch above that absolutely sold was sufficient for plaintiffs' needs, but defendant refused plaintiffs the right to use the water on the ground the water had previously been applied for for temporary use by others. Held, that plaintiffs were entitled to damages, since the lessor had given consideration for the right to use the water, and others desiring it, having notice of plaintiffs' right, could not claim priority.

2. In an action by a tenant of land against the owner of an irrigation ditch for breach of a contract to deliver water, the measure of damage was the difference between the rental value of the land with and without water.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by William A. Pallett and others against Simon J. Murphy. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Works & Lee, for appellant. H. S. Van Dyke and J. S. Chapman, for respondents.

HAYNES, C. This is an action to recover damages alleged to have been sustained by the plaintiffs by reason of the failure of the defendant to supply water to lands occupied by them as lessees. The plaintiffs recovered judgment, and this appeal is taken therefrom, and from an order denying a new trial.

The principal question arises upon the construction of a contract executed by and between Charles Prager and others, the owners of the Rancho Paso de Bartolo, and the appellant, Simon J. Murphy, whereby the owners of said rancho granted to Murphy a right of way for a ditch or conduit over the same for the conveyance of water for the purposes of irrigation, the plaintiffs herein being lessees of said rancho, or portions thereof, and contending that the terms and conditions of said grant entitled them, as such lessees under the terms of their lease, and the circumstances alleged in their complaint, to be supplied by defendant with water for the irrigation of said leased lands; and that they suffered damage by the failure and refusal of defendant to furnish the water demanded by them in the sum of \$1,552. Said contract for the right of way for said ditch is set out in full in the complaint. It was made on May 30, 1890, and was duly recorded. The right of way thereby granted to Murphy, his heirs and assigns, was specifically defined as to location, its width fixed at 1 rod, and its length at about 23.123 feet. The right was given the grantee to enter upon said rancho for the purpose of constructing the ditch, and afterwards for the purpose of repairs or doing any necessary work thereon, and specified the consideration of one dollar. Said contract further provided as follows: "It is further agreed and stipulated that the party of the second part, his heirs and assigns, hereby agree that the granting of the right of way herein is a part of the consideration of this indenture; and the said party of the second part, his heirs and assigns, in consideration of the same, agree that they will always allow the use of water for land on the Rancho Paso de Bartolo upon the lowest terms and most favorable conditions that they allow the use of water to others." A large portion of the lands leased to the plaintiffs were below defendant's ditch, and could be irrigated therefrom, and from no other source, and their lease contained this clause: "The lessor herein also leases, together with the lands hereinbefore described, all such water rights as may be appurtenant to said lands; but the said lessor, or his successors, shall not be liable for any water rates that might be charged for the use of water from

any company or companies supplying water to said lands, but such charges are to be met by the said lessees herein." It is not seriously questioned but that plaintiffs had, under this lease, whatever right to demand from defendant water for the purpose of irrigating the leased land that the indenture for the right of way secured to the owners of the lands over which it was granted. Plaintiffs' lease was executed May 2, 1894, and was for the term ending December 31, 1894. On May 12th the plaintiffs demanded of the defendant the use of water upon lands described in the complaint upon the terms and conditions stipulated in said indenture, and offered to comply with all the terms and conditions imposed thereby upon the owners of the land. Defendant refused to comply with this demand, giving as a reason therefor, in substance, that prior to this demand he had promised all the water to other parties; and for that reason, and no other, did not comply with the demand. The court found that during the irrigating season of 1894 there were 300 inches of water, measured under a 4-inch pressure, flowing in said ditch, and being managed, controlled, and distributed by the defendant; that of said quantity about 60 inches were required to supply purchasers of absolute water rights, and that the remainder was amply sufficient for the irrigation of the lands leased by plaintiffs, and for which water was demanded. Some extracts from the testimony of Mr. Reed, defendant's agent who had been in charge of the ditch and water from the time the ditch was constructed, will give a clearer idea of the situation, and of defendant's contention. He testified that up to the year 1894 perhaps a thousand acres, some wholly and some partially, had been supplied from the system; that portions of the lands leased by plaintiffs had been supplied the previous year; that defendant's water supply had been disposed of first to actual purchasers of water, and the surplus to parties who wished it; that they sold water rights at so much an inch with their own land, and to other parties so many inches or parts of inches, absolute sale, for specified land, and he thought about 60 inches had been disposed of in that way; and that the balance of the water had been supplied to the lands of people who applied for it temporarily, and generally in the order of their application. "If any one made application for a run of water, it was given to him, if we had it." That the grantors of the right of way for defendant's ditch acquired some right to the use of water to be furnished by the defendant from his ditch would appear to be incontrovertible. The ditch traversed their lands for the distance of about $4\frac{1}{2}$ miles, and occupied nearly 9 acres of land. It was agreed and stipulated by the party of the second part, the defendant, his heirs and assigns, that the granting of said right of way "is a part of the consideration of this indenture, and the said party of the second part, his heirs and as-

signs, in consideration of the same" agreed to confer some right, benefit, or privilege upon the grantors, and expressed the same in the following language: "That they will always allow the use of water for land on the Rancho Paso de Bartolo upon the lowest terms and most favorable conditions that they allow the use of water to others." It is argued by appellant that "the conditions upon which water might be demanded by the plaintiffs' lessors is that upon which other consumers were allowed the use of water." But this construction puts the grantors of the right of way in the same category with others who paid no consideration for a right to the use of water, and gives the grantors nothing for the concession of a valuable and essential right of way. That the grantee would "always allow" the grantor and his heirs and assigns "the use of water" is as much a part of the covenant as that which relates to the compensation, and must be given its proper effect. It was a promise in advance of the construction of the ditch for a valuable consideration, made in writing, and recorded; and all others desiring to use water from that ditch were charged with notice of the plaintiffs' rights, and could not claim priority over them. It is not contended by respondents that the absolute sales of water by the defendant to the extent of 50 or 60 inches was a violation of his covenant with the owners of the ranch. Plaintiffs were interested only in the supply for their leased lands for that year, and were not authorized to litigate for their lessors questions in which they had no interest. There was enough water flowing in the ditch, aside from said 50 or 60 inches, to have supplied the demand of the plaintiffs; and it is, therefore, not necessary to consider the extent to which the defendant might sell absolute water rights without violating his covenant, nor the quantity of water which the grantors of the right of way, or those claiming under them, might lawfully demand under all conceivable circumstances. The case here is much stronger than *Merrill v. Irrigation Co.*, 112 Cal. 426, 44 Pac. 720. There the plaintiff conveyed to the defendant a right of way across her land for a water pipe for a nominal consideration, "but the real inducement for the conveyance was an understanding [not in writing] that plaintiff could have water from defendant's pipe to irrigate her land." Defendant furnished water for a time, and then extended its pipe, and sold its water to others, and refused to furnish the plaintiff needed water, though requested so to do. *Mandamus* to compel the defendant to furnish water was sustained.

The evidence introduced by the plaintiffs to ascertain the amount of their damages was based upon the theory that the true measure of damages in such cases is the difference between the rental value of the land with and without water for irrigation. Appellant contends that such is not the true rule, and that the evidence admitted was

incompetent. That plaintiffs leased the land with the understanding and belief that it would be supplied with water is apparent from the provisions of the lease upon that subject. The refusal of the defendant to furnish water to the plaintiffs did not abrogate the lease, nor deprive the plaintiffs of all use of the land. They remained in possession, and were obliged to pay the stipulated amount of rent, and had all the benefit of the leased land that they could have without water for irrigation. The evidence objected to and received by the court was confined to the rental value of the land with and without water for irrigation. This was the true rule. Evidence as to the value of a possible crop that might be grown with the use of water would be as purely speculative as could well be imagined; while the rental value of land in communities where for many years portions of the land are leased or occupied without the possibility of irrigation, and other portions are leased or occupied with water for irrigation, fixes a standard for the estimation of damages in cases such as this as nearly accurate as it is possible to devise. Appellant has not cited any authorities upon this question, nor made any reply to the argument of respondents. In 8 Am. & Eng. Enc. Law, p. 611, it is stated in the text that, "where the damages may be estimated in more than one way, that mode should be adopted which is most definite and certain" (citing many cases). In *Gilbert v. Kennedy*, 22 Mich. 117, Christianity, J., speaking for the court, said: "Where elements of certainty are lacking by which damages can be accurately measured, resort must be had to such principle or basis of calculation applicable to the circumstances of the case as will be most likely to approximate certainty, and which may serve as a guide in making the most probable estimate of which the nature of the case will admit." The court did not err in receiving the evidence, and the finding as to the amount of the damages is justified by the evidence.

It is further contended by appellant that the findings are not justified by the evidence. But counsel say that "there is no conflict whatever as to the manner of furnishing the water, or of the reason for not supplying the water to the plaintiffs"; so it is apparent that the supposed insufficiency of the evidence to justify the findings is but an attack upon the legal construction placed by the court below upon the covenant contained in the indenture. I think the findings amply sustained by the evidence, and that the judgment and order appealed from should be affirmed.

We concur: CHIPMAN, C., COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

MURPHY v. FARMERS' & MERCHANTS' BANK OF LOS ANGELES. (L. A. 794.)¹
(Supreme Court of California. Dec. 27, 1900.)²

EXECUTORS AND ADMINISTRATORS — MORTGAGE OF ESTATE PROPERTY—FORECLOSURE—APPROPRIATION OF PROCEEDS—VALIDITY OF FORECLOSURE SALE—APPEAL—NEW TRIAL.

1. Where a debtor of an executor knowingly receives a part of the money borrowed by the latter on estate property in payment of the executor's individual indebtedness, the creditor holds such money in trust for a devisee who is injured thereby.

2. Where an executor mortgages estate property to a bank under order of court for the purpose of borrowing money to pay estate debts, and the money is paid to the executor, but a portion thereof is appropriated by the executor, and knowingly received by the bank, in payment of an individual debt of the executor, and the mortgage is afterwards foreclosed, and the land sold to the bank, the wrongful receipt of the money will not render the sale void.

3. A mortgage of land, part of a decedent's estate, given by the executor by order of court for money borrowed for the payment of debts, is not void, as depriving a devisee of a vested right in the property, because St. 1887, p. 115, authorizing the mortgage of such property, was not enacted till after the testator's death, since Code Civ. Proc. §§ 1516, 1563, making testator's real estate subject to sale to pay his debts, was in force at his death, and the mortgage was but a change in form of the debt, and not an additional burden, though the interest was increased thereby.

4. Where the complaint, in an action to quiet title, does not ask for general relief, and the evidence does not authorize the relief prayed, but shows that certain money is held by defendant in trust for plaintiff, the court, on appeal, cannot decree the payment of such sum under the pleadings, but will remand the case for a new trial, with leave to the plaintiff to amend his pleadings.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action to quiet title by Alice Winston Murphy against the Farmers' & Merchants' Bank of Los Angeles. From a judgment in favor of the plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Graves, O'Melveny & Shankland, for appellant. Albert M. Stephens and Stephens & Stephens, for respondent.

CHIPMAN, C. Action to quiet title. Plaintiff is one of 10 children of William H. Winston, who died testate in May, 1886. In June, 1886, his surviving widow, Mary E. Winston, was appointed executrix. Plaintiff is a devisee under the will of deceased, and claims as such. She brings this action to quiet her title to an undivided one-eleventh interest in a certain tract of land in Los Angeles county, as property of the Winston estate. The judgment was that plaintiff is the owner in fee of an undivided one-eleventh interest in the property in question; that defendant has no right or interest in said one-eleventh interest; and that plaintiff's interest

¹ For supplemental opinion, see 63 Pac. 731.

² Rehearing denied January 26, 1901.

"is subject to all lawful claims that may be made thereon in the course of the further administration of the estate of said William H. Winston, which is now uncompleted." The appeal is from this judgment, and from the order denying defendant's motion for a new trial.

The testator made certain specific bequests to plaintiff and other heirs at law, and provided that, after the legacies mentioned in the will were paid, the residue of the property should be equally divided between the testator's wife and children, share and share alike. The court found the following facts: That plaintiff is the owner of an undivided one-eleventh interest in the land described in the complaint, and that defendant's claim thereto is without right; that in November, 1891, the executrix filed her petition for an order authorizing her to mortgage the real estate in dispute; the petition showed that of the money coming into her hands all had been disbursed by the executrix in payment of debts of the deceased, expenses of administration, payment of the legacies, and family allowance, and other costs and charges against said estate; that certain exempt personal property was set aside to the widow, and there remained belonging to the estate two old mules, two young mules and one colt, valued at \$500. The petition showed accrued liabilities amounting to \$21,052.38; and debts, expenses, and charges to accrue, \$28,247.70; total, \$49,300.08. The petition was granted to the extent of authorizing the mortgage for \$45,000, and such mortgage was executed to defendant bank on December 16, 1891; and on December 1, 1896, there was due and unpaid thereon \$63,081.64. Foreclosure followed, and in due course, in June, 1898, a sheriff's deed, granting the premises to defendant as purchaser, and the land has been in defendant's possession ever since, claiming under this deed. No question arises as to the form of the proceedings to mortgage or the sale on foreclosure. There has been no final account or settlement of the estate or distribution, and the court found that there is no property of the estate with which to pay to plaintiff her legacy, and the executrix is insolvent, and was serving without bonds. At the time this mortgage was executed the executrix owed the defendant in her individual capacity \$33,347.03, which was made up of \$24,000 and accrued interest, being money borrowed by her from defendant some years before the probate mortgage was executed, and she used this money to purchase the entire interest of six adult children in the estate; and the personal indebtedness of the executrix also included the further sum of \$1,175 borrowed from defendant by her on personal account, for which she had given her note. The mortgage was executed by the executrix as such, and by three of the adult heirs, who had not sold their interest to Mrs. Winston, and by her individually; thus in-

cluding ten-elevenths of the interest in the property. The court found that of the \$45,000 borrowed by the mortgage the bank paid her only \$7,329.97, and applied \$4,323 in satisfaction of its own claim against the estate, which was justly due the bank, and credited the balance, namely, \$33,347.03, in payment of the personal debt above referred to, due it from the executrix; that the executrix paid out of this \$7,329.97 the legacies of two brothers of plaintiff, amounting to \$6,900, including three years' interest. The evidence was that the \$45,000 was passed to the credit of the executrix on the books of the bank on the day the mortgage was executed and delivered, and on the same day she gave the bank her checks to pay her individual indebtedness of \$33,347.03, above stated, and the allowed claim of the defendant, \$4,323, leaving a balance to her credit of \$7,329.97.

1. The written opinion of the learned trial judge printed in the briefs discloses the theory on which his decision rests, and it was that the mortgage money was impressed with a trust, and its application to pay the personal debt of the executrix was a breach of trust on her part; that the defendant had notice of the fact that the money it received was held by the executrix in trust, and could not be applied to the payment of her individual debt; and that, therefore, the mortgage was void as to plaintiff. I think the facts warranted the trial court in concluding that the defendant had knowledge that the money it received on the checks of the executrix, drawn upon this mortgage loan, belonged to the estate, and that in receiving it to pay the individual debt of the executrix the defendant became a party to the violation of the trust, and acquired no right to the money it received from her so far as plaintiff is concerned, and plaintiff's right to the money was unaffected by the mortgage or by the payment to defendant. But it does not follow that the deed under which defendant claims title is void, or that the proceedings by which it acquired title can be set aside or annulled upon the pleadings and evidence now before us. The petition showed legitimate charges against the estate amounting to more than \$45,000. The money borrowed passed to the credit of the executrix, and was under her control as executrix. The transaction was fair and open, so far as the evidence shows, and the mortgage was a valid lien, unless void for the reason next to be noticed. It was in the application of the money thus borrowed, and not in the execution of the mortgage or the sale under foreclosure, that an implied or constructive trust arose under which defendant must account. The title to the land is now in defendant.

2. Respondent contends that the mortgage was void as to plaintiff because it deprived her of vested rights. The testator died in 1886, and the act authorizing the mortgage was passed March 15, 1887 (St. 1887, p. 115),

and was an act adding a new article to the Code of Civil Procedure relating to mortgages and leases of real property of decedents. The sections relating to mortgages are 1577 and 1578. The proceedings to mortgage the property being regular and conformable to the statute, its provisions need not be set forth. Respondent relies upon *Brenham v. Story*, 39 Cal. 179. Upon the authority of that case, it was held in *Re Packer's Estate*, 125 Cal. 396, 58 Pac. 59, that under section 1537, *Id.*, as amended in 1893, the real estate of the intestate could not be sold where the petition showed nothing more than that a sale would be for "the advantage, benefit, and best interests of the estate and those interested therein," so as to affect the title of an heir that had vested prior to the passage of the act; there being no debts or charges on the estate. *Brenham v. Story* decided that upon the death of the ancestor the heir at once becomes vested with the full property, subject only to liens then existing or created by statute then in force. See cases cited in *Re Packer's Estate*, *supra*. In the present case plaintiff took subject to such charges on the estate as the law authorized at the death of her testate. These were "debts of the deceased, the expenses of administration, and the allowance to the family." Section 1516, Code Civ. Proc. "The estate, real or personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies." Section 1563, *Id.* All the property of a decedent shall be chargeable as above stated, and "may be sold as the court may direct, in the manner prescribed in this chapter." Section 1516, *supra*. There was therefore authority of law for disposing of the property for the purposes named, namely, to pay debts of the deceased, expenses of administration, family allowance, and legacies. The real property belonging to the estate could be sold to provide money to discharge the liabilities above enumerated. The title of the devisees under the will, "though a vested estate in a general sense, was incumbered by the lien created by the testator in his lifetime, and by the law at his decease, and was therefore a qualified, though a vested, interest" (*Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542); and plaintiff took her interest subject to the power of the probate court to sell the property for the purpose of paying the charges or liens resting against it. To authorize the mortgage of the property for the express purpose of raising money with which to pay these charges is but to change the form of the lien, and adds no new burden not already borne by the property, or to which the property may be subjected under the law as it existed when the testator died. It is true, as is claimed, that the mortgage, under the statute, may bear a greater rate of interest than the legacies may bear. But the increased rate of interest al-

lowed by law is an incident of the power by which the burden or lien already on the property may be changed by changing the form of the statutory burden or lien to a mortgage lien. It does not affect the question of power, nor can it reasonably be said to be a new burden. Presumably the mortgaged property would have a market value greater than the mortgage debt, for the lender would rarely loan up to the full cash value. But the mortgage is not a sale, and the creditors may at any time petition to sell and pay the mortgage, and they would thus have an opportunity to realize the margin of value above the mortgage debt; and, if a sale could not be made for an amount in excess of the loan, it would show that the estate had realized on the mortgage all the property was worth in the market, and creditors would have no cause of complaint, for no deficiency judgment can be entered. The mortgagee must look alone to the property. *St. 1887, supra*. We think that within the limitations placed by law upon the power to sell to pay charges against the estate, as the law existed at the decedent's death, the court may, on cause shown as required by the statute, authorize the mortgage, whether the decedent died before or after the passage of the act of 1887. This view of the statute would often save the estate from forced sale and consequent sacrifice; and, under the wisely exercised discretion of the court, would result in benefit to the interests it was designed to conserve. Cases where probate mortgages have been upheld, where given under sections 1577 and 1578, are the following: *Thomas v. Parker*, 97 Cal. 456, 32 Pac. 562; *Stow v. Schiefferly*, 120 Cal. 609, 52 Pac. 1000; *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *East v. Steele*, 127 Cal. 202, 59 Pac. 585. Upon the general question of the power of the legislature to authorize the mortgaging of estates of decedents, see *Cooley, Const. Lim.* (6th Ed.) pp. 115-124; 2 *Woerner, Adm'n*, § 345; *Woerner, Guardianship*, § 86.

Our opinion is that the court erred in deciding that plaintiff owns an undivided interest in the land. We think, however, that the money received by defendant in payment of the individual debt of the executrix was a trust fund, as to which defendant must account to the estate to the extent of plaintiff's right thereto. What that right is can be determined only after an accounting is had, and the estate is in a condition to be closed. As the complaint now stands, it is a simple action to quiet title, without even a prayer for general relief, and proceeds on the theory that plaintiff owns a definite interest in the land. There is no allegation in the complaint that would support a judgment against defendant for any definite sum of money, or for an accounting to the estate. The evidence discloses an entirely different state of facts from that sued upon. This court can do no more than reverse the judgment and remand the cause, with leave to plaintiff to

take such further proceedings as she may be advised.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with leave to plaintiff to proceed further in the case as she may be advised.

(131 Cal. 226)

CITY OF OAKLAND v. SOUTHERN PAC.
CO. (S. F. 1,664.)¹

(Supreme Court of California. Dec. 29, 1900.)

TAXATION—POWERS OF BOARD OF EQUALIZATION—INCREASE IN ASSESSMENT—EVIDENCE OF VALUE—NECESSITY.

Pol. Code, § 3673, authorizes boards of equalization to increase or lower the entire assessment roll so as to equalize the assessment of the property contained therein, and section 3677 provides that the assessor and any deputy whose testimony is needed must be present, and may make any statement or introduce witnesses on questions before the board, and section 3679 declares that the board must use the abstract of mortgages prepared by the county recorder, and other information it may gain from the records of the county recorder or elsewhere. *Held*, that the plaintiff, as a board of equalization, had no power, in the absence of evidence of the value of defendant's property, to raise defendant's assessment.

Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by the city of Oakland against the Southern Pacific Company. From an order denying a new trial, and from a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. A. Dow, for appellant. H. S. Brown, for respondent.

PER CURIAM. This action was brought to recover taxes claimed to be due plaintiff by defendant upon property owned by it on the first Monday of March, 1894. Findings were filed, and judgment entered for defendant. Plaintiff appeals from the judgment and from an order denying its motion for a new trial.

The amount of taxes that were due by defendant, according to the assessment as made by the city assessor, at the rate as fixed by the proper authorities, has been paid, and therefore the same is not involved in this action. The council of plaintiff, sitting as a board of equalization, after notice to defendant, but without evidence or testimony of any kind as to the value of defendant's property described in its assessment, increased and raised the assessment as made by the assessor \$681,500, which amount was, by resolution, directed to be added to the assessed valuation of the property which had been so assessed by the assessor. The main question in the case is as to whether or not the board of equalization had power to so increase the assessment without hearing or taking any evidence

whatever. The board of equalization, being an inferior tribunal or body created by statute, has such jurisdiction and powers as are given to it by statute, and none others. The powers of the board in regard to the equalization of taxes are prescribed by the Political Code, § 3672 et seq. It is provided in section 3673: "The board has power after giving notice in such manner as it may by rule prescribe, to increase or lower the entire assessment roll or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money." Section 3677: "During the session of the board the assessor and any deputy whose testimony is needed must be present, and may make any statement, or introduce and examine witnesses, on questions before the board." It is, by section 3678, made the duty of the recorder annually to transmit to the assessor a complete abstract of all mortgages, deeds of trust, contracts, and other obligations by which any debt is secured, remaining unsatisfied on the records of his office, not barred by the statute of limitations, on the first Monday of March of each year. Section 3679: "The board must use the abstract, and all other information it may gain from the records of the county recorder or elsewhere, in equalizing the assessment of the property of the county, and may require the assessor to enter upon the assessment book any property which has not been assessed." The board of equalization, in passing upon a question as to whether an assessment is too high or too low, acts in a judicial capacity, and its decision is an adjudication, and as clearly so as a judgment for the recovery of the tax. *People v. Goldtree*, 44 Cal. 325.

The assessor is the officer expressly authorized by law to fix the value of all property for the purposes of taxation. His valuation is presumed to be correct, but the sections of the Code cited provide a remedy for the correction of errors of judgment or mistakes made by him in his valuations. He is not required to hear evidence, but must use his best judgment in the first place, and fix the actual cash value of the property according to the rules laid down for his guidance. In so doing he should use his knowledge of values and of comparative values, with the aim and purpose of assessing all property at its full cash value, no matter who the owner thereof may be. The legislature evidently intended to provide, not a tribunal to reassess the property, but a body clothed with the authority to hear and determine if the assessor has equally and impartially performed his duty. The board so created has not the power, of its own volition, and on its opinion or the opinion of its members, without hearing evidence, to reassess the property. If it had such power, there should be some tribunal to correct the

assessments so made by the board. In the early case of *People v. Reynolds*, 28 Cal. 112, it is said: "When the party interested appears in answer to the notice or summons, he is entitled to be informed of the matters which he may be required to meet; and until a case be established authorizing an addition to be made to the assessed valuation of the property, he will have nothing to rebut, but may rest securely upon the assessed valuation. The board have no more right to add to the assessed valuation of the property, without evidence authorizing them to do so, than a court or jury have to find facts and determine the rights of litigants without evidence. If boards of equalization may arbitrarily, and of their own mere caprice, increase the assessed valuation of property, then they possess a power without prescribed limits which may be used for purposes of the grossest oppression and injustice." The above decision was made under the revenue act of 1861 (St. 1861, p. 427), which provided: "The board of equalization shall have power to determine all complaints made in regard to the assessed value of any property, and may change and correct any valuation, either by adding thereto or deducting therefrom, if they deem the sum fixed in the assessment roll too small or too great, whether said sum was fixed by the owner or the assessor." The act of 1861 would seem to give the board more extensive powers than any change in the section has since given it. When the Codes were adopted, the substance of the act of 1861 in regard to powers of the board was enacted in section 3673, Pol. Code, and read: "The board has power to determine all complaints in regard to the assessed value of property, and may, except as prohibited in this title, correct any valuation by adding or deducting such sum as may be necessary to make it conform to the actual cash value." The section was amended in 1880 as it now reads, and has ever since stood in its present form. It is argued that the amendment of 1880 dropped from the section the words "all complaints in regard to the assessed value of property," and that the board may now, after giving notice, raise an assessment without any formal complaint being filed; hence, if no complaint is necessary, no evidence is required. We do not think it was the intention to dispense with evidence. In *City and County of San Francisco v. Flood*, 64 Cal. 508, 2 Pac. 267, decided in January, 1884, it is said: "The action of the board in dealing with the valuation of the property listed in the roll is based upon evidence which may be adduced before the board. Sections 3673, 3677, Pol. Code. As to increase of amount of valuation or reduction, the board can only act on evidence. We cannot see how it could act otherwise." In *Hagenmeyer v. Board*, 82 Cal. 218, 23 Pac. 16, it is said: "The record does not show by affirmative proof that the board did not act

upon evidence before it. Therefore its order in the premises is conclusive that it did act upon such evidence as was necessary." In *Farmers' & Merchants' Bank v. Board of Equalization*, 97 Cal. 325, 32 Pac. 314, it is said: "The board had no power to order a new assessment to be made without evidence." Under the above decisions it has become the settled rule in this state that the board can only act upon evidence in raising or lowering an assessment. We are aware that a different rule has been announced in some states, but generally the rule in such cases has been based upon the peculiar wording of the statute under which the decision has been rendered. But, when such is not the case, we think the rule as herein announced the better and safer one. It is claimed that the record shows that there was evidence taken before the board. Counsel, in his brief, under this claim says: "Mr. Ryan was called upon to testify, but refused to make any statement why the assessment should not be increased. Mr. Martin, in behalf of the defendant, testified simply that the assessment, as it then stood, was too high." We have examined the record, and do not find that Mr. Martin was ever sworn as a witness, or that he testified before the board. The finding of the court is: "That said resolution was adopted without the taking or hearing of any evidence or testimony whatever as to the value of said property, and no evidence or testimony of any kind whatever was taken, or heard, or considered." The finding is supported by the testimony in the record. The judgment and order are affirmed.

131 Cal. 280

OVEREND v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRANCISCO.
(S. F. 1,680.)

(Supreme Court of California. Dec. 31, 1900.)

CONTEMPT—REFUSAL OF WITNESS TO ANSWER QUESTION—QUESTION FOR COURT—CRIMINATING QUESTION—WAIVER—COMMITMENT—VALIDITY OF ORDER.

1. A witness is guilty of contempt for arbitrarily refusing to answer a question on the ground that it tends to incriminate him, since the question whether such question would tend to convict the witness of a felony is for the court.

2. A witness cannot be adjudged guilty of contempt for refusing to answer a criminating question in a criminal case because he testified to such facts on a preliminary examination, since his act in so doing was not a waiver of such objection.

3. Under Code Civ. Proc. § 1211, requiring an order of commitment for a contempt committed in the presence of the court to recite the facts, an order committing a witness for contempt in refusing to answer a question is void where it does not recite the question which the witness refused to answer.

4. Under Code Civ. Proc. § 1211, requiring an order of commitment for a contempt committed in the presence of the court to recite the facts, an order committing a witness for a contempt in refusing to answer a question is void, where it does not recite facts showing the jurisdiction of the court.

5. The refusal of one from whom property has been embezzled to state whether he knows the defendant, who is charged therewith, will authorize a commitment for contempt, since such question is material, as tending to identify the defendant, and an answer thereto does not tend to incriminate the witness.

6. A judgment committing a witness for contempt is not void, as being double, in providing that he be punished by fine and imprisonment for a certain time, and also that he be imprisoned until he answers a certain question, which latter part has been held void, since the first part is separate and independent from the last.

7. Where certiorari is brought to review three separate commitments for contempt, the objection that all were based on a single contempt, which would only sustain one judgment, is without merit, where two of the commitments are declared invalid.

Department 1.

Original certiorari by Alfred Overend against the superior court of the city and county of San Francisco; Wallace, Judge. Writ sustained in part, and dismissed in part.

J. J. Guilfoyle (F. W. Van Reynegom, of counsel), for petitioner. Jones & O'Donnell, for respondent.

GAROUTTE, J. This is an original proceeding in certiorari to annul three certain orders or judgments made by the trial court. The facts are these: On June 15, 1898, at 10 a. m., one Minnie Campbell was upon trial in the superior court charged with the commission of a felony. Petitioner, Overend, was called and sworn as a witness; whereupon he refused to answer any questions, upon the ground that his evidence would tend to criminate him. The court then made an order which recited that the witness was the prosecuting witness in the case, and that he had appeared at the preliminary examination of defendant, and testified fully, without objection; that he had been ordered by the court to answer the questions which had been addressed to him, and had refused; and thereupon it was adjudged that he was guilty of contempt in refusing to obey the order of the court, and as a punishment he was "committed to the county jail of the city and county of San Francisco until two o'clock p. m., and, moreover, that he pay a fine of five hundred dollars for his contempt in that behalf." At 2:30 p. m. of the same day the trial was resumed, and Overend was again called to the witness stand, and asked the following question: "Do you know the defendant, Minnie Campbell?" and he again refused to answer, upon the ground that his answer might tend to convict him of a felony. The witness further stated that he would refuse to answer any and all questions that might be propounded to him as a witness in the case; whereupon petitioner was adjudged guilty of contempt, and ordered to be punished by paying a fine of \$500, and be imprisoned in the county jail of the city and county of San Francisco until 10 o'clock a. m., June 16, 1898. At 10 o'clock a. m., June 16th, petitioner was again called to the stand

to testify, and was asked the following question: "Do you know the defendant, Minnie Campbell?" He again refused to answer the question, upon the ground that his answer might tend to convict him of a felony, and further stated that he would refuse to answer any and all questions which might be propounded to him as a witness in said case; whereupon the court made an order reciting the facts found in the first order made; also reciting the question asked and the refusal to answer it; that it was indispensable to the prosecution to prove that petitioner did know the defendant, Minnie Campbell; and that, if petitioner should answer the question, "Do you know the defendant, Minnie Campbell?" he would not thereby give any evidence which would tend to convict him of a felony; and, by reason of his refusal to answer the aforesaid question, the petitioner was declared guilty of a contempt of court, and was ordered to pay a fine of \$500, and be imprisoned in the county jail of the city and county of San Francisco for the period of five days. The court at this time, and as a part of the same judgment, also ordered petitioner to be confined in the aforesaid jail until he answered the question, "Do you know the defendant, Minnie Campbell?" This latter part of the judgment has been declared void by this court. *Ex parte Overend*, 122 Cal. 201, 54 Pac. 740.

1. It may be declared well settled that the witness cannot constitute himself an arbitrary or exclusive judge as to whether or not the evidence called for by the question would tend to convict him of a felony. It is a matter which the trial court is to decide, and even its action may be reviewed upon appeal to this court. It is said in *Whart. Cr. Ev.* § 469: "The witness is not the sole judge of his liability. The liability must appear reasonable to the court, or the witness will be compelled to answer. * * * But, in order to claim the protection of the court, the witness is not required to disclose all the facts, as this would defeat the object for which he claims protection. It is not, indeed, enough for the witness to say that the answer will criminate him. It must appear to the court, from all the circumstances, that there is a real danger, though this the judge, as we have seen, is allowed to gather from the whole case, as well as from the general conception of the relations of the witness. Upon the facts thus developed, it is the province of the court to determine whether a direct answer to a question may criminate." It is said in *Ex parte Stice* by this court in bank (70 Cal. 53, 11 Pac. 459): "Whether the answer to this question would be or might be of such tendency the court in which the trial is proceeding must adjudge, * * * and it cannot be called on to do so in advance of the question being put. To hold that the reason stated above would justify a person called in refusing to be sworn would be to make such a person, and not the court, the final

judge, and exclude the court from any consideration of the matter whatever. Such is not and cannot be the law." In the case of *In re Rogers* (Cal.) 62 Pac. 47, it is decided: "As to the relevancy and pertinency of the questions propounded, it is sufficient to say that the decision of that matter rests with the judge, and not with the witness, but the decision of the judge at nisi prius is reviewable by this tribunal under the writ. *Ex parte Zeelandelaar*, 71 Cal. 238, 12 Pac. 259. Otherwise, the production of evidence would cease to be under the control of the court, and would depend upon the opinion of the witnesses."

2. It appears that the trial court based its judgments of contempt largely upon the ground that the witness had, without objection, testified at the preliminary examination of Minnie Campbell, and for that reason had waived his right to refuse to testify at the trial upon the ground that his evidence would tend to convict him of a felony. The position of the trial court in this regard is untenable. This question of waiving the privilege is discussed and decided in *Temple v. Com.*, 75 Va. 896, and *Cullen's Case*, 24 Gratt. 624. It is said in those cases that the witness' statements elsewhere have nothing to do with the question.

3. Section 1211, Code Civ. Proc., declares: "When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer." It has been held by this court and other courts, with entire unanimity, that when the contempt is a constructive contempt, namely, committed without the presence of the court, then the affidavit of facts forming the basis of judicial action must show upon its face a case of contempt, and, if it does not, then the court is wanting in jurisdiction, and the order of contempt is void. In the case of a contempt committed in the presence of the court, the section says that the order adjudicating the contempt must contain a recital of the facts. This provision can only mean that the order must contain a recital of those facts which make out a case of contempt; that is, a recital of those facts which in a case of constructive contempt the law says must be incorporated in an affidavit. In *People v. Turner*, 1 Cal. 155, it is said: "We think it follows, from the distinction above considered, that the final order of the court by which a party is adjudged to have been guilty of a

contempt should always show, upon its face, the facts upon which the exercise of the power is based and the adjudication is made." In *Ex parte Rowe*, 7 Cal. 183, we find this language: "If, then, we have the right to set aside the order of the inferior court in a case of contempt, it would seem clear that the warrant of commitment should state all the material facts upon which the action of the court is predicated. In the present case it should have been stated that the grand jury were inquiring into a certain question, stating it; that the prisoner was sworn as a witness, and certain questions propounded to him, stating them; that he refused to answer; that the facts were thereupon presented to the court by the grand jury, and the prisoner required by the court to answer, which, being refused, he was committed for contempt." Again, in *Batchelder v. Moore*, 42 Cal. 415, the court said: "The power of a court to punish for alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support." In *Ex parte Zeelandelaar*, 71 Cal. 239, 12 Pac. 259, Justice Sharpstein said: "In order to show a legal cause for the imprisonment of the petitioner, the return in this case should show that the question which he refused to answer was pertinent to the matter in issue before the court, and, as this is not shown by the return, no legal cause for the imprisonment of the petitioner is shown, and he should be discharged." This conclusion of the justice, in substance, was indorsed by the other members of the court. In *Schwarz v. Superior Court*, 111 Cal. 112, 43 Pac. 580, we find this declaration: "The offense being criminal in its nature, both the charge, and the finding and judgment of the court thereon, are to be strictly construed in favor of the accused."

4. Let us try this case in the crucible furnished by the law as declared in the foregoing authorities. The questions asked a witness must be pertinent and material to the issue. The court has no power to compel a witness to answer any others, and the refusal to answer a question not pertinent and material to the issue is no contempt of the court. Yet the first order of contempt made by the trial court in this proceeding which is before us for review does not state the question or questions asked of the witness. It follows that this court does not know anything about either their materiality or pertinency to the issue on trial. As far as this court knows, the questions asked may only have had the purpose of eliciting evidence wholly foreign to any issue bearing upon the

case. There is not even a recital in the order of contempt that the questions and answers thereto were material and pertinent to the issue. The section of the Code quoted requires the facts to be stated, and that requirement demands the question or questions addressed to the witness to be stated in the order. In a proceeding for contempt, the jurisdiction of the court to make the order must affirmatively appear. The cases stated so declare the rule. Here there is no affirmative showing of jurisdiction, because it is not shown that the questions were material and pertinent. For this reason this order adjudging defendant guilty of contempt is void, and should be annulled.

5. We pass to the order of contempt made at 2:20 p. m. of the same day by the court. The minutes of the court show that the witness was asked the question, "Do you know the defendant, Minnie Campbell?" The minutes further show that petitioner refused to answer the question. As to this contempt, the order made by the court adjudging it contains no recital of any jurisdictional facts whatever. The statute says the facts showing the contempt must appear upon the face of the order. For this reason we hold the second order of contempt void.

6. As to the third order of contempt made, the jurisdictional facts therein recited are fully sufficient to invest the court with jurisdiction to make it, and, that being so, the questions are at once presented: First, was the question asked material and pertinent to the issue? and, second, would the answer to the question tend to convict the defendant of a felony? Minnie Campbell was upon trial charged with embezzlement. Overend, petitioner, was the party whose property she was charged with having embezzled. Under these circumstances, the question, "Do you know the defendant, Minnie Campbell?" was material and pertinent to the issue as a means of identifying the defendant. Petitioner's testimony to this point was probably absolutely necessary in order that the charge might be established. Second, would the answer to the question, "Do you know the defendant, Minnie Campbell?" tend to convict the witness of a felony? If his answer was "No," it certainly could not have any such effect; and, if his answer was "Yes," we see nothing in that evidence which would tend in any material degree to convict the witness of a felony. If this question and answer, standing alone, would have such a tendency, we can hardly imagine any question and answer but that would have the same tendency. A mere acquaintance with defendant, Minnie Campbell, of itself, certainly could not tend to convict the witness of a felony. It was not for the witness to surmise, "Another question is going to follow which will tend to convict me of a felony, and therefore I will refuse to answer this one." He cannot know that a second question will be asked at all. It is only when the important question—

some question tending to criminate—is asked that he may plead this privilege. Perchance it never will be asked.

Some point is also made by petitioner that the evidence discloses that during the progress of the trial he asked the prosecuting officer to dismiss the charge against the defendant, Minnie Campbell. But we attach no importance to this fact. There is nothing to indicate that this act of petitioner was in any way criminal, even conceding that a criminal proposition of that character, made to the prosecuting officer, would have justified this witness in refusing to answer the question, "Do you know the defendant Minnie Campbell?"

We attach no importance to the claim that the judgment, under the third order, was in the nature of a double judgment, and therefore void. The court has already decided in *Ex parte Overend*, supra, that the second portion of the judgment was void. The part remaining, being separate and independent, can therefore stand as a valid and binding judgment.

It is also claimed that these various refusals to testify constitute but a single, continuing contempt, which may only be satisfied by a single judgment. *Ex parte Stice*, supra, appears to declare a contrary doctrine. But regardless of that decision, there being but one valid order of contempt made by the trial court, this contention, for that reason, fails of merit.

For the foregoing reasons, the court concludes that the first and second orders of contempt are void, and they are hereby annulled and set aside. The third order of contempt made is valid and binding, and as to it this writ will be dismissed.

We concur: VAN DYKE, J.; HARRISON, J.

131 Cal. 137

CITIZENS' BANK OF LOS ANGELES v.
LOS ANGELES IRON & STEEL
CO. et al. (L. A. 759.)

(Supreme Court of California. Dec. 29, 1900.)

TRUST DEED SECURING BONDS—FORECLOSURE BY SINGLE BONDHOLDER—CONDITIONS PRECEDENT—DEMAND ON TRUSTEE—OFFER OF INDEMNITY—NECESSITY—COMPLAINT—AVERMENTS—AMBIGUITY—REVIEW—ACTION ON NEGOTIABLE BONDS—DEMAND FOR PAYMENT—NECESSITY—PLEADING.

1. On the foreclosure of a trust deed the complaint alleged that plaintiff was the owner of some of the bonds and coupons secured thereby. The trustee stated in his answer that it refused to sue solely because a majority of the bondholders had not requested it in writing, and an issue raised as to plaintiff's alleged ownership was determined in plaintiff's favor. *Held*, that the failure to allege that plaintiff notified the trustee of the number of bonds held by it when it demanded foreclosure was not such an uncertainty in the complaint as would justify reversal of the judgment on the merits because a demurrer for uncertainty and ambiguity was overruled.

2. Where demand on the trustee to foreclose a trust deed is made by an owner of bonds secured thereby, an offer to indemnify him is unnecessary if the trustee makes no demand therefor.

3. The complaint in an action to foreclose a trust deed brought by a bondholder secured thereby, in his own behalf as well as in behalf of all the other bondholders, need not set forth the several owners of the bonds, if it appears that they are unknown to him.

4. By Civ. Code, § 3130, "it is unnecessary to make a demand for payment on the principal debtor in a negotiable instrument in order to charge him"; and hence, in an action on negotiable bonds, demand need not be alleged in the complaint, the suit being all the demand required.

5. If, in an action on bonds, a demand for payment is alleged, a failure to state of whom made, or that it was made improperly or of the wrong person, is matter of defense.

6. A trust deed securing bonds may be foreclosed by a single holder of unpaid coupons on the refusal of the trustee to do so on request, regardless of whether or not the refusal was arbitrary or unlawful.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Foreclosure by the Citizens' Bank of Los Angeles against the Los Angeles Iron & Steel Company and others. From a judgment for plaintiff, defendant company appeals. Affirmed.

W. B. Mathews (Chas. H. McFarland, of counsel), for appellant. F. W. Burnett, for respondent.

CHIPMAN, C. Foreclosure of deed of trust. Plaintiff had judgment, from which the defendant the Los Angeles Iron & Steel Company appeals. The only question presented relates to the correctness of the order overruling the demurrer of defendant and appellant, the steel company. On May 1, 1894, the steel company executed a trust deed to the National Trust Company, as trustee, to secure the payment of the principal and interest of certain bonds, amounting to \$30,000, payable in 10 years, and interest coupons payable semiannually. On September 25, 1897, plaintiff brought this action, alleging that it was the owner of \$5,000 of these bonds, and of the attached coupons maturing May 1, 1895, and thereafter. Foreclosure was asked for the unpaid interest only, but the complaint was framed so as to authorize the sale of the entire mortgaged property under section 728, Code Civ. Proc. It was alleged that plaintiff was ignorant of the number of the bonds outstanding, and the owners thereof; that the trustee had been requested to bring the suit, but had refused to do so; and that payment of the coupons had been demanded more than six months prior to the commencement of the action. An accounting was asked as to the number and ownership of the outstanding bonds and coupons.

1. The only alleged ground of ambiguity or uncertainty is that the complaint fails to show what proportion of the bonds alleged therein to have been issued by the steel company is owned and held by plaintiff, or was so held at the time it demanded of the National Trust Company, trustee under the

deed of trust, to bring the suit to foreclose. This demand was made August 15, 1897, and the complaint was filed September 25, 1897, and the allegation is that plaintiff "is the owner," i. e. was the owner at the filing of the complaint. Whether plaintiff in fact owned any bonds at the time it made the demand of the trustee to bring the suit, and, if so, how many, might be important as matter of defense, should its ownership at that time be denied. But we do not think the failure to allege that plaintiff made known to the trustee the number of bonds held by plaintiff when the demand was made would be such uncertainty as would justify a reversal of the judgment. The complaint did allege the fact of ownership of certain described bonds. The trustee was made a party defendant and answered, and in its answer it stated that it refused to bring the suit for the sole reason that a majority of the bondholders had not, in writing, requested it to bring the suit. Defendant and appellant, the steel company, answered the complaint, denying plaintiff's ownership of any bonds; and this issue was determined at the trial, and the fact was found to be that plaintiff was the owner of certain bonds and coupons, as alleged in the complaint. A judgment on the merits will not be reversed on a demurrer for uncertainty and ambiguity, under the circumstances as disclosed here.

2. Objection is made, presumably in support of the general demurrer, that there is no allegation in the complaint that demand for interest was made before demand on the trustee to bring the suit; no allegation that the interest had been due six months prior to demand upon the trustee; no allegation that the trustee had been informed when he refused to bring the suit that interest had not been paid, or that plaintiff owned the bonds, or that a majority of the bondholders had requested the trustee to bring the suit, or that an indemnity bond had been offered the trustee. These objections relate to provisions found in the bond or in the deed of trust. There was no demurrer for uncertainty in respect to these matters. The point of the general demurrer seems to be that the showing is insufficient to justify the plaintiff in bringing the action, thus taking the control of the matter out of the hands of the trustee. It appears, however, that the trustee answered, alleging that the ownership of the bonds was unknown to it, and admitting that it had been called upon to bring the suit, and that it refused, as already stated, for the sole reason that a majority of the bondholders had not made a written request for it to bring the action. It appears from the decree that all outstanding bonds and coupons were brought forward by their respective owners at the trial, and all the bondholders concurred in the action and were provided for in the decree, and none of them appeals, nor does the trustee.

tee, and that default in the payment of interest had continued for over two years prior to request on the trustee to bring the suit. No demand was made by the trustee for indemnity, and an offer of indemnity to him was, therefore, not necessary. Plaintiff could not allege the several ownerships of the bonds; for, as shown by the complaint, plaintiff did not know who were the owners; but plaintiff, in effect, brought the action for the benefit of all bondholders, and, as we have seen, they were all ascertained at the trial, and they surrendered their bonds and coupons. As to alleging demand upon the steel company for payment, demand was alleged, and that such demand was made more than six months prior to commencing the action. But no demand on the steel company was necessary, so far as it was concerned (Civ. Code, § 3130), the suit being all the demand required. *Cousins v. Partidge*, 79 Cal. 224, 21 Pac. 745; *Jones v. Nicholl*, 82 Cal. 32, 22 Pac. 878. Furthermore, as demand was in fact alleged, a failure to state of whom made, or that the demand was made improperly or of the wrong person, would be matter of defense. Appellant's principal contention is that a single bondholder cannot bring the suit without having shown that the trustee has arbitrarily and unlawfully refused to act; citing *General Electric Co. v. La Grande Edison Electric Co. (C. C.)* 79 Fed. 25; *Id.*, 31 C. C. A. 118, 87 Fed. 590; and other cases. It is well settled, I think, that any holder of unpaid coupons may sue upon refusal of the trustee to do so after request upon him. *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. Ed. 47, and cases last above cited. The cases cited by appellant do not require that the refusal of the trustee must appear to have been arbitrary or unlawful. Where the deed authorizes the trustee to proceed upon the written request of a majority of the bondholders, it is held in those cases that he cannot act without such petition. But the bondholder has a right of action upon showing that the trustee has refused to bring the suit, even though the trustee may have been justified, under the provisions of the deed, in refusing. If this were not so, it would result in placing the same limitation on the right of the individual bondholder to bring the action as is placed on the trustee, namely, the written request of a majority of the bondholders; and this would practically make it possible for a majority to deprive the minority of the remedy of foreclosure altogether. There is no provision in the deed of trust authorizing any such limitation upon the bondholder's rights. Apart from the foregoing, as we have seen, it appeared that all the parties interested in the action, including the trustee, were before the court, and the bondholders not parties came in and surrendered to the court their bonds and coupons. Besides, it was made to appear by the answer of R. H. Her-

ron, who was permitted to answer as a defendant, that he became the owner of all of the steel company's property at a receiver's sale, and the decree refers to him as the successor in interest of appellant. This answer was treated as a cross complaint, and was served on defendant the steel company, and was not answered by it. The substantial rights of appellant have in no wise been injuriously affected, and no good purpose can be subserved by a retrial of the case. The judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(131 Cal. 311)

PEOPLE v. BROOKS. (Cr. 646.)¹

(Supreme Court of California. Jan. 3, 1901.)

CRIMINAL LAW—RECORD—APPEAL—EVIDENCE—SUFFICIENCY—HOMICIDE—MURDEROUS DESIGN—POLICE OFFICER—PRIVATE CITIZEN—LAW OF ARREST—INSTRUCTIONS—SUFFICIENCY.

1. Only such evidence which the record shows to have been introduced in a criminal case will be considered on appeal.

2. Deceased was shot at by a policeman, who testified that his revolver was of a 44-caliber, whereupon defendant pursued deceased, firing a number of shots at him with what his close friends testified was a 41-caliber pistol. The pursuit lasted four or five blocks, and it was shown that after defendant fired the last shot deceased threw up his hands, and exclaimed, "Oh, my God!" and that he was found lying a short distance from where he made the exclamation. On examination it was found that deceased was hit by only one bullet, which was of a 44-caliber. Held sufficient to show that deceased was killed by defendant, though there was no positive evidence that he had a 44-caliber pistol, since the jury were not obliged to believe everything to which defendant's close friends testified.

3. Defendant, who was a barkeeper, left his saloon in response to a telephone message, going to another saloon, and, after a whispered conversation there with a person, left, and in 10 or 15 minutes returned to his saloon, appearing to be in a state of great excitement. He hurriedly procured a revolver, and went to the back door, whereupon a police officer followed him, and, seeing deceased in the back yard with a revolver in his hand, went out, and ordered him to throw up his hands. The latter fired a shot, and the officer, after firing six times at deceased, dropped, and went towards the saloon, saying to defendant, "Help me, and shoot him." Defendant emptied his revolver at deceased, and then returned, procured another pistol, and pursued deceased, firing a number of times, deceased falling after the last shot, and dying as the result of a bullet hole in his body. Held that, though defendant may have pursued deceased, and shot at him, through a high sense of duty imposed on him by the police officer, the jury were warranted in finding that he was actuated by a murderous design to kill him.

4. In a trial for homicide the court charged that a citizen must assist in arresting a person when called on to do so by a peace officer, and that, if such arrest is resisted, such citizen may use sufficient force to effect his purpose, even though it go to the extent of taking life; and

¹ Rehearing denied February 2, 1901.

that fleeing from arrest constituted a resistance. Further, that if the jury believed from the evidence that defendant had a right to believe, as a reasonable man, and did believe, that deceased had unlawfully shot at or mortally wounded a peace officer in resisting arrest, it was his duty to pursue and arrest deceased, and use all necessary means of effecting his arrest. Held to correctly and sufficiently state the law as to a private citizen's right to assist a peace officer when called on to make an arrest.

5. Under Pen. Code, § 671, providing that, where the punishment is imprisonment for a term not less than any specified number of years, and no limit to the duration of the imprisonment is declared, the defendant may be sentenced to imprisonment during his natural life, the court may sentence one found guilty of murder in the second degree to imprisonment for life.

In bank. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Jack Brooks was convicted of murder in the second degree, and he appeals. Affirmed.

Lewis H. Smith, Frank H. Short, W. D. Tupper, W. P. Thompson, and W. D. Crichton, for appellant. Tirey L. Ford, Atty. Gen., for the People.

McFARLAND, J. By the information the appellant, Brooks, and one Tony Rice were jointly charged with the murder of Don Donnelly. Brooks was tried separately, and convicted of murder in the second degree. He appeals from the judgment and from an order denying a motion for a new trial.

The record is in a very loose and unsatisfactory condition. The bill of exceptions, after showing that certain witnesses were examined at the trial, and certain evidence taken, contains a statement of the contents of a certain alleged dying declaration of the deceased, which was used at the preliminary examination before the magistrate; but the record does not show that said declaration was introduced in evidence at the trial. There is also a statement of a recitation of certain evidence and facts made by the judge at the time he pronounced sentence, but the things which he recited do not appear among the evidence taken at the trial. Of course, this is a mere statement of what the judge said, but there is nothing to show that the evidence to which he alludes was introduced; and these things cannot be considered here. In determining this appeal we can consider only the evidence which the record shows to have been introduced. The record, as we must consider it, presents only two contentions of appellant which need be noticed: First, that the evidence is insufficient to sustain the verdict of guilty; and, second, that the court erred, to appellant's prejudice, in refusing to give certain instructions to the jury which appellant asked.

1. We cannot say that the evidence was insufficient to support the verdict. The main facts of the case are these: On the morning of June 27, 1899, shortly before daylight, appellant was in the Favorite saloon in the city

of Fresno, where he was employed as a bar-keeper, and, after some conversation through the telephone,—in the saloon,—he went out, and remained away about 10 or 15 minutes, when he returned. When he left the Favorite he went to another saloon across the street, and in the immediate neighborhood, called the "Golden West," to which place he had been summoned through the telephone. He had there a whispered conversation with a Mr. Ardell, and, after remaining in the Golden West a minute or two, he went out of the side door behind certain "cribs" or houses of prostitution. That part of the city is known generally as Chinatown, and is occupied to a great extent by prostitutes. It does not appear where he went immediately after leaving the Golden West, but, as before stated, in about 10 or 15 minutes he returned to the Favorite saloon, and appeared to be in a state of great excitement. He hurriedly went behind the bar, and got a pistol, and went to the rear door of the saloon. At that time Rice, who was a police officer, and was in or at the threshold of the saloon, followed the appellant to the back door, and said to him something like "This is my business," or, "If there is going to be any shooting, I will do it." Rice looked out of the glass door, and, seeing the deceased, Donnelly, with a pistol in his hand, went out and said to him, "Throw up your hands;" but Donnelly immediately fired one shot, either at Rice (as the latter testified) or up into the air (as another witness testified), and Rice then fired six shots at Donnelly. Rice testified that, his pistol being then empty, he dropped, and went into the saloon, and that as he dropped he called on appellant to "come and help him," and said, "My impression is that I said 'Help me' and 'Shoot him,' both." Appellant, who had gone out of the saloon with or closely behind Rice, immediately began to fire at Donnelly, who retreated; and appellant, following him, fired six shots at him, which emptied his pistol. He then returned a short distance, and, meeting Ardell, got another pistol from the latter, and then again pursued the deceased for about four blocks, and fired at him again at least twice. The last shot was near the residence of Mrs. Shober, who was awakened by the shots, and who testified that she got up, and saw Donnelly running; and that about half a second after the last shot he threw up his hands and exclaimed, "Oh, my God!" He was found lying about a block from Mrs. Shober's house, with the bullet hole in his body which caused his death a few days afterwards. He had been shot only once, and the wound was made by a 44-caliber Smith & Wesson pistol, and Rice testified that this was the kind of pistol with which he shot. It was in evidence that the pistol with which appellant fired the first six shots was a 41-caliber Colt, and it is claimed by appellant that there was proof that the pistol which he received from Ardell was a 41-caliber. The contentions of appel-

lant are: First, that the deceased must have been killed by a 44-caliber bullet from Rice's pistol, and could not have been shot by appellant, because the latter had no pistol of that kind; and, second, that, if appellant killed the deceased, he was justified in so doing by the command of the police officer, Rice. As to the first contention, it is sufficient to say that appellant had more than one pistol, and that there was sufficient evidence to warrant the jury in finding that the deceased was killed by one of the last shots fired by appellant, although there was no positive evidence to the point that he had a 44-caliber pistol. The jury were not compelled to believe everything testified to by witnesses who were apparently his close friends. As to the second contention, it is enough to say that, while it might be imagined, perhaps, that appellant pursued the fleeing Donelly, and shot at him at every opportunity, solely through a high sense of duty imposed on him by Rice, still the facts amply warranted the jury in finding that he was actuated by a murderous design to kill him. Indeed, what Rice said can hardly be construed as a request to arrest Donelly, or to pursue him for that purpose. Rice testified that while he himself was shooting at Donelly he supposed that the latter was still shooting at him, which was a mistake, as Donelly shot only once; and what he said to appellant when his own pistol had been emptied was apparently for the purpose of asking appellant to rescue him from his supposed present danger. At all events, it was for the jury to say why appellant alone pursued the deceased so far, and from all the evidence they were justified in finding that he did so for the purpose of committing murder.

2. We do not think that appellant was at all prejudiced by the refusal of the court to give certain instructions asked by his counsel. The court did, at the request of defendant, give to the jury some 14 instructions, and these instructions, together with others given by the court of its own motion, correctly and fully stated the law applicable to the case; and these instructions were certainly very favorable to the appellant. We think that all of the instructions refused which were correct were substantially included in the instructions given. The rejected instructions most insisted upon by appellant as correct refer to the right of a citizen to assist a police officer when called upon to make an arrest; but as to this matter the court instructed the jury at the request of the appellant as follows: "A citizen must assist in the arrest of a person when called upon by any peace officer so to do, and when so called upon the law clothes such person or citizen with the rights and duties and immunities of such officer. While an officer, or citizen requested by an officer to assist in making an arrest, must use as little violence as possible, if resisted he may use sufficient force to effect his purpose, even though it go to the extent of taking life.

Resisting arrest does not always constitute the use of physical force. A person may resist arrest by fleeing from an officer attempting to arrest him. If the jury believe from the evidence that the defendant had a right to believe, as a reasonable man, and did believe, that the deceased had unlawfully shot at or mortally wounded the officer, Tony Rice, in resisting arrest, before giving pursuit and the firing of the fatal shot, then the defendant not only had the right, but it was his duty, to so pursue and arrest the deceased, and use all necessary means of effecting his arrest." Under these instructions the jury were fully informed as to the law on this subject, and the appellant was not prejudiced by the refusal of the court to give the instructions refused.

There is nothing in the point that the court had no authority to sentence the appellant to imprisonment for life. Section 671 of the Penal Code expressly provides that, where the punishment is imprisonment for a term not less than any specified number of years, and no limit to the duration of the imprisonment is declared, the defendant may be sentenced to imprisonment during his natural life. There are no other points requiring notice. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; HENSHAW, J.; VAN DYKE, J.; GAROUTTE, J.; HARRISON, J.

131 Cal. 183

GEORGES v. KESSLER et al. (L. A. 778.)

(Supreme Court of California. Dec. 29, 1900.)

MECHANIC'S LIEN—FORECLOSURE—TRIAL—OBJECTION TO EVIDENCE—COMPLAINT—AMBIGUITY—SUFFICIENCY—DETERMINATION ON DEMURRER—EXHIBIT—REVIEW—EVIDENCE—FINDING OF COMPLETION OF WORK.

1. In determining on demurrer whether a complaint on foreclosure of a mechanic's lien sufficiently alleges the contents of the notice of lien, a copy of the notice attached, and expressly made a part of the complaint, must be regarded as a part of it as much as if it had been set forth in the body thereof.

2. An objection to a complaint to foreclose a mechanic's lien that it cannot be determined therefrom whether the contract was made by one or both of two defendants named, is without merit where it expressly alleges that the contract was made "with the said defendant," thereupon naming one of the defendants referred to.

3. Where a complaint on foreclosure of a mechanic's lien expressly alleges that a husband and wife, defendants thereto, are the owners of the land, and there is no intimation that she was a party to the contract otherwise than that she assented thereto, an objection that the complaint is ambiguous, in that it cannot be ascertained whether she is sought to be held under an alleged contract made with her, or on account of some interest she has in the land, cannot be sustained.

4. On foreclosure of a mechanic's lien, where the notice of lien was offered in evidence, defendant objected on the ground "that it was incompetent, irrelevant, and immaterial, and that it was a variance from the allegation of the complaint; no such lien having been pleaded,

and no contract set out in the complaint such as is described or attempted to be described in said lien." *Held*, that the objection did not point out to the court wherein a variance existed, or was supposed to exist; and was, therefore, properly overruled.

5. The finding of the court on foreclosure of a mechanic's lien that plaintiff fully completed the work according to the terms of the contract was objected to as not being justified by the evidence, because plaintiff did not put in an electric alarm bell; and on this point plaintiff testified that defendant directed him not to put it in, saying he would not pay for it, while defendant testified that its cost was included in the proposed sum for which the work was to be done. *Held* that, the evidence being conflicting, the finding could not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Action by Ellis P. Georges against W. J. Kessler and others. From a judgment for plaintiff, and from an order denying a new trial, defendant W. J. Kessler appeals. Affirmed.

Len Claiborne, Dunnigan & Dunnigan, for appellant. F. G. Hentig and John W. Kemp, for respondent.

HAYNES, C. Action to foreclose a mechanic's lien under a contract between the plaintiff and defendant W. J. Kessler for an improvement upon a building situate upon premises alleged to be the property of Mr. and Mrs. Kessler. Defendant Hanna was alleged to have or claim some interest therein, but she made default, and will not be further noticed. The plaintiff had findings and judgment, and defendant W. J. Kessler appeals from said judgment and from an order denying his motion for a new trial.

The demurrer to the complaint is general and special. Under the general demurrer it is said that the complaint does not allege that the notice of lien described the property sought to be affected by the lien, nor the terms, time given, and conditions of the contract. The complaint fully described the property as the westerly 82½ feet of lot 9 in block F of the Mott tract, and identified it as that upon which the building whereon the work was done was situated, and, after stating the work agreed to be done, stated the amount to be paid, and that it was agreed to be paid upon completion of the work; and, in addition to these allegations, which, we think, were sufficient, a copy of the notice of lien was attached to and expressly made part of the complaint, and became part of its allegations; "for there can be no difference between setting forth such instrument in the body of the pleading and in annexing it as an exhibit, and making it a part of the pleading by proper reference. In each case the copy is a part of the pleading. The only difference is in the arrangement or sequence of the parts, and this difference is entirely unimportant upon the question whether the pleading states a cause of action." Lambert

v. Haskell, 80 Cal. 612, 22 Pac. 328; Ward v. Clay, 82 Cal. 506, 23 Pac. 50, 227. See, also, the concurring opinion of Mr. Justice Temple in *Society v. Thornton*, 127 Cal. 577, 60 Pac. 37.

The first specification of ambiguity is to the effect that it cannot be determined whether the contract was made by Mr. Kessler, or Mrs. Kessler, or by both. It expressly alleged that the contract was made "with the said defendant W. J. Kessler," and the same statement is made in the notice of lien. It is also specified that the complaint is ambiguous in that it cannot be ascertained whether Mrs. Kessler is sought to be held under an alleged contract made with her, or on account of some interest she has in the land. It was expressly alleged that Mr. and Mrs. Kessler are the owners, and there is no intimation that the wife was a party to the contract otherwise than that she assented to it. The next specification is a repetition of the first above noticed. The next is that the complaint is ambiguous and uncertain in that the allegations in the complaint are inconsistent with the exhibit attached to it; but in what respect, or in what particular, is not specified. When the notice of lien was offered in evidence by the plaintiff, defendant objected on the ground "that it was incompetent, irrelevant, and immaterial, and that it was a variance from the allegation of the complaint,—no such lien having been pleaded, and no contract set out in the complaint such as is described or attempted to be described in said lien." This objection did not point out to the court wherein a variance existed, or was supposed to exist.

Nor do we think there is in fact any variance between the contract stated in the complaint and that stated in the notice of lien. The contract was oral, the proposition and specifications being memoranda. The proposition made by plaintiff was to do the work for \$138, "alarm bell and battery not included." This proposition was accepted by defendant. The reference to the alarm bell shows that there had been previous conversations, in which an alarm bell was spoken of, and the evidence confirms the inference. The lien filed was for \$138, the amount or value of the work stated in the proposition (the alarm bell and battery not included), less \$5 paid on account. At the conclusion of plaintiff's evidence in chief the defendants moved for a nonsuit on the ground that the evidence was not sufficient to show that the work was done according to the specification and contract set out, and on the further ground that there was no testimony tending to prove the contract set out in the complaint. This motion was properly denied. It was but a restatement of appellant's contention as to the supposed variance between the complaint and the notice of lien. In the transcript there are several specifications of alleged insufficiency of the evidence to support the findings, though but one of them is noticed in appel-

lant's brief. The court found, in substance, that plaintiff fully completed the work according to the terms of the contract; and it is contended that this finding is not justified, because the plaintiff did not put in said electric alarm bell. Upon this point the plaintiff testified that defendant directed him not to put in the alarm bell, saying he would not pay for it; while the defendant testified that the cost of the alarm bell was included in the proposed sum of \$138. Upon this state of the evidence the finding cannot be disturbed. I advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

131 Cal. 316

PEACHY v. WITTER et al. (L. A. 782.)

(Supreme Court of California. Jan. 4, 1901.)

MORTGAGES—AGREEMENT TO EXTEND TIME OF PAYMENT—WANT OF CONSIDERATION—ATTORNEY'S FEES—FORECLOSURE SUIT—BILL—EVIDENCE—ADMISSIBILITY—ADJOURNMENT—INTERVENTION.

1. A description of property in a bill to foreclose a mortgage as lot 18, block 16, in the city of E., county of S., state of C., as per map of said city in the office of the county recorder of said county, is not so uncertain as to render the complaint demurrable.

2. Where there is a conflict as to the making of an agreement extending a note, a finding will not be reversed on appeal.

3. A promise, made without consideration, to extend the time of payment of a note, does not prevent suit thereon within such time.

4. Where an attorney for defendant states that he is a witness, and requests an adjournment until afternoon, to secure the presence of his associate counsel, who was detained by sickness in his family, the cause will not be reversed for a refusal to grant such request, where it is not shown that all defenses were not fully presented.

5. Where a note containing an agreement for attorney's fees is secured by a mortgage, it is proper to grant attorney's fees on foreclosure.

6. Where a mortgagee offers to settle a cause on the payment of the principal, and afterwards brings foreclosure, a letter from the mortgagor accepting such offer after suit was commenced is not admissible.

7. Where there is no consideration for an agreement to settle a debt secured by a mortgage for less than the amount due, evidence of such agreement is not admissible in a foreclosure suit.

8. Where the intervener in a mortgage foreclosure suit contends that a decree in favor of the complainant would cloud his title, but his affidavit does not disclose the date of his title or the nature of his ownership, it is not error to deny the intervention.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

Bill by William T. Peachy against G. F. Witter, Jr., and others for the foreclosure of a mortgage. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

E. Graves and G. F. Witter, Jr., for appellants. W. H. Spencer, for respondent.

GRAY, C. The defendants appeal from a judgment against them and from an order denying their motion for a new trial in a suit brought by plaintiff on a promissory note for \$400, besides interest, and to foreclose a mortgage given to secure said note. There is also an appeal from an order denying one Charles Orendorff the right to intervene.

1. Appellants contend that the description of the premises alleged to be mortgaged, as it appears in the complaint, is uncertain, and for that reason the demurrer to the complaint for uncertainty should have been sustained. A part of the property included in the mortgage, as appears from the complaint, was described as lot 18 of block 16 of the city of El Paso de Robles, county of San Luis Obispo, state of California, as per map of said city on file in the office of the county recorder of said county. This description is undoubtedly plain and certain; and, as to the description of the rest of the property included in the mortgage, while it is not as certain, perhaps, as it should have been, yet it appears from the subsequent course of the case that the appellant understood just what land was meant by the description, and was not misled or even inconvenienced in any way in making his defense on account of any uncertainty in the description of the premises contained in the complaint. There was not any error, therefore, in overruling the said demurrer that should lead to a reversal of the judgment.

2. Appellants' next contention is that the action was prematurely brought, for the reason that the agent of plaintiff, acting within his authority and on behalf of his principal, by oral agreement extended the time for the payment of the note for a reasonable time, which reasonable time did not expire until after the date on which the action was begun. There is a conflict in the evidence as to whether the agent made such an agreement, and for that reason the finding of the court contrary to the contention of defendants should not be disturbed. Again, if there was any such an agreement for extension of time as claimed, it was made without any consideration therefor, and is a mere nudum pactum, and cannot be enforced. *Hughes v. Davis*, 40 Cal. 117.

3. On the calling of the case for trial one of the defendants, who had signed the answer as one of the attorneys, stated that he was a witness in the case, and desired the presence of his associate counsel, who was absent on account of sickness in his family, and asked that the case go over until afternoon, when his said associate could possibly be present. The court denied the request. We here repeat what was said by the court in *Bank v. Chester*, 55 Cal. 49: "Granting or refusing a continuance on account of the ab-

sence of counsel is a matter which rests largely, if not wholly, in the discretion of the court, and we cannot see that there was any abuse of discretion in this case." The case was tried before the court without a jury. The defendants were represented at the trial by one of their attorneys of record, and apparently their defenses were presented for all they were worth. We see no error in the refusal of the court to continue the case.

4. The complaint set out a copy of the note in suit, which contained, as a part thereof, a provision for a reasonable attorney's fee. It was also alleged in the complaint that the mortgage was given "to secure the payment of said note." These allegations of the complaint are found by the court to be true, and such finding is supported by the evidence. The agreement for an attorney's fee, therefore, appears to have been secured by the mortgage, and it was proper to so treat it in the decree of foreclosure. *Bank v. Goldtree* (Cal.) 61 Pac. 785.

5. A letter was offered in evidence, dated February, 1899, written by defendant Witter, Jr., some days after the action was begun, and purporting to accept a proposition of plaintiff, theretofore made, to the effect that he (plaintiff) would release the mortgage on payment of the principal of his note. This letter was properly excluded for two reasons: First, because it was written too late to constitute an acceptance of the alleged offer of plaintiff, as the said offer had been revoked by the commencement of the action; and, second, this letter, as well as the other evidence touching an agreement to take less than the whole amount due the plaintiff, was immaterial, because it appeared that there was no consideration for any such an agreement. An agreement to take less than the full amount of a claim, made after the same is due, must have a new consideration to support it, or such agreement cannot be enforced. There was no error in the exclusion by the court of evidence offered by appellants.

6. Orendorff seeks to intervene in the action for the reason, as stated on his behalf, "that a part of the premises described in said complaint is the property of said Chas. Orendorff," and "that if judgment were rendered in this action pursuant to said complaint, and the property sold as described in said complaint, it would cloud the title of the said Chas. Orendorff." Orendorff presented no complaint in intervention to the court, and he does not disclose the date of his title or the nature of his ownership in the affidavit filed on his behalf. From the meager showing made, it was impossible for the court to determine that his title was one that could be litigated in a suit for foreclosure. The burden was on him to show that his was a proper case for intervention. It appears to be the settled law that an adverse claim to the land in opposition to the mortgagor and mortgagee cannot be tried in the equitable action

of foreclosure. *Williams v. Cooper*, 124 Cal. 666, 57 Pac. 577; *Murray v. Etchepare* (Cal.) 61 Pac. 930. On the showing made, the court properly denied the intervention.

The other points urged by appellants are not of sufficient importance to require special notice. We advise that the judgment and orders appealed from be affirmed.

We concur: CHIPMAN, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

(131 Cal. 291)

In re LUFKIN'S ESTATE. (Sac. 825.)¹

(Supreme Court of California. Jan. 3, 1901.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW—TRIAL COURT—DISCRETION—WILL—CONSTRUCTION—LEGACY—ELECTION.

1. Where decedent's estate consisted of personal property worth \$6,500, and his widow had property of her own which produced an income of \$204 per annum, an allowance of \$40 per month to the widow, pending administration, will not be disturbed as unreasonable, or as constituting an abuse of discretion on the part of the trial court.

2. Where testator, whose estate consisted entirely of personal property, devised \$1,000 to his widow, on the payment of which she was to relinquish all further claim on his estate, the widow was entitled to an allowance pending administration of the estate, since her election between the legacy and an allowance was not to be exercised until payment of the legacy.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Application by the widow of D. T. Lufkin, deceased, for a monthly allowance out of the estate pending administration. From an order granting the allowance, certain heirs appeal. Affirmed.

Holl & Dunn and A. L. Shinn, for appellants. Albert M. Johnson, for respondent.

SMITH, C. Appeal from order making allowance to widow of deceased of \$40 per month for maintenance pending administration. The application was contested by the daughters and the children of a deceased son of a former marriage. The grounds of opposition were (1) that the widow had separate property sufficient for her maintenance; (2) that there was no property in the estate from which the allowance could be paid; and (3) that under the will of the deceased she was put to her election between her right to family allowance and the legacy bequeathed her.

The estate consists of a note and mortgage of the value of between \$7,000 and \$8,000, held by the California State Bank as security for an indebtedness of the deceased amounting, at the date of bearing, to \$2,500. The widow, it appears, has property of her own

¹ Rehearing denied February 4, 1901.

amounting to something over \$3,000, consisting of \$1,621 in bank, and the balance in solvent promissory notes, and she has also the interest for life on \$2,000, her income being \$204.73 per annum. With regard to the first point, this court cannot say that the separate property of the widow was sufficient for her maintenance. Nor can it entertain the question whether it was the duty of the court below to consider the separate property of the widow in fixing her allowance; for there is nothing in the record to show whether it did consider it or not. And, whether it did or did not consider it, this court cannot say that the allowance was not reasonable, or that it was more than was necessary for the maintenance of the widow. By the provisions of section 1466, Code Civ. Proc., the function of determining those questions is vested in the lower court, and, from the nature of the case, must rest largely in the discretion of the court. With that discretion, if not exercised on erroneous principles, we cannot, unless in extreme cases, interfere. The only point to be considered, therefore, is as to the construction of the will.

The provision of the will in question is: "I give, devise, and bequeath to my wife, Lucy, the sum of one thousand dollars (\$1,000), on the payment of which one thousand dollars she relinquish all further claim to my estate." By other bequests the whole of the testator's estate was disposed of. The term "claim," in its usual and proper sense, is broad enough to include the statutory claim or right of the widow to an allowance from the estate of the testator, and, where a different intention is not manifested by the context, must be so construed. Code Civ. Proc. § 16. It was doubtless so understood and intended by the testator here, and this intention is the more manifest from the fact that there was no community property or real estate from which a homestead could be allotted, and in fact nothing to which the term could apply, except the claim to family allowance. The bequest is, therefore, to be construed as conditional on the relinquishment of the claim of allowance for maintenance, and the widow is thus put to her election between the two. The case also comes within the reason of the rule "that he who accepts a benefit under a * * * will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it." 1 Jarm. Wills, 385; Story, Eq. Jur. §§ 1075, 1076; Morrison v. Bowman, 29 Cal. 346; In re Stewart's Estate, 74 Cal. 98, 15 Pac. 445; In re Smith's Estate, 108 Cal. 115, 40 Pac. 1037; Etcheborme v. Auzeirais, 45 Cal. 121; Eproson v. Wheat, 53 Cal. 715.

As to the time the election is to be exercised, the will is equally clear. It is to be exercised only "on the payment" of the legacy. Until then the widow is entitled to the enjoyment of her statutory rights, and to the

allowance made to her thereunder. I advise that the order appealed from be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

131 Cal. 294

HIGGINS et al. v. CITY OF SAN DIEGO
et al. (L. A. 724.)

(Supreme Court of California. Jan. 3, 1901.)

MUNICIPAL CORPORATION—LEASE OF WATER PLANT—PAYMENT FOR USE—PARTICULAR FUNDS—SURPLUS—FUNDS DEPOSITED IN BANK—FAILURE OF BANK—TREATMENT OF FUNDS—PRIORITY OF CLAIMS—OPERATING EXPENSES—PAYMENT—LEGALITY—WATER COMMISSIONERS—APPOINTMENT—SALARY—GENERAL FUND—STREET FUND—STREET-SPRINKLING FUND.

1. Const. art. 11, § 18, provides that no city shall incur any indebtedness in any manner or for any purpose exceeding in any year the revenue provided for it for such year, without the assent of two-thirds of the qualified electors. Act March 16, 1889 (Municipal Charters Act) §§ 11, 12 (St. 1889, p. 658), substantially reenacts the provision of the constitution. Section 9 (page 707) establishes a "fire department fund," on which all warrants must be drawn for fire department supplies and expenses whatsoever, and a number of other funds, with like directions as to warrants, concluding with a provision that the percentage of each annual tax levy shall be named for each fund, and the whole amount of taxes and revenue apportioned to the several funds accordingly, and that no transfer shall be made from one fund to another except as otherwise provided by the charter, unless by vote of the common council, and in no case shall any moneys be transferred from the school or library funds to any other fund. Section 10 (page 708) apportions fines to the police department and street funds. Section 11 (page 708) requires officers collecting city moneys to make monthly statements to the auditor, and pay such moneys to the treasurer; the auditor to apportion such moneys to the various funds to which they belong. Section 5 (page 705) directs the manner of apportionment of the moneys, and of drawing warrants for salaries and bills allowed by the auditing committee. Sections 1 and 2 (page 704) relate to the duties of the auditing committee, requiring that they designate the fund from which claims shall be paid. Sections 1 and 2 (page 696) declare that the auditor shall prepare an estimate of the probable necessities for the city for the current fiscal year, and show the revenue anticipated and the probable expenditures, when the council shall fix a tax rate sufficient to raise the necessary funds. Ord. San Diego, No. 128, established a water fund; section 9 of the ordinance providing that salaries and expenses of all kinds connected with the water department should be paid from such fund. *Held*, that a water company which leased its plant to the city of San Diego could enforce payment for the use of such plant out of the surplus of any funds of such city left at the end of a fiscal year after payment of claims chargeable to the same, where the water and general funds, which were primarily liable, were exhausted.

2. A bank in which the city of San Diego deposited funds of the fiscal year of 1891 failed, but the city's books showed these funds as cash in the treasury for two years thereafter, when a fictitious account was entered on the books, wiping out the fund. Part of the fund

was recovered by suit, and there was no showing that more could not be realized. *Held*, that in an action against the city by a water company which had leased its plant to such city for the fiscal year of 1891 for the use of such plant, the funds primarily liable for such use being exhausted, the whole amount of the deposited fund must be treated as in the treasury for the fiscal year 1891, for the purpose of fixing the amount of plaintiff's judgment, and not merely the amount recovered from the bank, since it constituted a part of the funds raised to meet legitimate claims.

3. Act March 16, 1889 (Municipal Charter Act), gave no priority of right among claimants against the city, dependent on the order of time in which liabilities are incurred, so far as the city's different funds were concerned, except as to the water fund, in regard to which it was provided that the salaries of the water commissioners and expenses of operating the water plant should be paid before payment of the monthly rental. *Held*, that payments on claims accruing subsequent to those of a water company which leased a water plant to the city of San Diego, out of the water fund, were not illegal, and might properly be deducted from the amount the company should recover.

4. Though a lease of a water plant by a city is void, the city is liable for the use thereof; but payment of the operating expenses of such plant by the city is not illegal, and the water company cannot recover such moneys paid out of the water fund primarily applicable to its claims for the use of such plant.

5. Under St. 1889, p. 694 (Municipal Charter Act) c. 6, §§ 1, 2, authorizing the appointment of water commissioners when the city shall become the owner of any water supply or shall decide to construct a system of water supply, the city may appoint water commissioners, at a salary, where it leases a water plant, since the word "owner" is used in the sense that the city should have control of the water supply.

6. Where a city pays the salary of the city justice out of the general fund, instead of the salary fund, which was primarily liable therefor, before a demand on the city by a water company for payment for the use of a water plant leased to such city, out of such general fund, such payment is not an illegal diminution of such fund, since the company could look to such fund only at the end of the fiscal year.

7. The street fund established by St. 1889, p. 707 (Municipal Charter Act), from which must be paid all expenses for street repairs, sprinkling, cleaning, and improvements for which other provision is not made, and highway and bridge repairs, and the street-sprinkling fund established by ordinance, out of which water used in street sprinkling was paid for, as well as labor in doing so, are not primarily liable for the claim of a water company against the city for the use of a water plant.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by T. J. Higgins and others against the city of San Diego and others and the San Diego Water Company. From a judgment in favor of the city on the water company's cross complaint and the city's answer thereto, plaintiffs having withdrawn, defendant water company appeals. Reversed.

Works & Works and Works & Lee, for appellant. H. E. Doolittle, City Atty., for respondents.

CHIPMAN, C. Plaintiffs brought this action, as taxpayers of the city of San Diego, to set aside a contract of lease between the

said city and defendant water company. The case was tried on the cross complaint of the water company and the answer of the defendant city thereto, the plaintiffs having withdrawn from the action. The court found that the lease in question was void, and that the company was not entitled to recover the reasonable value of the use of its property by the city, nor was it entitled to damages for that breach of the contract. On appeal the decision of the lower court was affirmed as to the invalidity of the contract of lease, but the court held that the company was entitled to recover the reasonable value of the use of its plant and water. *Higgins v. Water Co.*, 118 Cal. 524, 45 Pac. 824. On rehearing, as to the form of judgment, the court held that the company was entitled to an "ordinary general judgment for whatever amount shall be found due it, without any direction as to the revenues out of which the judgment shall be satisfied." The directions given to guide the trial court will be better understood from the following excerpt from the court's opinion on the rehearing: "We cannot direct the superior court to enter a judgment upon the findings for the reasonable value to the city of the use of the water company's plant and of the water supplied, because it does not appear that the claims of the water company all accrued at a time when there were unappropriated revenues to meet them; and it will be necessary for the court to ascertain, as the basis of its judgment against the city, just when the claims of the water company for the reasonable value of use aforesaid, etc., equaled the amount of unappropriated revenues for respective fiscal years during which the city had the use of the water company's plant. Claims for the use of plant and the value of water supplied after such time are like other claims upon exhausted revenues. They are void, and will not warrant a judgment of any character." 118 Cal. 528, 50 Pac. 671. At the first trial the lower court found the reasonable value of the use of the plant and water per month; and at the second trial evidence was given of the payments made from time to time on account, and the money in the treasury to the credit of the various funds at the end of each month, and also showing the amounts accruing and unpaid each month during the time the plant was held by the city. The period of use was from June 1, 1891, to March 7, 1893. In ascertaining the unappropriated revenues to meet the water company's claims, the trial court found that there were but two funds provided by the city which were applicable to their payment, to wit, the water fund and the general fund; that there was no money in either of these funds, when the unpaid claims of the company accrued, available for their payment for the year 1891; that there was to the credit of these two funds for the year 1892, available for the payment of the company's claims for that

year, only the sum of \$5,421.29; that for the year 1893 there was available, in addition to payments made, the further sum of \$5,997.22 to the credit of said two funds. This sum was sufficient to pay in full the balance due for 1893. Upon these findings the court gave judgment against the city for the sum of \$11,418.51, leaving quite a large sum unprovided for. From this judgment the water company appeals.

The constitutional provision involved is section 18, art. 11: "No county, city, * * * shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year without the assent of two-thirds of the qualified electors," etc. Appellant's contention is that all contracts or liabilities incurred by the city during any fiscal year are valid and binding up to the amount of the revenues of the year, and that it is only contracts made or liabilities incurred after that time or beyond the revenue for the year that are void. Applied practically, the contention is that there were certain funds primarily applicable to the payment of the company's claims, to wit: (1) The general fund, the street fund, the street-sprinkling fund, and the water fund; and (2) that of all other funds, except possibly the school fund, all surplus remaining on hand at the end of the fiscal year in each fund, after paying the liabilities chargeable against that fund, must be applied to the payment of the general liabilities of the city for that fiscal year before being carried forward to the next year. This is the principal question presented by the appeal, and we give appellant's statement of its position still further, as follows: Conceding that moneys apportioned to any fund cannot be used for any other purpose until the object for which it has been apportioned has been accomplished, the learned counsel say: "But what we insist upon is that when the object for which it has been apportioned has been accomplished, by meeting all the claims specially chargeable to that fund, the surplus is applicable to the payment of other debts or liabilities of that year, and cannot be carried over into another year, leaving debts of the present year unpaid." If the municipal revenues were all thrown into a general fund, out of which all claims could be paid to the limit of such revenues, the solution would be much simplified. But this is not the case. Under the charter of the city there are certain designated funds, and the charter requires the revenues raised by taxation and from other sources, such as licenses, fines, etc., to be apportioned to these various funds. In a series of cases, commencing with *Gas Co. v. Brickwedel*, 62 Cal. 641, this court has decided that no indebtedness shall be incurred (except in the manner stated in the constitution) exceeding in any one year the revenue actually received by the municipality; i. e. that each year's income must pay each year's

liability, no part of which shall be paid out of the income of any future year. Other cases dealing with this provision of the constitution are *Shaw v. Stater*, 74 Cal. 258, 15 Pac. 833; *Schwartz v. Wilson*, 75 Cal. 502, 17 Pac. 449; *Smith v. Broderick*, 107 Cal. 644, 40 Pac. 1033; *Weaver v. City and County of San Francisco*, 111 Cal. 319, 43 Pac. 972; *McBean v. City of Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794; *Bradford v. City and County of San Francisco*, 112 Cal. 537, 44 Pac. 912; and this present case (118 Cal. 524, 45 Pac. 824, 50 Pac. 670). The precise question now before us, as applicable to municipal expenditures, has not, we believe, been decided.

Looking to the language of the constitution, we find the only inhibition to be that "no * * * city * * * shall incur any indebtedness or liability * * * exceeding in any year the income and revenue provided for it for such year," etc. The natural and reasonable construction to be given this language is that all legitimate indebtedness of the municipality for any year must not exceed all the revenues and income provided for that year, and all indebtedness beyond such provision becomes void, and cannot be paid out of the funds of a succeeding year, or at all, except by the assent of two-thirds of the qualified voters. In the case before us there were moneys of considerable amount at the close of one or more years, when the company's claims accrued and were presented, against which there were no other claims made. These moneys had been distributed to various funds created by the charter, or by the council pursuant to the charter; but because the company's claims were not, on their face, payable out of any one of these funds, payment was refused, and these surplus moneys were carried over into the next year, and paid out as moneys belonging to the particular funds, on claims accruing against those funds during the succeeding year. In our opinion, there is nothing in the constitution forbidding the payment of the company's claims at the end of the year out of any revenue on hand in the various funds against which no claims existed which had accrued that year. If there is anywhere any inhibition against payment, it must be found in the municipal charter, or in some legislative provision elsewhere to be found. We know of no legislation applicable to the case, outside of the municipal charters act (Act March 16, 1889; St. 1889, p. 643). Sections 11, 12, p. 658, and section 12, p. 709, are substantially re-enactments of the constitutional provision, and there is nothing in these sections that goes further than to provide that no liability shall be incurred "during any fiscal year that cannot be paid out of the revenues provided for such fiscal year." This fiscal year begins January 1st, "for taxation, assessment and all other purposes." St. 1889, p. 698. If any provision is to be found in the act reaching the question now here, it is

found in the section establishing so-called "funds" (Id. p. 707), or other sections, a summary of which will next be given. Section 9 reads: "The following funds are hereby established: (1) 'Fire department fund,' upon which all warrants must be drawn for fire department supplies and expenses whatsoever." Then follow 13 other funds, with like directions that all claims pertaining to the particular fund must be paid by warrants drawn on that fund. The section contains a general provision as follows: "The common council may, from time to time, establish such other funds as they may deem necessary, and shall establish and continue in force all interest funds, bond funds, bond redemption funds, and other funds now or hereafter established for the payment of all interest upon and the payment of all bonded indebtedness of the city; and the percentage of each annual tax levy shall be named for each fund, and the whole amount of taxes and revenue of the city apportioned to said several funds accordingly; and no transfer shall be made from one fund to another except as otherwise provided in this charter, unless by a vote of the common council, by ayes and noes, recorded in the journal of proceedings; and in no case shall any moneys be transferred from the school fund or library fund to any other fund. The common council shall by ordinance determine and designate to what funds shall be apportioned all moneys arising from the levy of all license taxes in the city; provided, that none of such moneys shall be apportioned to either the school fund, library fund or to any of the bond funds, interest funds or bond redemption funds of the city." Section 10 (page 708) requires all fines to be apportioned to funds as follows: "One-half thereof to the police department fund and the other half into the street fund." Section 11 (page 708) requires all officers who collect moneys belonging to the city, except moneys collected by the treasurer on account of redemption of property sold for taxes, to make monthly statements to the auditor and pay such moneys to the treasurer. The auditor must, upon filing the treasurer's receipt, "forthwith apportion the money so paid in to the several funds to which it belongs, and file with the treasurer his statement of such apportionment." There is nowhere any provision that, when money is once apportioned to a given fund, it shall be thenceforth dedicated to the payment only of warrants authorized to be drawn upon that fund. The nearest approach to such provision is the following: "In no case shall any moneys be transferred from the school fund or library fund to any other fund." Section 5 (page 705), relating to the duties of the auditor, requires that he "shall apportion all moneys paid into the treasury of the city, in accordance with the annual tax levy and ordinances imposing and apportioning license taxes, fines," etc., "and draw all warrants upon the treasury for salaries as fixed by the

charter, and for all demands and bills allowed and ordered paid by the auditing committee." He must keep a cash book, which shall show at all times the amount of moneys received in the treasury, by whom paid in, and on what account, and show all moneys paid out, giving the number and date of warrant paid, and show the balance in the treasury. He shall keep in ledger form a just and correct account with the various funds of the city, and shall, monthly, make and report to the council an abstract of his accounts with said funds for the preceding month, showing receipts and disbursements, and from what received and for what paid out, and the balances in each fund, and the amount received in and paid out of the treasury during said month. Sections 1 and 2 (page 704) prescribe the duties of the auditing committee in the allowance of claims and the ordering of warrants in payment, and they must "designate the particular funds from which they are to be paid," etc. Bearing upon the question in some measure are the provisions found in sections 1 and 2 (page 696) as to levying the annual tax. The auditor, on or before the first Monday of April in each year, "shall prepare and transmit to the common council, accompanied with the estimates and reports of each department, * * * an estimate of the probable necessities for the city for the current fiscal year, giving the amount required to meet the * * * probable wants of all the departments * * * in detail, and showing the necessities of each of the several funds to be provided for in the treasury." The charter directs that this estimate shall, as near as may be, show the revenue anticipated and the probable expenditures, based on the expenditures and resources of the preceding year. With this estimate before them, the council are required to fix the tax rate and make the levy "necessary to raise sufficient revenues to carry on the different departments of the municipal government for the current fiscal year."

The "water fund" was established by ordinance No. 128, by which the lease of the water company's plant was accepted pursuant to the lease executed April 18, 1891, under the authority of joint resolution No. 56. The ordinance created a water department and a board of water commissioners, and prescribed their duties and fixed their compensation. Section 9 of the ordinance provides as follows: "That in conformity with the provisions of the city charter a water fund is hereby established into which all revenues derived from the department shall be paid, and upon which all warrants shall be drawn for salaries, material, supplies and expenses of every description connected with the water department, including the monthly payment of rent as stipulated by said lease, which warrants shall be drawn and paid in the order above mentioned." The ordinance authorized the board of water commissioners to "set all water rates for takers and con-

sumers in accordance with such ordinances as are now in force or which may hereafter be adopted," etc.; and it provided that "all money received by said board shall be paid to the city treasurer, who shall keep duplicate receipts therefor, one of which shall be filed with the city auditor, who shall keep accurate accounts of all receipts and disbursements." There was no source of revenue specially designated upon which warrants were authorized to be drawn for the support of this department or to pay the lease rentals, except this water fund. The general fund was available, if at all, by reason of its being created to pay "the appropriations and general expenses not payable from other funds." Apparently the strongest expression in the charter, as above synopsised, tending to support the view taken by the trial court, is the following: "And the percentage of each annual tax levy shall be named for each fund, and the whole amount of taxes and revenue of the city apportioned to said several funds accordingly." But this is not equivalent to the declaration of a purpose to limit any particular class of expenditures to the apportionment made for that class; for, if that were so, there could be no transfer from one fund to another to re-enforce an exhausted fund. In *Potter v. Fowzer*, 78 Cal. 493, 21 Pac. 118, it was held that, where the law established a fund and expressly limited the amount of its receipts, the board of supervisors could not transfer money from the general fund, and thus increase the expenditures under this limited fund. If we could find in the charter of defendant any express limitation upon the expenditures under a particular fund, we would still have to find some provision which in its effect prohibited the use of any surplus there might remain in that fund at the end of the year for any other purpose, before we could say that this surplus could not be used for some other object. It is not denied by either party that this surplus might be transferred to some other fund, even though that other fund had been exhausted of all the money apportioned to it. But this could not be done if the money apportioned to each fund must be regarded as dedicated to the use of that fund alone. The object of the law in providing for transfer from one fund to another is to meet a case where in the original apportionment the council had miscalculated as to the probable requirements of the various funds. The power to create other than the funds designated in the charter shows that it was in the mind of its framers that some portion of the revenue provided for the fiscal year might be required for purposes not embraced in funds existing when the apportionment for the year might be made. The form of demands, bills, and claims against the city prescribed by section 3 (page 705) requires no mention by the claimant of any fund to which he must look; and when he receives his warrant, drawn as it must be upon some designated fund, he

enters into no agreement to look alone to that fund. *Carter v. Tilghman*, 119 Cal. 104, 51 Pac. 34. If the fund is at the time of presentation exhausted, the claim cannot be paid; but the council may transfer money from some other fund and thus pay it, for it is not an illegal claim because when first presented there were not moneys to meet it. Where a legitimate indebtedness has been incurred for one of the various objects for which the municipality was created, and a claim therefor is duly presented, we do not think it is within the power of the municipality to defeat payment by drawing a warrant on some exhausted fund, or by refusing to draw a warrant because the particular fund applicable to its payment is exhausted. *Carter v. Tilghman*, supra. If at the close of the fiscal year there is a surplus in any fund, not expressly reserved by some law for the payment of claims upon that particular fund, and there are no claims existing against that fund created during the year, such surplus, and any other surplus remaining in any other such fund, should be and is available to discharge the unpaid legitimate indebtedness of that fiscal year; and we find nothing in the law to forbid this just and proper course to be taken. Let us not be misunderstood. There may be a surplus—for example, in the salary fund—at the end of the year, because some salaries have not yet been actually paid. There may be claims presented and allowed at the close of the year, for which warrants have not yet been drawn, upon other funds. In such case the surplus would be the moneys in the treasury against which there was no just claim presented or existing under the law, as in the case of salaries; and this surplus, in our judgment, should be treated as money applicable to the payment of any just debt then existing, created during that year. And a claimant cannot be deprived of his right to this surplus simply because the particular fund against which his warrant is drawn or should be drawn has become exhausted. See *Stevens v. Truman*, 127 Cal. 155, 59 Pac. 397. The city cannot defeat the payment of its honest debts by refusing to transfer funds to an exhausted fund, or by accumulating an undue proportion of the year's revenue in any one fund, or by transferring from one fund to another fund in order to defeat the claim against the fund from which the transfer was made. As was said in *Carter v. Tilghman*, supra, the council has "no power to indulge in a game of hide and seek with the funds" of the city. We do not wish to intimate that the council in the present case purposely arranged the funds at the close of the year so as to leave nothing in the water fund or general fund. But it must be obvious that by a simple bookkeeping process the council could so manipulate the funds of the city as to work great injustice, if they could carry over into another year the surplus of moneys in the various funds simply

because there were no claims against the city which were primarily payable from such funds. We think the creditors of the city have the right to contract with reference to its entire revenue, and, while it may be that payment cannot be enforced so long as the particular fund primarily available is without moneys to make payment, still if at the end of the year there is a surplus in any other fund not claimed, or not by the charter expressly reserved, it should be used to pay the debts of the city, so far as the surplus will go. This seems to be all that was designed to be accomplished by the constitution or by the charter, and if its framers desired to go further, as the legislature has in some cases in county legislation (*Potter v. Fowzer*, supra), they should have so provided in plain and unmistakable terms.

2. It appeared that about October, 1891, a deposit of the city's funds of \$45,500 (presumably the funds of the fiscal year 1891) was made by the treasurer in the California Savings Bank of San Diego. The bank failed in November, 1891, but the city auditor testified that this money "was carried in the bank, the same as if it was cash in the treasury"; that "the books showed just the same as if there was cash in the treasury." It so remained on the books until March 31, 1893, when a fictitious account, called "Dividend Fund," was entered on the books, by which the various funds which had been credited with their proportion of this \$45,500 were debited with like amounts, aggregating this total amount, and this so-called "Dividend Fund" was credited, and thus the credit to the various funds was wiped out. In effect, this dividend fund took the place of what in ordinary bookkeeping might be called "Profit and Loss Account." An effort was made, by suit commenced in 1892, to collect some of this lost money, and some was collected; and, so far as we know, still other payments may be realized. The auditor testified that the ledger showed a credit by collections of \$4,327.50 March 23, 1893, and \$910 August 21, 1893. The trial court dealt with this \$45,500 as unavailable, except as to the amount received, because apparently lost to the city through the failure of the bank. In this we think the court erred. The money was provided by the city, and became a part of its funds, against which liabilities might and did accrue, including the claims of the water company. It was said in *Montague v. English*, 119 Cal. 225, 51 Pac. 327: "The contract being valid in the first instance, we are unable to see how any event happening subsequent to that time can vitiate it. The mere fact that the fund upon which the party has relied for payment has become exhausted after he has furnished the material demanded by his contract, and before presentation of his claim, in no manner bears upon the validity of the contract or the legal liability of the city. Such unfortunate conditions facing the claimant only affect his remedy. The contract exists, and the lia-

bility of the city exists; but under the construction of this provision of the constitution, which declares that each year's revenue of the municipality must pay each year's indebtedness, the claimant is bound to look for satisfaction of his claim in the year's income, and only there." The contract here is implied, but it is none the less valid for that reason. *Buck v. City of Eureka*, 124 Cal. 61, 56 Pac. 612, was also an implied contract on which the plaintiff was allowed by the court a general judgment. In the former appeal of the present case (118 Cal. and 50 Pac., supra) it was held that plaintiff was entitled to an "ordinary general judgment * * * without any direction as to the revenues out of which the judgment should be satisfied." And the further direction was given to ascertain when the plaintiff's claim "equaled the amount of unappropriated revenues for the respective fiscal years during which the city had the use of the water company's plant," etc. It cannot be said that the funds deposited in the bank were appropriated. They were part of the funds of the city while so deposited,—as much so as while in the city treasury,—and it was not until 1893 that they were written off the books. It is true, the allowed claims of plaintiff could not be paid out of these funds, simply because the money for the time being was beyond reach of the city; but this money constituted a part of the funds of the fiscal year, raised to meet legitimate claims, and must be treated as in the treasury for the fiscal year 1891, for the purpose of fixing the amount of plaintiff's judgment.

3. It is contended, touching the right of the company to recover all moneys paid out of the fund primarily applicable to its claims, (1) that all payments upon claims accruing subsequent to those of the company were illegally paid, and cannot properly be deducted from the amount it shall recover; (2) that the payment of the expenses of operating the water plant under the lease was illegal, because the lease was held to be void, and that the charter authorizes the appointment of water commissioners only when the city "shall become the owner of any water supply or shall decide to construct a system of water supply,"—citing St. 1889, p. 694, § 1. It is hence claimed that the payment of the salaries of the water commissioners and the other expenses of their offices was wholly illegal and void. Furthermore, it is urged that the salaries of these officers were illegally paid out of the water fund, because, as that fund was illegally created, the money therein in fact became a part of the general fund, out of which officers' salaries could not be paid; and (3) that the city justice was wrongfully paid out of the general fund during the whole time.

We find nothing in the charter that makes the city liable in the order in which claims accrue against it. In the absence of some such provision, "there is no obligation upon the municipality, any more than upon any other

debtor, to pay the claims against it in the order in which they are incurred, unless they are presented in that order and in such condition and with such formalities as entitle the claimant to immediate payment." *Weaver v. City and County of San Francisco*, 111 Cal. 319, 43 Pac. 972. There is no priority of right among claimants, dependent upon the order of time in which liabilities are incurred, given by the charter, so far as the different funds are concerned, except as to the water fund; and there the provision is that the salaries of the commissioners and the expenses of operating the plant shall be paid before payment is made of the monthly rental.

As to the point that the payment of the operating expenses of the water plant was illegal because the lease was void, it is a sufficient answer that these payments rest upon the same ground as payments for the reasonable use of the plant. If, as was held here, notwithstanding that the lease was void the city was liable for the use of the plant, the city would certainly be authorized to make provision for payment, which it did by the organization of the water department and the water fund, and by the appointment of commissioners and other employes to conduct the department and collect the revenues. This was done under the provisions of the charter found in sections 1, 2, chapter 6 (St. 1889, p. 694). But it is objected that this could only be done upon the city becoming the "owner of any water supply, or shall decide to construct a system of water supply," etc.; and it is contended that, inasmuch as the city never became the "owner" of any water supply, the water fund and the water department had no legal existence. "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. * * *" Civ. Code, § 654. "The ownership of property is either: (1) absolute; or (2) qualified." *Id.*, § 678. We do not think the word "owner," occurring in the charter, was used in the sense that the city must be the holder of the title, but rather in the sense that it should have the control of a water supply. The term "owner" includes any person having a claim or interest in real property, though less than an absolute fee. *Lozo v. Sutherland*, 38 Mich. 171. *Anderson's Dictionary* cites numerous cases in illustration of the principle that the term may designate the person in actual possession and occupancy of premises.

That the salary of the "city justice," so called, was paid out of the general fund for the whole period, is urged as an illegal diminution of that fund, and therefore the money so used was available to pay the water company. We do not find in the charter any such officer named. A police court is established, to be held by a "police judge," and the mayor is authorized to designate in writing any justice of the peace of the city, who "shall have power to preside in and hold the police judge's court," etc., in certain

cases. Assuming that the city justice referred to is the one or the other of these judicial officers, and assuming that he should have been and could have been paid from the salary fund, but was instead paid from the general fund, what then? The water company could look to the general fund only at the end of the year. A warrant drawn upon this fund after it had become exhausted could not be paid, and this would be true even though the fund had become exhausted by payments of claims primarily payable from some other fund. The fact would be the same,—that there was then no money available in that fund. If the right to the surplus in this general fund had attached, and the company had demanded payment before the alleged illegal payment to the city justice, the case might be different, for the reason that at the time of such demand there would have been money in the fund available for its payment. The record does not show the facts in this regard. But the liability for the salary of the city justice was legally incurred, and this is not questioned; and so the payment out of the general fund was not the payment of an illegal claim, but at the worst was the payment of a legal claim out of the wrong fund. If there was no authority for so paying it, the remedy was to transfer money from the proper fund to the general fund to reimburse the latter fund. This was not done, however, and we see no way by which the remedy can be applied in this action. What was said in *Weaver v. City and County of San Francisco*, *supra*, quoted approvingly in *McBean v. City of Fresno*, *supra*, seems appropriate here: "Whoever deals with a municipality does so with notice * * * that all other persons dealing with the municipality have the same rights to compensation and are subject to the same limitations as he is. Even though at the time of making his contract there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city; and, if others whose claims have accrued subsequent to his are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. * * * In dealing with the municipality he must rely upon the integrity of its officers that they will not incur any liabilities during the year in excess of the income and revenues provided for that year, and, as a prudent man, he will ascertain not only the amount of the income, but also the amount of the claims already existing, and of those that are likely to be incurred." In a concurring opinion in the former appeal of the case now before us, the chief justice expressed some dissent to this language, as too broad; but the court has not receded from the position taken in former cases, and we do not see how it can do so

without subjecting the municipality to a possible liability in excess of its revenues previously provided, in an amount which may prove to be very burdensome. Appellant complains of payments made out of the general fund other than the salary of the city justice, but they were legal claims, and the same thing is true of them as in the instance of the salary.

4. We are brought lastly to notice the contention that not only were the water fund and the general fund primarily applicable to the payment of the company's claims, but that the street fund and the street-sprinkling fund were also so applicable. The charter established a "street fund" from which must be paid all expenses for street repairs, street sprinkling and cleaning, highway and bridge repairs, and all other street improvements not otherwise provided for in this charter." The only reason stated for claiming this fund as primarily liable is that it was liable for street sprinkling. The street-sprinkling fund is claimed to be primarily liable because the water used for sprinkling streets was payable out of that fund. This latter fund was not established by the charter. The ordinance establishing it does not appear in the record, and we have no knowledge as to what expenditures were by the ordinance made payable out of this fund. The record contains the items of expenses paid out of it, and they include water used for sprinkling streets, labor sprinkling streets, repairs of hydrants and sprinklers, purchase of hose, etc. The answer to appellant's contention, as given by the learned trial judge, printed in respondent's brief, was as follows: "None of the company's claims, however, are founded on liabilities incurred for water furnished for street sprinkling. There is no evidence that any of the water furnished was used for that purpose. Aside from that, the company's claim is a general one, arising out of the liability of the city to pay for the use of the company's plant and the value of the water supplied during the time the city retained possession of it." This seems to us a satisfactory answer. There is nothing in the charter or in any ordinance shown to us from which it may be reasonably inferred that either of these funds was primarily liable for the rent of the company's plant. The judgment and order should be reversed, and the cause remanded; the cause to be retried on the evidence used at the last trial, with leave to either party to submit further evidence.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded; the cause to be retried on the evidence used at the last trial, with leave to either party to submit further evidence.

BEATTY, C. J. I concur in the judgment of reversal, but there are some points in the decision and some things said in the opinion from which I dissent. A passage is quoted from the opinion in *Weaver v. City and County of San Francisco* with commendation. My reasons for dissenting from that doctrine are fully stated in my concurring opinion upon the former appeal of this case. 118 Cal. 529, 45 Pac. 824, 50 Pac. 670. But even that doctrine does not sustain the conclusion reached in this case. In *Weaver v. City and County of San Francisco* it was held that a judgment against a city must be made payable out of the revenues of the year in which the claim accrued; but it was not held that the claimant could not have a judgment for the amount earned, because the money in the treasury at the time he made the contract, or coming in afterwards, had been misapplied in payment of claims subsequently accruing, and therefore void. Here, however, as I understand the opinion, it is held that the claimant upon a valid contract cannot have a judgment for more than is left in the treasury at the end of the fiscal year, although it be shown that large sums were paid out after its claim accrued upon claims that were invalid. This is a doctrine which finds no support in anything that has ever been decided in any previous case in this court. The right of the plaintiff to its judgment does not depend upon the ability of the defendant to pay it, or the means of enforcing it. How the judgment is to be collected is a question wholly foreign to this case. All that we have here to decide is the amount of the plaintiff's valid claim, and that is unaffected by any illegal expenditures made by the defendant after the respective monthly claims matured.

131 Cal. 333

McFADDEN v. GOETTERT et al. (S. F. 1,621.)

(Supreme Court of California. Jan. 9, 1901.)

LOST CERTIFICATES OF STOCK—OWNERSHIP—WANT OF PROOF—EVIDENCE.

Plaintiff lost two certificates of mining stock. Defendant found two certificates of the same stock, and plaintiff sued him for conversion of the shares. Plaintiff did not know the numbers of his certificates. His broker testified that the certificates of the stock purchased for plaintiff by him bore the same numbers as those found by defendant, basing his recollection thereof on a memorandum which he made on plaintiff's bill at the time. Plaintiff had thrown back the bill on his desk, and he had kept it in a small account book until the day before the trial. The bill itself showed the writing on its face to be very faint, but the numbers of the certificates were written very heavily, which discrepancy the broker could not explain. The bill purported to be for 300 shares of stock, while the numbers on the reverse side represented only 250 shares. The broker's assertion that it was his custom to so write the numbers of certificates on his bills was contradicted. No other evidence tended to identify the certificates lost with those found. *Held*, that a verdict for defendant, because

plaintiff's ownership of the certificates was not sufficiently proven, was supported by the evidence.

Department 1. Appeal from superior court, city and county of San Francisco; Wm. R. Daingerfield, Judge.

Action by one McFadden against one Goettert and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Thomas E. Curran (Geo. H. Francoeur, of counsel), for appellant. Chas. G. Nagle, Wilbur G. Zeigler, and H. H. McPike, for respondents.

HARRISON, J. The plaintiff charges the defendants with the conversion of certain shares of stock belonging to him, and seeks by this action to recover damages therefor. His cause of action is based upon the following facts: At some time in the early part of 1896 he owned and had in his possession two certificates, representing, respectively, 50 and 100 shares of the capital stock of the Consolidated California & Virginia Mining Company. These certificates were in an envelope, which he carried in one of the pockets of his coat, and which was lost therefrom. At some time after he last saw the envelope he missed the stock, and upon making inquiries was informed that the defendant Goettert had found two certificates of the same stock, corresponding in the number of shares to those which he had lost. The certificates found by Goettert were numbered, respectively, 33,191 and 34,122, and were delivered by him to the defendant Heringhi, who claimed to be the owner thereof, and who afterwards sold them through his brokers, Stauf & Cooper, the other defendants. The plaintiff in his complaint alleged that he was the owner of the shares of stock evidenced by certificates which were thus numbered, and this allegation was denied by the defendants. The cause was tried before a jury, and a verdict rendered in favor of the defendants. From the judgment entered thereon, and also from an order denying a new trial, the plaintiff has appealed.

The issue presented for trial was the plaintiff's ownership of the shares of stock represented by the certificates which were found by Goettert, and the burden of proof was upon the plaintiff to show such ownership in himself; for, unless he was the owner of these shares, he had no right of action against the defendants, and could not question their title thereto. Upon this point the judge instructed the jury as follows: "The plaintiff is obliged to establish by a preponderance of the evidence that this stock found by defendant Goettert was his (plaintiff's) stock. It is not sufficient that he owned one hundred and fifty shares of Consolidated California & Virginia mining stock, but that he owned the identical shares found by Goettert. You are to infer the identity or nonidentity of the stock claimed to have been converted with

that claimed to have been lost from all the circumstances in the case on both sides." No exception was taken to this instruction; the error relied on by the appellant being that the verdict is not sustained by the evidence.

The plaintiff testified that when he purchased the stock he did not take the numbers of the certificates, and could not say what the numbers were. The broker through whom he purchased it testified that he had purchased for the plaintiff 150 shares of the capital stock of the above-named corporation, represented by certificates with the above-named numbers. He stated, however, that his recollection of the numbers was based entirely upon the bill therefor which he had made out to the plaintiff before he delivered the stock to him, and that his reason therefor was that he checked off the certificates by writing the numbers of the same upon the back of the bill. He also testified that when he handed the bill to the plaintiff the plaintiff threw it back upon the desk, and that he (the witness) placed it in a small account book kept by him, and that it had remained there until the day before the trial, when, upon a search among his papers, he found it. The bill was produced, and upon inspection the writing upon the face appeared quite faint, while the numbers upon the reverse were written very heavily. The witness stated that he was unable to account for this discrepancy. He also stated that it was his custom to indorse the numbers of certificates sold by him upon the back of the bill presented to his customers, but a bill was shown in which he had failed to observe this custom. Moreover, the bill presented to the plaintiff purported to be for 300 shares of the capital stock of this corporation, while the numbers of the certificates written upon the reverse thereof represented only 250 shares. There was no other evidence tending to identify the certificates found by Goettert with those lost by the plaintiff, and, in view of the above testimony of the broker, it may well be assumed that, under the above instruction of the court, the jury disregarded his statements regarding the numbers upon the certificates sold to the plaintiff, and, if so, the plaintiff failed to maintain his action.

When the jury brought in their verdict certain of the jurors stated, in answer to an inquiry from the court, that they doubted the identity of the stock. We cannot review the action of the jury in determining the weight to be given to the testimony in this particular, and as the court, upon the motion for a new trial upon the ground that the verdict was against the evidence, refused to set aside the verdict, it must be assumed that he also was satisfied that the plaintiff had failed to show his ownership of the stock found by Goettert. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(131 Cal. 321)

MCGORRAY v. STOCKTON SAVINGS & LOAN SOC. et al. (Sac. 718.)¹

(Supreme Court of California. Jan. 8, 1901.)

BANKS—DEPOSITOR—INDORSEMENT OF CERTIFICATE—RIGHT TO RECALL DEPOSIT—LIABILITY OF BANK FOR PAYMENT—APPEAL—NOTICE.

1. Where a depositor delivered his certificate to the bank, indorsed to the sheriff, with directions to pay him the money whenever he should deliver to the bank for deposit a certificate of redemption of certain lands, and the sheriff never complied with the condition or made any claim to the money or certificate, the depositor may recall his deposit, and payment of the money to him by the bank discharges it from all liability.

2. Unless notice of appeal from the judgment was made within six months after its entry, as required by Code Civ. Proc. § 939, the appeal cannot be considered.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Action by B. McGorray against the Stockton Savings & Loan Society and another. From a judgment in favor of the defendant society, and from an order denying a new trial, plaintiff appeals. Order reversed.

Elliott & Elliott and A. H. Carpenter, for appellant. Nicol, Orr & Nutter, for respondents.

CHIPMAN, C. Plaintiff brings the action to recover from defendant bank \$12,778.05 alleged to have been deposited with the bank by plaintiff on September 19, 1894, with instructions "to pay the same to Thomas Cunningham, sheriff of San Joaquin county, provided the said sheriff called for the same and left with the bank for plaintiff a certificate of redemption of certain real property on or before the 15th day of November, 1894." The complaint further alleges that "the said sheriff having failed to call for said money and leave for plaintiff with said bank said certificate of redemption, and the time for so doing having elapsed, the plaintiff demanded of said defendant bank * * * the amount of money deposited with it as aforesaid," which was refused, etc. This demand is alleged to have been made about November 15, 1894. Upon this complaint judgment was demanded against the defendant bank. The bill of exceptions shows that on motion of defendant the court ordered plaintiff to bring in Cunningham as a party to the action, by proper amendment; that thereafter plaintiff filed an amended complaint, in the title of which he named Cunningham as defendant; that no allegation was made of or concerning Cunningham, or any interest asserted by him in the money in controversy; that Cunningham appeared by general demurrer, and it was sustained by plaintiff's consent, and plaintiff's counsel refusing to amend as to Cunningham, and plaintiff consenting, judgment on demurrer was given in favor of Cunningham, and he seems to have passed out of the case. The court found: That on

September 19, 1894, plaintiff deposited with the defendant bank \$12,778, and at his request the bank issued to plaintiff a certificate of deposit as follows: "No. 61,575. Stockton Savings & Loan Society. Stockton, Cal., September 19, 1894. Certificate of Deposit 15. B. McGorray has deposited in this bank (\$12,778) twelve thousand seven hundred and seventy-eight dollars, payable to himself or order on return of this certificate properly indorsed. S. S. Littlehale, Assistant Cashier. This certificate does not bear interest. Not subject to check." That subsequent to the issuance and delivery of the certificate McGorray indorsed it as follows: "Pay to Thomas Cunningham, sheriff of the county of San Joaquin. [Signed] B. McGorray." That thereafter, and with said indorsement thereon so made by him, McGorray delivered said certificate to the bank, with instructions to hold the same subject to the order of Cunningham, sheriff as aforesaid, and to deliver the same to him and pay him said money "at any time when he (said Cunningham) should deliver to the defendant for plaintiff a certificate of redemption of certain lands situate in the county of San Joaquin." That defendant has ever since held and now holds said certificate, and it has been during all said time, and is now, ready, able, and willing to deliver the same to Cunningham upon his delivering to it, for McGorray, a certificate of redemption of said land, and defendant has been able and willing at all said times to pay the money represented by said certificate to plaintiff upon the proper indorsement thereof. That plaintiff on several occasions inquired of defendant at its bank how he could obtain the money represented by said certificate, and on each occasion was informed by defendant's officers that such money would be paid on the indorsement of said certificate by said Cunningham. That in the month of May, 1898, plaintiff demanded of defendant payment to him of said sum, and at the same time defendant, on said demand, offered to pay plaintiff said money upon the written order of said Cunningham, or upon the indorsement of said certificate by Cunningham. That such order or indorsement of said Cunningham was at no time obtained or made, and no demands other than as above were ever at any time made, by plaintiff, and no certificate of redemption of said land has been delivered to defendant for plaintiff. As conclusion of law, the court found that, by the indorsement of said certificate of deposit and delivery thereof to defendant, plaintiff created and vested in Cunningham, sheriff of said county, an apparent interest in said certificate and the money represented thereby; that defendant cannot safely pay said money, or any part thereof, without the order or indorsement of the certificate by Cunningham, and plaintiff can take nothing by his action. Judgment went for defendant, from which, and from an order denying plaintiff's motion for a new trial, plaintiff appeals.

¹ Rehearing denied February 8, 1901.

There is no evidence whatever that Cunningham at any time had any interest or claimed any interest in the money or certificate of deposit. He was not in privity with either the plaintiff or the bank. He had nothing to do with making the deposit. The indorsement of the certificate to Cunningham did not in itself operate to transfer any title to or interest in it, or in the money it represented, in the absence of any act of Cunningham by way of acceptance or confirmation. He was a stranger to the transaction and in ignorance of it, and it was only in the event that he did a certain thing that the certificate was to be delivered to him and he was to be entitled to the money. He never did this thing, and it is not pretended that he was prevented from doing it by plaintiff, or that he ever offered or that he still desires to do it. When brought into court as defendant he made no claim to the property, and suffered the case to be tried without answer by him. Defendant asked that he be made a party to the action, and yet when brought in it took no steps to cause Cunningham to answer. The fact is that Cunningham made no claim to the property, so far as the evidence discloses, and it was a matter of indifference to plaintiff whether he became a defendant or not. Defendant asked in its answer that Cunningham be made a party, but it did not allege that he claimed any interest in the property, or that he "made demand * * * for such property" upon defendant, as required by section 386, Code Civ. Proc. Cunningham was not put to his answer by either party, and, so far as we can see, the case stands as though Cunningham at no time had anything whatever to do with the matter, and was wholly ignorant of what plaintiff had done. The question then is, could plaintiff recall his deposit, and would the payment of the money to him by defendant discharge the latter from all liability? We think the answer must be in the affirmative. The bank became the agent of plaintiff to do a particular act (Civ. Code, §§ 2295, 2297), and the principal (plaintiff) could terminate the agency at any time before the act was performed and before any rights of third persons had intervened. The agency was terminated by its revocation. *Id.* § 2356. The evidence was that the condition on which the particular act was to have been performed never happened, and that the only third person who by any possibility was concerned in the matter is not shown to have acquired any rights, or to have been in any way interested in the subject of the agency. Upon revocation of the agency by plaintiff the burden was on defendant to show that other claim was made upon the deposit, and in this defendant failed, and plaintiff was entitled to have the money paid to him.

Respondent's point that the notice of appeal from the judgment was not made within six months after entry of judgment, and such appeal cannot be considered, is well taken

(section 939, Code Civ. Proc.); and this court cannot, therefore, direct a judgment to be entered for plaintiff, if it were so disposed. Plaintiff gave notice of a motion to vacate the judgment, and enter another and different judgment, and correct the conclusions of law filed in the action, under sections 663, 663½, *Id.* This notice was separate from the notice of motion for a new trial. The motion for a new trial was heard and denied, but the motion to vacate the judgment and correct the conclusions of law seems not to have been made, nor was any order entered on such a motion. We assume that appellant does not rely on this motion. No question is raised, however, as to the consideration of the motion for a new trial, and we will raise none. It was specified in the notice that the evidence was insufficient to justify the decision, and that the decision is against law. Assuming that the evidence supports the findings, still it must follow, from what has been already said, that the order denying a new trial should be reversed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed and the cause remanded for a new trial.

131 Cal. 271

NOLAN BROS. SHOE CO. v. NOLAN. (S. F. 1455.)

(Supreme Court of California. Dec. 31, 1900.)

TRADE-MARKS AND TRADE-NAMES-INFRINGEMENT—DECEPTION OF PUBLIC—FAMILY NAME—INJUNCTION.

1. Plaintiff's acquiescence in defendant's use of a certain trade-name for a number of years in a wholesale shoe business does not preclude him from objecting to its use in a retail shoe business, since the mere use of a trade-name in one business does not give the right to use it in another business.

2. Where a retail dealer and his predecessors have conducted a business under a trade-name for 22 years in a city, another's use of the same name in the same business may be restrained as an infringement of the former's rights.

3. In an action to restrain the use of "Nolan Bros." as a trade-name, that the name "Nolan & Sons" was used by complainant's predecessor for a time does not show an abandonment of the term "Nolan Bros.," where the latter name at no time for a period of 22 years prior to the suit was absent from complainant's place of business.

4. In a suit to restrain the use of "Nolan Bros." as a trade-name in a retail shoe business, the fact that defendant was successor to a wholesale firm doing a shoe business under the name of "Nolan Bros." will not entitle him to the use of such name in the retail shoe business as successor to such firm, as the latter is a distinct and different business.

5. In a suit to restrain the use of "Nolan Bros." as a trade-name, a contention that "Nolan," being a family name, could not be used as a trade-name, so as to exclude its use by another of the same name, cannot be sustained, where such trade-name was used by defendant as "W. H. Nolan & Co., Successor to Nolan Bros., 10-12 Sutter Street," and all the name except the "Nolan Bros." was inconspicuous

characters, only visible for a short distance, so as to deceive the public into believing that it was complainant's place of business.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Bill by Nolan Bros. Shoe Company against W. H. Nolan to restrain the latter from using the name "Nolan Bros." in connection with his business as a retail shoe dealer. From a decree for complainant, defendant appeals. Affirmed.

W. S. Goodfellow (Jas. L. Robison, of counsel), for appellant. Smith & Murasky (C. W. Lynch and F. G. Drury, of counsel), for respondent.

GAROUTTE, J. Two brothers by the name of Nolan were engaged for 10 years in carrying on a wholesale shoe business in the city of San Francisco under the name of "Nolan Bros." One brother sold his interest in the business to the other, and that brother (W. H. Nolan) shortly thereafter closed out the wholesale business, and opened up a retail shoe business at another point in the city, under the name of "W. H. Nolan & Co., successor to Nolan Bros." A third brother, P. F. Nolan, had been engaged in the retail shoe business in the city of San Francisco for 22 years, some of this time in company with J. C. Nolan, a brother, and some of the time joined with one or more of his sons. In the year 1895, and shortly after the defendant W. H. Nolan had launched his retail shoe business upon the world, P. F. Nolan placed his business into a corporation under the name of "Nolan Bros. Shoe Company," and thereupon that company brought this action to restrain defendant in the conduct of his business from using the trade-name "Nolan Bros." The action is based upon the claim that such use is an infringement upon the rights of plaintiff to the use of the name of Nolan Bros.

It is asserted upon the part of defendant that plaintiff allowed him to use the name "Nolan Bros." in the conduct of his shoe business for a period of 10 years without objection, and that it is now too late to attack his right to its use. Whatever legal effect this long term of use might have as against plaintiff's claims, if defendant had been engaged in the retail shoe business, we will not decide; for during that period of time defendant was only engaged in the wholesale shoe business, and for that reason no occasion or necessity arose for plaintiff to make any objection. The use of the name by the defendant did not interfere with plaintiff's business, and hence it was an immaterial matter to him. Plaintiff was not injured by the use of the name and therefore was not concerned in the use. If defendant had been using the name "Nolan Bros." for these 10 years in the conduct of the plumbing business, plaintiff surely could not have objected. It does not appear from

the showing here made that defendant's wholesale shoe business interfered with plaintiff's retail shoe business to any degree; and without a showing of injury plaintiff had no right, under these circumstances, to object to defendant's use of the name, any more than if the defendant had been engaged in the plumbing business. The mere use of a trade-name in one business does not give a party a right to its use in any other business. We therefore attach no importance to the use of the name "Nolan Bros." by defendant for 10 years without objection upon the part of plaintiff, and we hold that the case stands exactly as if defendant engaged in the retail shoe business, never having been in the wholesale business.

Upon the foregoing assumption, has plaintiff such an interest in the name "Nolan Bros." as to be entitled to an order restraining defendant from making use of it? And this depends upon whether or not plaintiff's predecessor in interest had established a right to the use of the trade-name "Nolan Bros." in the retail shoe business when defendant started his retail shoe business. We will not give the evidence in great detail upon this question. While to some extent it may be said to be conflicting, yet we deem it ample to support the restraining order made by the trial court to the effect that the defendant's use of the name was an interference with plaintiff's rights. Plaintiff's predecessor in interest had been carrying on the retail shoe business in the city of San Francisco 22 years or more, and in a great many ways, and certainly for a great portion of that time, was doing business under the name of "Nolan Bros." The evidence before us of abandonment of the name by plaintiff's predecessor in interest does not establish the fact. The fact that the name "Nolan & Sons" was used as a trade-mark for a certain period of time by plaintiff's predecessor in interest is but a circumstance, and not at all sufficient of itself, to prove an abandonment. "A person may temporarily lay aside his mark and resume it without having in the meantime lost his property in the right of its use. Abandonment in the nature of a forfeiture must be strictly proven." Browne, Trade-Marks, § 681. In *Julian v. Drill Co.*, Price & St. Am. Trade-Mark Cas. 572, 573, it is said: "Abandonment means general abandonment to the public, and must be shown affirmatively and positively as affecting the interests of the public." At no time during the period of 22 years was the name "Nolan Bros." absent from the place of business. For 14 years continuously prior to the commencement of this action four metallic signs, in conspicuous places upon the front of the store, bore the trade-name "Nolan Bros."; for 13 years immediately prior to the commencement of the action within the doorway of the store a large glass sign carried over its front the words "Nolan Bros."; for the same length

of time a large sign bearing the words "Nolan Bros.," so that all could see it, was visible from the office door; and for the past 2 years prior to the commencement of this action it is conclusively established by the affidavits that the business was in all substantial respects carried on under the name of "Nolan Bros." The fact that other trade-names may have been used by the plaintiff for a short period of time in connection with the one here involved cannot neutralize the effect of the evidence quoted. Our conclusion is that this evidence greatly lacks in showing an abandonment of the right of plaintiff to use the name "Nolan Bros." *Coleman, Burden & Warthen Co. v. Dannenberg Co. (Ga.)* 30 S. E. 639, 41 L. R. A. 470, is cited to support the contention that P. F. Nolan could not, by using the name, "Nolan Bros. Shoe Co." two years before incorporation, acquire any right to the use of the name "Nolan Bros." It is claimed upon this point that the use of tags by P. F. Nolan, conspicuously indicating and representing that the business conducted by him was owned and conducted by a corporation, was a fraud on the public, by which he could not acquire any right. On examination, we find the case cited fails to support the contention, while *Block v. Distributing Co. (C. C.)* 95 Fed. 978, is the other way.

It is next claimed "that defendant had the absolute right to use a sign indicating that he was the successor to Nolan Bros., 10-12 Sutter street, that being the fact." What we have already said is opposed to this contention. The wholesale business carried on by defendant and his brother in another portion of the city is not the same business now carried on by defendant. The latter is a separate, distinct, and different business, and the statement upon the sign that he (defendant) is a successor of the business formerly conducted under the name of "Nolan Bros., 10-12 Sutter Street," is not correct. No one succeeded to that business, and it had no successor. The business became extinct, and the sign does not express the facts.

It is insisted that "the family name of a tradesman or manufacturer cannot be made a trade-mark so as to exclude the right to its use by another bearing the same family name." This contention is sound to a limited extent only. If the name is used in a manner clearly indicating an intent to mislead and deceive the public, then the use of the name will be restrained by a court of equity. The first answer to appellant's contention in this regard is found in the fact that it is not a use of the family name "Nolan," standing alone, to which objection is made, but it is a use of the name "Nolan Bros.," and in a case like that at bar the principle of law invoked seems to have no application. Furthermore, it is shown by the affidavits "that the said defendant established a retail boot and shoe business at No.

1022 and 1024 Market street, * * * and over such store placed a large sign containing the words and figures following, to wit, 'W. H. Nolan & Co., Successors to Nolan Bros., 10-12 Sutter Street.' That the words 'W. H. Nolan & Co., Successors to,' and the words and figures '10-12 Sutter Street,' are in such small and inconspicuous letters and figures that the same cannot be read at a distance of more than seventy-five feet or one hundred feet, while the words 'Nolan Bros.' are in such large and conspicuous letters, and so prominently displayed, that the same may be readily seen and read for a distance of nearly three hundred feet thereof." It is also stated in the affidavits of various parties that said sign is a deceptive sign, and is calculated to deceive the public, and lead the public, the dealers and buyers of boots and shoes and footwear, and the patrons and customers of plaintiff, to believe that the plaintiff is conducting a retail boot and shoe store, and a branch place of business, at Nos. 1022 and 1024 Market street. It is further shown that almost daily, ever since the establishment of said store by said defendant at Nos. 1022 and 1024 Market street, the salesmen of plaintiff have encountered many of the buyers of boots and shoes and the customers and patrons of plaintiff, who have purchased shoes at the store of defendant under the impression and belief that they were dealing with the plaintiff. Under the foregoing facts appellant's contention upon the proposition that he has here advanced is undermined. *England v. Publishing Co.,* 8 Daly, 375.

The remaining propositions advanced by appellant are not considered meritorious. For the foregoing reasons, the order is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(131 Cal. 326)

SECURITY LOAN & TRUST CO. v. MATERN et al. (L. A. 735.)¹

(Supreme Court of California. Jan. 9, 1901.)

MORTGAGES—ADDITIONAL SECURITY—PLEADING—ONE CAUSE OF ACTION—RELEASE OF PART OF LAND—MORTGAGE OF THIRD PARTY—CONSIDERATION.

1. A mortgagee released part of mortgagor's land at his request, taking a mortgage on the property of B. as additional security. The agreed payments not being made, the mortgagee sought to foreclose the original and the subsequent mortgage. The complaint set out the making of the mortgages, in a first and second count, and averred that each mortgage was given as security for the same note. *Held*, that only one cause of action was stated against defendants, though different counts were used and different relief was sought from different defendants.

2. Where a mortgagee released his mortgage as to part of the land, taking a mortgage on another's lands as additional security for the payment of the mortgagor's note, the second mortgagor was a proper defendant in an action

¹ Rehearing denied February 8, 1901.

to foreclose the first mortgage, since he was responsible for any deficiency that might arise on foreclosure of the first mortgage.

3. Where a mortgage stated that it was given as security for a note dated March 1, 1895, "according to its terms," made by M. in favor of plaintiff, and secured by a mortgage of the same date, giving the date and place of record of the mortgage, there was a sufficiently definite description of the obligation for which it was given, and hence the mortgage was not invalid for want of definite description.

4. Where a mortgage was executed as security for the payment of an instrument "according to its terms," which were set forth in another recorded mortgage, the fact that the instrument was not a note, though referred to as such by the mortgage for security, does not invalidate the mortgage, since the mortgagor is presumed to have known its character, it having been set forth in the public records.

5. Where plaintiff released a part of mortgaged premises from the lien of its mortgage on condition that the mortgagor would obtain another mortgage for it as additional security, and a third party executed such mortgage at the request of the mortgagor, there was a sufficient consideration for the execution of the latter mortgage.

6. Where defendant testified that he had executed a mortgage without consideration, evidence that he had executed such mortgage at the request of another mortgagor in order to enable the latter to make an exchange of that portion of his mortgaged premises, which the mortgagee released in consideration of the new mortgage, and that such release and mortgage were deposited together in escrow, and then recorded at the same time, was admissible to rebut defendant's testimony.

7. Where a mortgage given in consideration of the release of a portion of other mortgaged premises was shown to be one transaction with the release, the release did not absolve defendant from liability on his mortgage.

8. Where a mortgage was given as additional security for the payment of a note secured by another mortgage, an agreement by a third party to guaranty the obligation of the latter mortgage was no defense to plaintiff's right to foreclose the mortgage given as security.

9. Where a mortgage was given as additional security for the payment of a note secured by a mortgage on other premises, the conveyance of the latter premises to defendant, who had made the mortgage for additional security, was no defense to an action to foreclose such mortgage together with the original, since such conveyance was not of record or delivered at the beginning of the action, though its date was anterior thereto.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Security Loan & Trust Company against Lena B. Mattern and another to foreclose certain mortgages. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Dunnigan & Dunnigan and Luke D. Bechtel, for appellants. Miller & Brown, for respondent.

HARRISON, J. The appellant Lena B. Mattern executed to the respondent a mortgage bearing date March 1, 1895, upon certain land in the county of Los Angeles, to secure payment of the sum of \$3,500, according to the terms of a promissory note there-

for executed by her to the plaintiff at the same time, with certain coupons for interest therein specified and described. The mortgage was recorded March 18, 1895. In August, 1897, the mortgagee executed at the request of Mrs. Mattern a release of a portion of the mortgaged land, and at the same time, in consideration thereof, the appellant Bechtel executed to the respondent a mortgage upon certain other property to secure the payment of the note executed by Mrs. Mattern. The release bears date June 24, 1897, and the mortgage of Bechtel bears date August 2, 1897, but each instrument was delivered and recorded August 9, 1897. Mrs. Mattern having failed to make the payments as agreed by her, the present action was brought for the foreclosure of her mortgage; the plaintiff also setting forth in its complaint the execution by Bechtel of his mortgage to secure the same obligation, and praying for a sale of the land described in each mortgage. Answers to the complaint were filed on behalf of each of the appellants, and the cause was tried by the court, and judgment rendered in favor of the plaintiff, directing a sale of the property described in the Mattern mortgage, and that, if the proceeds thereof should be insufficient to satisfy the amount of the plaintiff's claim, the property described in the Bechtel mortgage should then be sold, and, if then there should be a deficiency, judgment therefor should be docketed against Mrs. Mattern. From this judgment, and from an order denying them a new trial, Mrs. Mattern and Bechtel have appealed.

Each of the appellants demurred to the complaint upon the ground of misjoinder of causes of action, uncertainty, and want of facts to constitute a cause of action. The demurrers were chiefly based upon the theory that two distinct causes of action are set forth in the complaint,—one against Mrs. Mattern and one against Bechtel; and the demurrers specified several objections to portions of the complaint which are therein styled as counts, but which are treated by the demurrants as distinct causes of action. The court properly overruled these demurrers.

Although one portion of the complaint is entitled therein "First Count," and another portion "Second Count," the portions so entitled do not purport to set forth separate causes of action, but to state the facts by which the defendants, Mattern and Bechtel, are respectively related to the plaintiff's cause of action. A complaint, while setting forth a single cause of action, may at the same time ask for different relief from different defendants, according as they are connected with this cause of action; and its character is to be determined from its contents, rather than from a misnomer on the part of the pleader. The averment that the mortgages referred to in the different counts were given as security for the payment of the same promissory note, and that this note which is set forth in each of the counts is the same note, indicates with

sufficient clearness that only one cause of action is set forth in the complaint. Under the averment that the Bechtel mortgage was executed as additional security for the payment by Mrs. Mattern of the notes secured by her mortgage, Bechtel was properly made a defendant for the purpose of securing to the plaintiff, according to the terms of its mortgage, any deficiency that might arise upon the foreclosure of the Mattern mortgage. See *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200. The statement in Bechtel's mortgage that it was given as security for the payment of a promissory note dated March 1, 1895, "according to its terms," made by Mrs. Mattern in favor of the plaintiff, and secured by a mortgage of the same date, giving also the date and place of record of the mortgage, was a sufficiently definite description of the obligation for which it was given.

Neither is the mortgage invalidated because the instrument set forth in the Mattern mortgage, to which it refers, is not strictly a promissory note, within the definition of the Civil Code. Having executed his mortgage as security for the payment of an instrument "according to its terms," which is set forth in a public record, he is presumed to have known its character, and will not be relieved from his obligation because he has styled it a "promissory note." As the complaint sets forth at length the instrument for which the Mattern mortgage was given, its designation as a promissory note is immaterial. That instrument expressly provides for the payment of the interest coupons which are therein described, and no uncertainty is created by subsequently setting forth at length the form of these coupons.

The objection to the averment in the complaint in reference to the item of \$29.57 advanced for the preservation of the Mattern property needs no consideration, since no claim therefor was made by the plaintiff at the trial, and the item is not included in the judgment.

The defendant Bechtel alleged in his answer that the mortgage executed by him was without any consideration, and at the trial he gave testimony to the same effect. Aside from the consideration which is presumed from a written instrument, a sufficient consideration was shown for the execution of his mortgage. It was shown that he had executed it at the request of Mrs. Mattern, and that prior to its execution, Mrs. Mattern being desirous of effecting an exchange of a portion of the mortgaged premises for other property, a contract for that purpose was prepared by him; that the plaintiff agreed to release this portion of the premises from the lien of her mortgage upon the condition that Bechtel would make this mortgage; that he executed the mortgage at the request of Mrs. Mattern; that the mortgage thus made by him, together with the release by the plaintiff, were deposited in escrow until it was shown to the satisfaction of the plain-

tiff that Bechtel's property was unincumbered; and that the two instruments were placed of record at the same time. The contention that this evidence was outside of the pleadings was properly overruled. The evidence was admissible in rebuttal of Bechtel's testimony that he had executed his mortgage without any consideration. The further objection that, by introducing the release of a portion of the mortgaged premises, Bechtel was absolved from liability upon his mortgage, is without merit, since it appeared that the mortgage was given for the purpose of procuring the release, and was a part of the same transaction, and that this transaction was conducted in part by Bechtel himself, and was carried into effect with the knowledge and consent of all the parties interested. As the release was given at the request of Mrs. Mattern, her objection that the action is for a foreclosure of only a portion of the property originally mortgaged is entitled to no consideration.

The agreement by Trexler to guaranty the obligation of Mrs. Mattern was not available as a defense to the plaintiff's right to foreclose the mortgage given by Bechtel. Neither was the conveyance of the mortgaged premises to him from Mattern available as a defense in the action. This conveyance was not of record at the commencement of the action, and, although bearing date prior thereto, is averred by Bechtel in his answer to have been delivered to him and recorded June 9, 1898, subsequent to the commencement of the action.

Many other objections to rulings of the court in receiving or excluding evidence are presented by the appellants in their brief, as well as to the action of the court in the trial and determination of the cause, but they are not of such a nature as to demand extended consideration. The objection that the court erred in adjudging the attorney's fee allowed to the plaintiff to be a lien upon the land of Mrs. Mattern, thereby creating a greater deficiency to be enforced out of Bechtel's land, is not sustained by the record. The court finds the amount due upon the promissory note for principal and interest thereof, and declares that that amount is a lien upon the lands described in her mortgage, and in its decree directs a sale of sufficient of the land "to raise the amount due unto the plaintiff for the principal and interest and costs of this suit and the expenses of sale." The court does not find or decree that the attorney's fees allowed by it are a lien upon the land of Mrs. Mattern, or direct the sale of any property in satisfaction thereof. The court was authorized to fix the amount of the attorney's fees without receiving any evidence upon the subject. *Clancy v. Plover*, 107 Cal. 272, 40 Pac. 394. The judgment and order are affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.

ing was said about the deposit of a jury fee, and it is perfectly manifest from the record that the rule of the superior court in respect to that matter was never considered as having any bearing upon the point to be decided. The ruling of the court denying a jury trial was based simply and solely upon the ground that the defendants were not entitled to a jury, and, this ruling being made, it would have been a perfectly vain and useless act to deposit or tender the jury fee. The rule merely requires the jury fee to be deposited by the party demanding a jury before the commencement of the trial, and, if a jury trial is denied in advance, the rule can have no operation. Besides, the party making the demand has all the time before the commencement of the trial to make his deposit. Here, when the demand was made, there was no jury in attendance, and the trial by the court, to which the defendants were forced, began and ended before it was possible for a jury trial to have commenced. For these reasons I think the failure of defendants to deposit or offer the jury fee is no answer to their position. It is quite as clear that they did not waive their right to a jury by any of the proceedings referred to in the department opinion. There can be no waiver of a jury except in one of the three modes enumerated in section 631 of the Code of Civil Procedure. *Swasey v. Adair*, 88 Cal. 183, 25 Pac. 1119; *Biggs v. Lloyd*, 70 Cal. 449, 11 Pac. 831. If these conclusions are correct, the appeal has been disposed of by an erroneous decision of the only point considered in the opinion of the department, and the serious and important question in the case—the question decided in the superior court, and the question most elaborately argued by counsel here—is left untouched. I think it called for a decision, and that the appeal should not have been disposed of without a decision.

130 Cal. 639

NAPHTALY et al. v. ROVEGNO et al.
(S. F. 1,654.)

(Supreme Court of California. Jan. 14, 1901.)

In bank. On rehearing. Affirmed.

For opinion in department, see 63 Pac. 66.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. The appellants claimed that the issues raised by their answer were properly triable by jury. When the cause was first entered upon the trial calendar of the superior court, there was a controversy between plaintiffs and defendants as to whether it was a court or jury case; and that court, holding with the plaintiffs, marked it as a court case. In that condition it remained on the calendar until, previous cases being disposed of, it was called for trial. The appellants did not then ask for a continuance, but they renewed their demand for a jury trial, supporting their demand by an argument in which they attempted to show that the nature of the issues to be tried entitled them to a jury. Noth-

130 Cal. 631

SAN MATEO COUNTY v. COBURN.
(S. F. 1,450.)

(Supreme Court of California. Jan. 12, 1901.)

In bank. Rehearing denied.

For opinion in department, see 63 Pac. 78.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. A county, within the meaning of section 14 of article 1 of the constitution, is either a municipal corporation, or it is not a corporation at all; and in either case it is entitled, in condemning a right of way, to set off benefits against damages. *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547; *Moran v. Ross*, 79 Cal. 549, 21 Pac. 958. In my opinion, a county is a municipal corporation, within the meaning of this clause of the constitution; and the decision in *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, that it is not a municipal corporation, within the

meaning of another provision (i. e. the prohibition of the creation of municipal corporations by special laws), is not inconsistent with this view. The term "municipal corporation" has a broad sense and a restricted sense, and it is used in these different senses in the two clauses of the constitution. In one it comprehends counties, and in the other it does not.

(131 Cal. 132)

McCLAIN v. HUTTON et al. (Sac. 712.)

CONTINENTAL BLDG. ASS'N v. SAME.

(Supreme Court of California. Jan. 11, 1901.)

In bank. On motion to modify judgment. Granted.

For former opinions, see 61 Pac. 273, and 63 Pac. 182.

PER CURIAM. In the judgment of the court in bank in this case it was directed that the costs should be allotted one-half to the appeals of Mrs. Hutton, and one-half to those of the Continental Building & Loan Association,—the former to be paid by the respondents, including the appellant Chandler, in amounts proportionate to their respective claims; the latter by the respondents, excluding the appellant Chandler, in the same proportions. L. H. Holt should also have been excluded with Chandler. The judgment is therefore modified in this respect, and Mrs. Hutton will be allowed to recover the costs allotted to her, in the proportions stated, against the respondent cross complainants named in her notice of appeal; and the Continental Building & Loan Association, the costs allotted to it against the respondent cross complainants named in its notices of appeal, with the exception of the cross complainants Chandler and Holt, as to whom its appeal has, in effect, failed.

(131 Cal. 369)

LAVENSON v. WISE. (S. F. 1,451.)

(Supreme Court of California. Jan. 14, 1901.)

CONTRACTS—EXECUTION — SIGNING — ATTORNEY AND CLIENT—FEES—QUANTUM MERUIT.

1. A writing signed by an attorney, reciting the receipt by him of a certain note from defendant for collection on contingent fee, was binding on the attorney, though not signed by defendant.

2. Where an attorney received a note for collection on contingent fee and assurance that there was no defense, but, on the obligors setting up fraud, the attorney went to trial without further agreement, and afterwards prepared a transcript for appeal, he could not recover on a quantum meruit for his services; the trial not having occurred until long after the answer was filed, and the attorney having had knowledge of the defense and the amount of work involved.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by J. H. Lavenson against J. H. Wise. From a judgment for plaintiff, and

from an order denying a new trial, defendant appeals. Reversed.

D. H. Whittemore, for appellant. Joseph Rothchild, for respondent.

CHIPMAN, C. Action for services as attorney at law rendered defendant by Joseph Rothchild, Esq., plaintiff's assignor. Defendant denied the alleged indebtedness, and, as a separate answer, alleged that the firm of Christy & Wise, composed of John H. Wise (defendant) and Harry E. Wise, was the owner of a promissory note for \$9,760, made by one James Murphy and one E. Smalley; that said Rothchild represented to said firm that he could collect the money due on said note, whereupon it was agreed between Rothchild and Christy & Wise that said firm should pay said Rothchild \$50, which was then paid, and "should, when the money due on said note was collected, and only out of the proceeds of the collection of said note, and not otherwise, further pay said Rothchild the sum of \$500, as fee in and for the collection of the money due on said note, by suit or otherwise"; that Rothchild commenced suit on said note, but failed to collect the same, or any part thereof, and has abandoned all attempt to collect the said note; that said unsuccessful attempt to collect said note was the only service performed by said Rothchild for said firm or for defendant. The cause was tried by a jury, and plaintiff had a verdict for \$1,000. The appeal is from the judgment and from the order denying motion for new trial.

The evidence of plaintiff tended to show that plaintiff's assignor performed services in relation to the collection of the note referred to in the answer which were of the value of \$1,000; also services in relation to an accounting between Wise and Murphy and Smalley, or the "Yellowstone Saloon," as the place is called, the sale of one-half interest in which was the consideration for the note; also services in relation to the sale of certain goods by Wise to Wise and Murphy. Some evidence was given as to the amount of work done by Rothchild in relation to the accounting, and in the matter of the sale of goods by Wise to Murphy and Smalley. Mr. Rothchild testified that his services in each of the two latter matters were reasonably worth \$250, and this is undisputed by the evidence, as is also his estimate of the value of his services, to wit, \$1,000, for bringing the suit on the note. The principal question in controversy arises in regard to the agreement to collect the note. The testimony tended to show that when he undertook the business it was with the understanding that it was an ordinary case on promissory note, to which there was no valid defense, and that Mr. Rothchild was employed because he had information about Murphy's business and property, from which he was assured he could collect the judgment when obtained. I think it fairly inferable

from the evidence that, when the agreement presently to be stated was entered into, Rothchild understood from what Wise told him, or led him to believe, that the case would not be litigated. With this understanding Rothchild signed and gave to Wise the following paper: "San Francisco, Dec. 9th, 1895. Received of Mr. John H. Wise a note for nine thousand seven hundred and sixty (\$9,760.00) dollars, dated April 15th, 1895, payable six months after date, with interest thereon at the rate of 8 per cent. per annum. Said John H. Wise to pay upon demand the sum of fifty (\$50.00) dollars for court costs and the sum of five hundred (\$500.00) dollars as a fee upon collection of the same. [Signed] Joseph Rothchild." On December 14, 1895, Mr. Rothchild filed a complaint in the action on the note referred to in the receipt, and on January 11, 1896, the defendants in that action filed an answer. The note was payable to D. H. Whittemore, or order, indorsed to Christy & Wise by Whittemore, and by them indorsed to John H. Wise, who brought the action and is defendant here. The answer admitted the execution of the note, but alleged that it was without consideration, and that Wise took it with full knowledge of that fact; that the consideration was a half interest in the Yellowstone saloon, its fixtures and stock of merchandise, which Christy & Wise had agreed to sell and transfer to Murphy and Smalley, the makers of the note; that Christy & Wise neglected and refused to make the transfer of the saloon, and on November 8, 1895, Murphy and Smalley notified Christy & Wise that they had rescinded said contract of purchase, and declined to pay said note; that it was agreed between Christy & Wise and Murphy and Smalley that the note was to be paid from the income of the saloon, and not otherwise, of which Christy & Wise had full knowledge; that John H. and Harry E. Wise falsely represented to the makers of the note at the time of said purchase that the daily receipts of the saloon were \$100 per day, whereas they were but \$35 per day, and that one McCallum, who they represented was an experienced saloon keeper, had agreed to buy the other half of the saloon, and could bring in much business, etc.,—all of which was alleged to be false. Other false and fraudulent representations were set up in the answer, on account of which, and the failure on the part of Christy & Wise to keep their contract, Murphy and Smalley had, in November, 1895, rescinded, and notified Christy & Wise that they would not pay said note. The trial of that action commenced on December 10, 1896, and lasted several days, and on February 25, 1897, the court made its findings in favor of defendants in the action, and judgment followed for defendants. The evidence is that Wise directed Rothchild to take an appeal to the supreme court, and the latter gave the usual notice, and prepared the transcript, comprising 340 pages of typewritten

matter. Wise paid the reporter for this work. Plaintiff testified: "I then made a demand on Mr. Wise for five hundred dollars in that matter, and he declined to pay it, and I never received a cent." Rothchild's connection with the case then ceased, and what became of the appeal is not disclosed.

It appears without conflict that upon the filing of the answer to the suit on the promissory note Rothchild had knowledge of the nature of the defense set up. An assistant in his office devoted several days to looking up questions of law likely to arise under the issues presented by the answer. The case was not tried for nearly a year after issue of fact was joined. There is no question but that Rothchild knew, or had reason to know, that the defense set up to the note would defeat payment if it prevailed, and that, in any event, it meant litigation, which he had not contemplated when he entered into the agreement with Wise. He testified: "I had a conversation with Mr. J. H. Wise about it [the answer] and he told me it was not true. These things could be disproved; they could not prove it." He testified that he received the note "on the terms set out in the receipt" and continued in the case until after the trial; that after the trial "I asked him [Wise] what he proposed to do about it, and he said he would take the case to the supreme court. Q. You had not said a word about changing this agreement? A. Not a word at all. Q. After you had received that transcript, and put him to that expense, that was the first time you suggested that you would not go on with the case? A. I did nothing of the kind. I told him to pay the \$500. Q. Was that the first intimation that you gave that you were not going on? A. After the trial. I never bothered him during the trial, because I did not have time. Q. You never bothered him during the year 1896? A. Not at all. Q. You never bothered him for a month after the trial, did you? A. Oh, I do not know the time. Some time after the trial I asked him for \$500, and he declined to pay it. Q. That was the first time there was any change in the terms of the agreement? A. I do not know what you mean by 'change.' The first time I ever asked him for money was after the trial. I signed an agreement to do certain things. He never agreed to do anything. Q. Didn't you receive the note on these terms? A. I suppose so; yes. Q. Well, was not that the agreement? A. I do not know. I do not see how you can pin a man down to an agreement if he [Wise] did not sign it. I was willing to trust him. I did not ask him for any writing. I was willing to take it that way. The receipt merely recites the terms, and Mr. Wise had a doubt about the propriety of turning over a \$9,000 note, and I had to satisfy him that I was perfectly responsible." At another part of his testimony he testified: "I went on because John H. Wise told me

these allegations [referring to the answer] were not true. He could prove they were not true." Again, he testified: "Q. Now, Mr. Rothchild, did you inform Mr. Wise in any way that you would not go on with the case on these terms? A. No, sir. Q. You never told him that, did you? A. No, sir. Q. You went on through the year 1896? A. Yes. Q. Under this agreement? A. Yes. Q. You tried the case under this agreement? A. No, I did not. Q. Did you tell him that you would not continue under the agreement? A. No, sir. Q. Did you ask him for any other agreement? A. No, sir. Q. Did you ever speak to him on any occasion about another agreement? A. I could not do it, because I was in the middle of a trial. I never knew the true state of the facts." Mr. Rothchild seems to have been of the impression that his receipt to Wise was not a contract because Wise did not sign it. This is an erroneous view of the receipt. It was an agreement on Mr. Rothchild's part to take the case on the terms proposed by him, and Wise became bound by it when he delivered the note to Rothchild under that agreement. It was not necessary for Wise to sign it. He acted under it, and this was sufficient to bind him. The serious question is: Could Mr. Rothchild go forward under his contract, and try the case, after he knew it was to be seriously litigated, and might be defeated, without informing Mr. Wise that this new phase of the matter would involve labor not previously contemplated, and that he would require a larger contingent fee, or would require some fee in the event of failure to obtain judgment? Upon the face of the agreement the fee was contingent. That agreement was not changed by Mr. Rothchild, nor attempted to be changed, until after the trial and judgment had gone against his client. Mr. Rothchild did nothing and said nothing which would lead Mr. Wise to suppose that any change was to be made in the contract of employment. It is true, Wise told him the allegations of the answer were untrue, and he could prove them to be so, and that the defendants in that action could not prove what they had alleged. Mr. Wise may have so thought and so believed, and, whether he did or not, it was Mr. Rothchild's duty to inform him that the answer so changed the matter from its original aspect that a new agreement would have to be made as to his compensation. Saying nothing and doing nothing to indicate an unwillingness to continue as he had begun, Mr. Rothchild must be held to have continued under the only agreement then existing between the parties.

Upon this phase of the case there is no conflict in the evidence. By his own testimony, we think, Mr. Rothchild has shown that he ought not to have recovered for services in the case brought against Murphy and Smalley. In the conversation which preceded the signing of the receipt there

was nothing said about paying any fee in the event the suit was litigated. It was assumed by both parties that it would not be litigated. But there is nothing in the evidence which would warrant the assumption that Wise willfully or fraudulently deceived Rothchild in this regard; and, if he did so, still, as soon as the fact came to Rothchild's knowledge (as it did when he was served with the answer), he should have promptly rescinded, or demanded some different arrangement. He could not proceed with the case as though the contract was still in force, with a mental reservation that he would repudiate it, or rescind it after the trial, should his client be cast in the suit. To justify such a course would be to allow fraud to be met by fraud, and this the law will not allow.

Respondent contends with much confidence that he should recover in this action because recovery on the note was prevented by Wise. The facts on which this claim rests were all brought to Mr. Rothchild's attention in the answer of Murphy and Smalley to Wise's suit against them, and in the course of the preparation for trial. Even though Wise gave him every assurance that he could overcome this defense, it did not change the fact that the contract of employment still bound Mr. Rothchild, and continued to do so until modified, superseded by another, or rescinded. Mr. Rothchild had good cause for rescinding the contract, or for refusing to proceed under it, but it was too late to rescind after it had been performed. Under the facts in the case as they now appear, we are unable to discover any ground upon which the present action on quantum meruit can rest as to the matter of the suit against Murphy and Smalley. The verdict was general, and we cannot, therefore, determine what part of the \$1,000 awarded plaintiff was for services other than those in the matter last above mentioned. The cause should be remanded for a new trial, and we advise that the judgment and order be reversed.

We concur: COOPER, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

131 Cal. 364

**STUMPF v. BOARD OF SUP'RS OF SAN
LUIS OBISPO COUNTY. (L. A. 753.)**

(Supreme Court of California. Jan. 14, 1901.)

**HEALTH—SANITARY DISTRICTS—ELECTION—
JURISDICTIONAL FACTS—EVIDENCE—HEAR-
SAY—UNSWORN STATEMENTS—CERTIORARI—
RETURN.**

1. Where the return to a writ of certiorari to review the action of a board of county supervisors in creating a sanitary district shows no evidence of posting the order calling the required election, nor a recital in the proceedings that notice was posted, the election was void, and the subsequent declaration of the board that the district was duly organized was a nullity; and therefore all the orders, records, and proceedings of the board should be annulled.

2. Where the return to a writ of certiorari to review the action of the board of supervisors in creating a sanitary district did not show that any evidence was taken or heard as to whether the signatures to the petition for its establishment were genuine, or whether 25 of them were resident freeholders in the district, it was error on the hearing for the court to permit a witness who had signed the petition, and was present when it was presented to the board, to testify that the board questioned him as to the residence of the signers, and whether they were freeholders, since, as his statements before the board were not sworn to, they were mere hearsay when repeated before the court,

and did not prove the residence or signatures of the signers.

3. Where the board of supervisors, in determining whether 25 of the signers of a petition for the formation of a sanitary district were freeholders and residents in the district, and that their signatures were genuine, relied on the mere unsworn statement of one of the signers, instead of having the facts established according to rules of evidence required in the courts, the sufficiency of such evidence as proof may be reviewed on certiorari, since it was in proof of jurisdictional facts.

4. Where, on certiorari to review the action of the board of supervisors in creating a sanitary district, it appeared that the only evidence taken before the board as to the genuineness of the signatures of the signers of the petition for the creation of the district, and whether 25 of them were freeholders and residents thereof, was unsworn to and improper, it would be useless to require a further or amended return to show evidence of jurisdiction; and, no leave to make such return having been requested, the orders, records, and proceedings of the board will be annulled.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; E. R. Unangst, Judge.

This is a proceeding by J. W. Stumpf to review the action of the board of supervisors of San Luis Obispo county in the matter of the alleged creation of Templeton sanitary district, in said county. From the judgment Stumpf appeals. Proceedings annulled.

P. O. Chilstrom and S. M. Swinnerton, for appellant. A. E. Campbell (Venable & Goodchild, of counsel), for respondent.

HAYNES, C. The plaintiff based his application for the writ upon an affidavit, as required by section 1069 of the Code of Civil Procedure. The writ was issued and served, and a return thereto was made, setting out the petition for the formation of the district, which purported to be signed by 27 "residents and freeholders" of the district therein described. On November 7, 1898, the board made an order reciting that "a petition in due form having been received from residents and freeholders of the district herein-after described," praying for the creation of a sanitary district, and ordering that an election be held on December 10th by the qualified electors residing within the district, the boundaries of which were stated in the order designating the place at which the election should be held, and the persons who should conduct the same, and further ordering "that a copy of said order be posted for four successive weeks prior to said election in three public places within the proposed district," and that it should be published for four successive weeks in the Templeton Advance. The return to the writ further shows that officers of the district were nominated, and an affidavit of the publication of said order calling an election was made and filed; that on January 4, 1899, the board canvassed the returns of the election, and found the whole number of votes cast to be, for a sanitary district, 59 votes, and against it 44 votes;

and that persons therein named had been elected, respectively, to the offices of sanitary assessor, and members of the sanitary board,—and declared that “a sanitary district, to be known and designated ‘Templeton Sanitary District,’ has been duly established,” with boundaries therein described. The return does not show that any evidence was taken or heard as to whether the signatures to the petition were genuine, nor whether 25 of them were each a resident freeholder within the boundaries of the proposed district; nor does the return show that the order calling an election was posted in three public places within said proposed district for four weeks, or at all, or that any evidence in regard thereto was heard. The defendant also filed an answer to the petition for the writ, denying the allegations of the petition. This was irregular. The return to the writ constitutes the answer, as well as evidence, and the case is heard thereon, unless upon motion an additional or amended return is made. Upon the hearing, however, Mr. Whicher, the clerk of the board of supervisors, was called by the plaintiff, and testified that no evidence was received by the board as to whether or not the signers of the petition were residents and freeholders within the district; that no witnesses were produced or examined before the board upon that question; that Mr. Smith, a member of the board, examined the names, and was satisfied with them. Mr. Fisher was called by the defendant, and testified that he was one of the petitioners; that he was present at the time the petition was presented to the board. He was then asked several questions by counsel for defendant, as to whether he was questioned by any member of the board as to the residence of the signers of the petition, and whether the petitioners were freeholders, and whether Supervisor Smith did not go over the names and question him in “regard to them.” These questions were each objected to by plaintiff upon the ground that it did not appear that the witness was sworn before the board, and that the questions were incompetent. Each objection was overruled, and the plaintiff excepted. The witness answered each question affirmatively, and further testified that Supervisor Smith looked over the petition and asked witness about the names,—if they were freeholders,—“and I said, ‘Yes. If you are not satisfied, you can go down and look at the records;’ and he said, ‘We will take it for granted.’”

No objection was made upon either side to the introduction of parol evidence, and the question of its admissibility need not now be considered; but, if its admissibility be conceded, the court erred in overruling plaintiff's objections above noted, for the reason that the unsworn statement of the witness made before the board of supervisors was incompetent, and its repetition before the court was mere hearsay, or the repetition of un-

sworn statements, and did not tend to prove that, as a matter of fact, the petitioners were each residents and freeholders within the proposed district, and that their signatures were genuine. The determination of these questions, upon which the jurisdiction of the board depended, required the exercise of judicial power; and, as the statute did not prescribe the character of the proof by which they should be determined, they must be established in accordance with the rules of evidence recognized by the courts and the common law. “An exception to the rule that the sufficiency of the evidence will not be reviewed is made when the question is whether jurisdictional facts were or were not proved. This exception arises out of the most important office and function of the writ,—the keeping of inferior courts and tribunals within proper bounds. If the decision of the inferior tribunal as to the sufficiency of the evidence to establish jurisdictional facts were not reviewable, the writ of certiorari would be of no avail as a remedy against an assumption of jurisdiction. And, for the purpose of enabling the reviewing court to determine whether jurisdictional facts were established, it will require a return to be made of the evidence upon which such facts are based.” 4 Enc. Pl. & Prac. p. 262. This court has said: “In all cases it is essential that there be proof of a sufficient petition, inasmuch as without it the board could acquire no jurisdiction to act, and its proceedings would be absolutely void. * * * Upon certiorari, though the inferior tribunal is required to certify only matters of record, yet, if the jurisdictional facts do not appear of record, it must certify not only what is technically denominated the ‘record,’ but such facts, or the evidence of them, as may be necessary to determine whatever question as to the jurisdiction of the tribunal may be involved.” *In re Madera Irr. Dist.* 92 Cal. 296, 333, 335, 28 Pac. 272, 675, 14 L. R. A. 755, citing *Blair v. Hamilton*, 32 Cal. 52; *People v. Board of Delegates of San Francisco Fire Dept.*, 14 Cal. 479; *Lowe v. Alexander*, 15 Cal. 300. The statute authorizing the formation of sanitary districts requires that the order or proclamation calling an election “shall be posted for four successive weeks prior to the election, in three public places within the proposed district, and shall be published,” etc. The return shows that proof of publication was made by affidavit of the publisher, in due form; but there is no evidence of posting, nor is there even a recital in the proceedings to the effect that such notice was posted. Without such posting the election was void, and the subsequent declaration of the board of supervisors to the effect that the Templeton sanitary district was duly organized is a nullity. As it is only the evidence that was heard by the board of supervisors upon questions essential to their jurisdiction that can be considered by the court in determining whether the

board acquired jurisdiction, it is obvious from the parol testimony hereinbefore recited that it would have been useless for the court to require an additional or amended return; and, no leave to make an amended return having been requested, we advise that the judgment and order appealed from be reversed, and that judgment be entered annulling all the orders, records, and proceedings of the board of supervisors in the matter of the alleged creation of Templeton sanitary district, in said county of San Luis Obispo.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed, and that judgment be entered annulling all the orders, records, and proceedings of the board of supervisors in the matter of Templeton sanitary district, and adjudging that said district has no legal existence.

(131 Cal. 356)

SAVINGS & LOAN SOC. v. CITY AND
COUNTY OF SAN FRANCISCO.
(S. F. 1,462.)¹

(Supreme Court of California. Jan. 14, 1901.)

TAXATION — ASSESSMENT — DESCRIPTION OF
PROPERTY — BANKS — RECOVERY OF
TAXES PAID — INTEREST.

1. A sworn statement of taxable property returned by a taxpayer is not conclusive on the assessor, and he may assess property omitted therefrom without requiring the taxpayer to appear and testify in relation thereto.

2. The term "loans on stocks and bonds," used in describing an item of property assessed to a savings bank, sufficiently describes the property.

3. The fact that loans made by a bank are secured by property which is exempt from taxation does not render such loans untaxable.

4. A finding that a 20 per cent. increase in an assessment for taxation applies only to certain items of property assessed is warranted where the items raised can be ascertained by mathematical calculation.

5. Civ. Code, §§ 1915, 1917, allowing interest as damages between parties to an action, does not apply to the state or any of its political subdivisions; and a taxpayer entitled to recover illegal taxes paid to a county under protest, as provided by Pol. Code, § 3819, which makes no provision for the payment of interest, cannot recover interest thereon.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the Savings & Loan Society against the city and county of San Francisco to recover taxes paid under protest. From a judgment allowing the recovery of a portion of such taxes, plaintiff appeals. Affirmed.

A. N. Brown, for appellant. H. T. Creswell and James L. Gallagher, for respondent.

CHIPMAN, C. Action to recover certain taxes which were paid under protest. In response to a demand made by the assessor of the city and county of San Francisco,

plaintiff, between the first Monday of March and the first Monday of July, 1896, returned a verified statement purporting to contain a complete list of all its property subject to taxation for that fiscal year. Without requesting a corrected statement requiring plaintiff to appear and testify in regard to the statement returned, the assessor, of his own motion, made an assessment upon the property described in the statement, as well as other property omitted therefrom. The added property was found by the court to have belonged to plaintiff on the first Monday of March of the year named, and this finding is not disputed. It appears also that on June 25th plaintiff received notice in writing from the assessor of the property assessed, including the added items and giving their valuations. Plaintiff did not appear before the county board of equalization, or request any reduction of the assessment or any alteration, or that the added property be omitted therefrom. In September the state board of equalization ordered the entire assessment roll of defendant to be raised 20 per cent., except certain property; and the auditor thereupon raised plaintiff's assessment accordingly, as will hereinafter appear. The trial court gave judgment for plaintiff for the taxes assessed upon "state and mining bonds" of which it appeared plaintiff owned none, and the amount of the tax assessed upon the 20 per cent. increase of the face value of the "county and school-district bonds." Plaintiff's suit was for the entire tax paid, excepting only the amount thereof which was assessed upon the property listed to the assessor by plaintiff. The appeal is from the judgment on bill of exceptions.

1. Plaintiff contends that, "until he shall have subpoenaed and examined the taxpayer who has furnished to him a sworn statement, the assessor can do nothing but accept the statement as true, and act upon it as a full and correct list of the taxable property of the one by whom or on whose behalf it has been made and returned." Plaintiff devotes the greater part of its opening brief to a discussion of this proposition, and the learned counsel for plaintiff has also furnished us with an elaborate discussion of the question in review of the decision rendered here, since the original briefs were filed, in *People v. National Bank of D. O. Mills & Co.*, 123 Cal. 53, 55 Pac. 685. The court is asked to re-examine the question there decided adversely to plaintiff's present contention: (1) Because its determination "was not essential to the disposition of that case"; and (2) because "the chief constitutional and statutory province of the statement [made by the taxpayer] has been overlooked." So far as we can see from the argument now made, the question was substantially the same in that case as in this, and the opinion then given shows that the proposition had careful attention, and we are not disposed to recede from the position there taken. We

¹ Rehearing denied February 14, 1901.

do not regard the assessment complained of as the arbitrary assessment which the assessor is authorized to make under section 3633 of the Political Code. It was an assessment under the general powers given the assessor and the duties imposed upon him by law,—Pol. Code, § 3628 et seq., and section 3861, which latter requires him to take an oath that he has made diligent inquiry and examination to ascertain all the property within the county subject to assessment, and that the same has been assessed on the assessment books. We are entirely satisfied with the reasoning in the case above cited, upon the authority of which we must hold against plaintiff's contention.

2. The assessment contained the following items of personal property:

Furniture	\$ 5,000
Franchise	5,000
Money	40,300
Money on deposit in Bank of California	86,286
Loans on stocks and bonds.....	861,358
State and mining bonds.....	173,450
County and school-district bonds....	349,327
Total	\$1,520,721

Of these items the statement furnished by plaintiff contained only the first four. The remaining three were added by the assessor, the assessment as to the others being the same as returned in the statement of plaintiff. It is now contended that the assessment as to the item "Loans on stocks and bonds" was void for uncertainty, and because upon untaxable property. The rule as to the degree of certainty required in describing personalty in assessments for taxation is this: that the property shall be so described that taxpayers may know for what they are to be taxed. City and County of San Francisco v. Flood, 64 Cal. 504, 2 Pac. 264. Appellant makes a very ingenious argument—more ingenious than forcible—to show that the term "loans on stocks and bonds," according to Webster's definition of the word "loan," is without legal or actual significance, and, "as written, is not only not taxable property, but no property whatsoever." A "loan," it is shown by defendant, is (1) a lending; (2) that which is lent; (3) a permission to use; that ex vi termini a loan imports that the thing loaned has passed out of the possession and control of the lender into that of the borrower; that neither the "act of lending" nor the "permission to use" can be property; that the only thing that would be loaned on stocks and bonds would be money, and the fact that money has been lent would involve the fact that the money loaned (the loan) was not in the lender's possession, and could not be taxed to him; that, if the money can be found, it is to be assessed and taxed to the person who owns it, and cannot be assessed to two distinct persons. Subdivision 4, § 3650, of the Political Code provides that the assessor must list "all personal property,

showing the number, kind, amount and quantity; but a failure to enumerate in detail such personal property, does not invalidate the assessment." The statute indicates that the classes of personal property should be set down separately, while a statement of every article need not be. People v. McCreery, 34 Cal. 432. In that case an assessment reading, "Money," valuation "\$5,000"; "Money loaned," valuation "\$125,000,"—was held to sufficiently describe the property. The money loaned was assessed to the lender, which seems to meet appellant's suggestion that such a thing is impossible. If the term "loans" means money loaned, we need look no further for authority in holding the designation or classification in the present case to be sufficient. Appellant's corporate name implies that appellant is engaged in the business of receiving money as "savings," and lending out or making "loans" of these deposited "savings" in the interest of depositors. These loans, it must be presumed, are evidenced by some sort of obligations of the borrowers, executed in connection with the hypothecation of the stocks and bonds as security for the loans; and these evidences of indebtedness of the borrower to plaintiff necessarily become solvent credits or choses in action,—promissory notes or contracts of pledge,—and are taxable unless for some reason they are made nontaxable by the law or the constitution, as appellant urges they are. Upon the point now under discussion, we think plaintiff could not have been misled by or mistaken as to the meaning of the terms used in classifying the personal property in question. In commercial and banking usage the meaning of the expression "loans on stocks and bonds" is as well understood as the expression "money in bank." If a proposed borrower should approach plaintiff's counter and ask the cashier if the society "made loans on stocks and bonds," the cashier would at once understand what was meant.

3. But, conceding the terms used to be sufficiently definite, appellant contends that, it being admitted that all these shares of stock in corporations formed under the laws of this state are not subject to assessment or taxation, these notes or other evidences of indebtedness constitute "the contract or other obligation by which the credit [the lender's counterpart of the borrower's debt] is secured," within the meaning of article 13, § 4, of the constitution; that as such they were, "for the purposes of assessment and taxation, to be deemed and treated as an interest in the property affected thereby; that as the whole includes all its parts, and as the whole of the property affected by these notes and contracts of pledge was not taxable, it must follow that every part of that property and every interest in it was likewise not subject to taxation. The claim seems to be that the term "property," used in the section of the constitution referred to,

includes both real and personal property, and that, as plaintiff acquired an interest in the stocks by the loan, such interest can no more be taxed than can the property itself so held as security. We do not think it necessary to decide whether the term "property," as used in the constitution, includes personal property. Section 1 of article 13 includes "credits" within the meaning of the word "property," and provides that all property (except certain enumerated kinds) "shall be taxed in proportion to its value," etc. In the case of the mortgage of land the mortgage debt is taxed to the holder, and so would the debt be taxed to the holder if the security be some form of personal property not exempt. We cannot see any reason for holding that, because the security happens to be of some kind of property exempt by law, the debt secured thereby should also be exempt.

4. It is claimed that the money and solvent credits were illegally assessed, because raised above their face value by the state board of equalization. The court found that the increase was only upon the three items,—furniture, franchise, and county and school-district bonds. Appellant excepted to this finding as not supported by the evidence, and claims that it appears from the assessment book that the increase of valuation made by the auditor pursuant to the order of said board was upon all the personal property assessed to plaintiff. The assessment book showed the items and valuation as heretofore stated, amounting in the aggregate to \$1,520,721. If the 20 per cent. increase had applied to all the personal property, it would have amounted to \$304,724, whereas the actual increase was \$71,865, or exactly 20 per cent. of the three items mentioned by the court, lacking 40 cents. An attempt was made by defendant to show by the witness Herzer, chief deputy in the assessor's office, what items were raised, to which plaintiff objected on the ground that the roll speaks for itself, and cannot be interpreted by the opinion of witnesses. The trial court took the view that, if the items raised could be arrived at by mathematical calculation, the roll must be held to be sufficiently definite, although it fails to designate each item which the auditor took into account to reach his aggregate. The witness' testimony contributed nothing to the meaning of the roll. As to the county and school-district bonds, the trial court gave plaintiff judgment for the tax increase thereon, which it had paid, and plaintiff was only required to pay the 20 per cent. increase on the value of the furniture and the franchise. We see no reason for holding the assessment void on the ground alleged. If the increase of the roll could be ascertained by including any one or all the other items, or by including one or more of them, and including or excluding one or more of the items found by the court to be the ones raised, there might be some ground for

holding with appellant on the ground of uncertainty as to what property was burdened with the increase. But as there is no possible way to reach the amount of the increase, except by computing the 20 per centum on these three items, and as by so doing the result is readily ascertained, we conclude that the court was warranted in finding the fact as it did.

5. It is claimed that the court erred in not allowing interest from date of payment of the tax under protest; citing Civ. Code, §§ 1915, 1917; Perley, Interest, p. 135. The Code sections cited relate to interest as compensation or damage between parties to an action, and the language of the statute is general, and does not include the state or any of its political subdivisions. The state is not bound by general words of a statute which would operate to establish a right of action against it. *Mayrhofer v. Board*, 89 Cal. 110, 26 Pac. 646; *Whittaker v. Tuolumne Co.*, 96 Cal. 100, 30 Pac. 1016. The action here is brought under a new section of the Political Code (3819), in which no provision is made for the payment of interest. St. 1895, p. 335.

The view we have taken of the questions presented by appellant makes it unnecessary to particularly notice the alleged errors of law at the trial. The judgment should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

131 Cal. 350

CARTER et al. v. BUTTE CREEK GOLD-MINING & POWER CO. et al. (Sac. 787.)
(Supreme Court of California. Jan. 11, 1901.)
APPEAL AND ERROR—UNDERTAKINGS—SUFFICIENCY—DISMISSAL.

Where an appeal bond recited that plaintiffs had appealed from a judgment, and also from an order denying a motion to set the same aside, in consideration of which, and of such appeal, the sureties undertook that appellants would pay all damages awarded against them on "the appeal," such undertaking was ambiguous, in that it did not show for which appeal it was given, and, not covering both appeals, it was fatally defective, and the appeals should be dismissed.

In bank. Appeal from superior court, Butte county.

Action by T. O. Carter and others against the Butte Creek Gold-Mining & Power Company and others. From a judgment for defendants, and from an order refusing to set aside said judgment, plaintiffs appeal. Appeals dismissed.

T. F. Batchelder, J. G. Severance, and D. L. Forster, for appellants. Park Henshaw, for respondents.

GAROUTTE, J. Respondents have moved to dismiss the appeals in this case. One of

the grounds relied upon to secure a dismissal is based upon the claim that the undertaking upon appeal is substantially defective. This undertaking recites that whereas the appellants have appealed to this court from the judgment entered in the action, and also from the order denying plaintiffs' motion to set aside the judgment, now, therefore, "in consideration of the premises and of such appeal," the sureties undertake that appellants will pay all damages awarded against them on "the appeal." The case of *Estate of Heydenfeldt*, 119 Cal. 346, 51 Pac. 543, is similar to the case at bar. There the appeal was taken from various orders, and the sureties undertook "that said appellant will pay all damages and costs which may be awarded against her on said appeal." In this case the undertaking uses the language "the appeal." In the *Heydenfeldt* Case this court said: "It has been established by a long line of decisions of this court that an undertaking on appeal, such as the one given in this case, is entirely invalid for any purpose. *People v. Center*, 61 Cal. 191; *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 815, and previous cases there cited; *Associates v. Wilkins*, 71 Cal. 626, 12 Pac. 799; *McCormick v. Belvin*, 96 Cal. 182, 31 Pac. 16; *Centerville & K. Irr. Ditch Co. v. Bachtold*, 109 Cal. 111, 41 Pac. 813. It is said in the *Centerville* Case, *supra*: "If the undertaking has no special reference to either matter appealed from, but is conditioned generally upon 'such appeal' (*People v. Center*, 61 Cal. 191; *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 815), or 'said appeals' (*McCormick v. Belvin*, 96 Cal. 182, 31 Pac. 16), all the appeals will be dismissed upon the ground that by reason of its ambiguity it cannot be determined for which appeal it was given." For the foregoing reasons, the appeals are dismissed.

We concur: VAN DYKE, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.

131 Cal. 1

THOMPSON et al. v. STAACKE et al. (S. F. 2,301.)

BANK OF CALIFORNIA v. SAME.

(Supreme Court of California. Jan. 17, 1901.)

In bank. Rehearing denied.

For opinion in department, see 63 Pac. 81.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order of the court denying a rehearing. If it is not true that "the moneys here involved are moneys expended under the subsequent orders," as stated in the opinion of the court, then this appeal cannot be properly disposed of without deciding the question whether the first order of allowance ceased to be operative on the filing of the inventory or when the estate became insolvent. I think it clear that at least \$47.50 has been allowed in this

account for support of family in excess of the total amount payable under the last two orders, and, unless this sum is covered by the maxim de minimis, the appellants were entitled to a decision of the question presented by their appeal. In my opinion, even so small a sum as \$47.50 is not within the rule de minimis, especially when it appears that the future proceedings in the settlement of this estate will be embarrassed by the question raised, but not decided, upon this appeal.

131 Cal. 352

PEOPLE v. ANDERSON. (Cr. 603.)

(Supreme Court of California. Jan. 12, 1901.)

MANSLAUGHTER—EVIDENCE—SUFFICIENCY.

The state contended that accused was guilty of manslaughter, in that, knowing that deceased had such an appetite for whisky that his death would result from an unrestrained use of it, gave it to him for the purpose of causing death, or so carelessly as to amount to criminal negligence. Deceased boarded at defendant's hotel, and on being taken ill was cared for by defendant. The physician instructed defendant to give a certain small quantity of whisky. Deceased was intoxicated when the physician first called, but he never saw deceased intoxicated thereafter. His stomach would not retain liquor. Defendant knew that deceased could not drink with safety. At one time during the illness a flask of whisky was in a drawer in deceased's room, but not where he could get it, and once when the physician asked for whisky accused took a flask from under the mattress, but did so with no attempt to conceal from whence it was taken. At the time deceased was too weak to get out of bed. Before the doctor was sent for, deceased drew a check for \$2,000 in favor of accused, which he immediately tried to cash, but deceased subsequently disclaimed knowledge of the check, and refused to provide for defendant in his will, as urged to do by defendant. *Held*, that the evidence was insufficient to sustain the verdict.

In bank. Appeal from superior court, Humboldt county.

Simon Anderson was convicted of manslaughter, and he appeals. Reversed.

S. M. Buck and J. F. Coonan, for appellant. Tirey L. Ford, Atty. Gen., for the People.

HARRISON, J. The appellant was charged with the crime of murder in the killing of Thomas Kehoe, and upon his trial therefor was convicted of manslaughter. He has appealed from the judgment entered thereon upon the ground that the verdict is not sustained by the evidence. The evidence established that Kehoe died from Bright's disease of the kidneys, superinduced by an excessive use of alcoholic drinks. It is claimed by the prosecution, in support of the verdict, that, with the knowledge that Kehoe had such a passion for whisky that his death would result from an unrestrained use of it, the defendant gave it to him to drink, or placed it within his reach, either for the express purpose of producing his death, or with such carelessness as to constitute a

criminal negligence which would make him responsible for his death. There was no direct testimony that the defendant ever gave any whisky to the deceased, except in accordance with the directions of the attending physician, or was in any way instrumental in allowing him to obtain any whisky; but it is claimed that the circumstances connected with his death and the relations shown to have existed between him and the defendant are sufficient to justify the verdict. The deceased had for a long time been addicted to excessive drinking, and for some time prior to his death was an inmate of the hotel kept by the defendant. In the early part of April, 1899, while at the defendant's hotel, he had an attack of delirium tremens, and was under medical treatment therefor for about a week. After his recovery from this he remained under medical treatment for other troubles for another week, during a portion of which time the defendant was his nurse; and after his recovery from this he went about the streets as usual. The record does not give any account of his condition or doings from this time until after the 15th of May, except that he continued to room at the hotel of the defendant, and was occasionally seen upon the streets. At some time between the 15th and 20th of May he had evidently yielded to his passion for drink, and as a result thereof was taken with some kind of sickness which confined him to his bed, and required the attendance of a nurse. In the early part of this sickness the defendant alone took care of him, but after the 20th of May, an employé, one Nilsen, who came into his service on that day, assisted him, and thereafter, while the deceased remained at the hotel, the defendant cared for him during the day and until midnight, and during the remainder of the night Nilsen, who seems to have been a night watchman, relieved him by himself looking into the room of the deceased at frequent intervals, and ministering to his wants. Kehoe remained in the hotel until May 25th, when he was removed to a hospital, where he died on May 28th. Dr. Ottmer, who had been the medical attendant of Kehoe during his sickness in April, was sent for by the defendant Monday afternoon, May 22d, and attended upon the deceased from that time until his death. He testified that he found Kehoe in bed, in a very weakened condition, and in an advanced stage of Bright's disease of the kidneys, from which he had been suffering prior to his first attendance upon him; and he gave instructions to the defendant to give him a tablespoonful of whisky every three hours. There is no evidence that from this time Kehoe was given or had any whisky, except in accordance with this instruction. Neither is there any evidence that the defendant was present at any time when Kehoe drank any whisky, or in any way contributed to his drinking before he was taken down with his last illness; and although Dr.

Ottmer says that Kehoe, when he saw him that evening, was as drunk as he could be, and must have drunk a great deal to have got into the condition he was in, it was not shown that the defendant was in any way connected therewith, or ever knew that he had been drinking, until he took to his bed as the result thereof. Dr. Ottmer says that after his first visit Kehoe was sober whenever he called, and that at the first visit he did not want any whisky, since he had had all that he wanted; that he was sober after that evening, because he could not keep any liquor on his stomach; that in his weak condition a very little would make him appear to be quite intoxicated.

It was shown by the prosecution that while Dr. Ottmer was attending Kehoe in April he advised him that, if he continued to drink as he had been drinking, it would kill him, and that the defendant was present when this advice was given; that during his sickness in May whisky was permitted to be in his room, and an opportunity afforded to Kehoe to get the same in the absence of his attendants; and it is urged that when the defendant assumed to nurse and care for him during his last attack it was an act of criminal negligence to permit any whisky to be placed within the reach of Kehoe, or so that he would have an opportunity to satisfy his craving for it. As a part of the evidence in support of this claim, it appears that when Nilsen first began to assist the defendant there was a pint flask of whisky in a drawer in Kehoe's room, but Nilsen states that it was where Kehoe could not get at it. It was also shown that a flask of whisky was at one time upon a stand, and that there was at another time a flask upon the bureau; but, as the defendant had been instructed to give Kehoe a tablespoonful of whisky every three hours, and as it appeared that Kehoe was too weak to get out of bed, the jury were not authorized to hold that it was criminal negligence to allow the flask to be in the room. On Monday evening, May 24th, an attorney went to Kehoe's room, together with Dr. Ottmer and a friend of Kehoe's, for the purpose of having him execute his will, and they were afterwards joined in the room by the defendant. Kehoe's weakness was so great that he could scarcely talk; and when the doctor asked for whisky, that he might give him a hypodermic injection of strychnine and whisky for the purpose of enabling him to answer the questions put to him, the defendant reached across the bed, and took a small flask of whisky, partly filled, from under the mattress at the side of the bed. It is urged from this fact that the jury were authorized to find that the whisky was placed there by defendant to enable Kehoe to get at it and drink it. Aside from what has before been said that there is no evidence that Kehoe did drink any of it, Dr. Ottmer also testified that, although it was within Kehoe's reach, if he had drunk

it he could not keep it down, as he would vomit even water. It must also be borne in mind that the defendant took the flask from the bed openly, in the presence of several persons; and it is hardly to be supposed that, if he had placed it there with any sinister motive, he would thus publicly have betrayed himself. Moreover, it is only a conjecture that the flask was placed there by the defendant.

Testimony was offered on the part of the prosecution that on Monday afternoon, before the defendant sent for Dr. Ottmer, Kehoe made a check in favor of the defendant for \$2,000, as a gift to him, and that the defendant had two persons affix their names as witnesses thereto; that immediately upon its receipt the defendant sought to have it cashed by the bank where he had been informed that Kehoe had money on deposit, but the bank, being suspicious, declined to pay it; that, on Wednesday evening, Kehoe, while his will was being prepared, disclaimed all knowledge of making the check, and, although urged by the defendant to make some provision for him in his will, refused to do so. These facts are urged as showing motive on the part of the defendant that he desired the death of Kehoe in order that he might obtain his money. If it be assumed that Kehoe made the check at the suggestion or request of the defendant, that fact has no tendency to show that the defendant gave him any whisky. A sufficient motive for obtaining the check would be found in a purpose to take a wicked advantage of the impaired condition of Kehoe's mind for mere purposes of greed, in the belief that his physical condition was such that he would never recover, or know of having made the check. We are clearly of the opinion that there was no evidence before the jury from which they were authorized to find that Kehoe came to his death by reason of any act of the defendant. The judgment is reversed, and a new trial ordered.

We concur: McFARLAND, J.; TEMPLE, J.; VAN DYKE, J.

131 Cal. 336

McNAMARA v. OAKLAND BUILDING & LOAN ASSN. (S. F. 1365.)

(Supreme Court of California. Jan. 11, 1901.)

BUILDING AND LOAN ASSOCIATIONS—BY-LAWS—WITHDRAWAL OF MEMBERS—LOANS—PREMIUMS—MORTGAGES—FORECLOSURE—SET-OFF—ATTORNEY'S FEES.

1. The provisions of the act of March 31, 1891 (St. 1891, p. 252), amending Civ. Code, div. 1, pt. 4, tit. 16, governing building associations, do not apply to associations incorporated prior to the enactment of the amendatory act, unless they have elected to continue their existence thereunder, as provided by section 646, authorizing such election.

2. Under Civ. Code, § 644, giving building associations power to fix the terms on which members may withdraw, it is competent for an association to enact a by-law providing that

a borrowing member cannot withdraw before his loan is fully paid, except by the consent of the directors.

3. A clause in a mortgage given by a borrowing member of a building association, providing that, in case of foreclosure, the association shall have the option to apply on the mortgage note the cash surrender value of shares of stock pledged by the borrower, less all fines and penalties, and that thereupon the shares shall become the property of the association, gives the borrower no right to set off payments made on the stock against the amount due on the loan, nor does it compel the association to do so.

4. A borrowing member of a building association occupies the dual relation to the corporation of borrower and stockholder, each of which is distinct from the other.

5. Evidence that a borrowing member of a building association had a copy of its by-laws, providing that the premium on the loan should be deducted from the principal, and that he voluntarily paid interest on the mortgage note, which included the premium for six years, is sufficient to support a finding that he knew he was to pay such premium.

6. A borrowing member of a building association, who has consented to pay a premium on his loan as fixed by the board of directors, in violation of a by-law requiring the money to be loaned to the highest bidder, cannot complain of such violation where no fraud is shown, and all the applicants for loans were successful, and none of them suffered by the failure of the directors to invite public bids.

7. The early proceedings of a building association showed that its attorney, in a suit to foreclose a mortgage providing for the payment of attorney's fees, had been its regularly salaried attorney, as provided by a by-law prescribing the duties of corporation attorney, and authorizing the board of directors to fix his compensation, but there was no evidence that he occupied that position when the suit was brought, and it did not appear that he was then paid a salary by the association. *Held*, that the allowance of attorney's fees was not error.

8. Where the complaint, in a suit to foreclose a mortgage stipulating for the payment of reasonable attorney's fees, sets forth the provision in the mortgage, a finding that the mortgagor executed the mortgage is equivalent to a finding that he agreed to pay reasonable attorney's fees.

9. In a suit to foreclose a mortgage stipulating for the payment of a reasonable attorney's fee, it is unnecessary to aver that the fee claimed is reasonable.

10. In a suit to foreclose a mortgage given by a member of a building association, full equity is done by giving him credit on his loan for the present cash value of his shares, ascertained by a public sale thereof.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by J. N. McNamara against the Oakland Building & Loan Association. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

R. Clark (W. H. Linforth, of counsel), for appellant. John Yule, for respondent.

CHIPMAN, C. Plaintiff's action is to cancel a mortgage given by plaintiff to defendant's assignor, the Oakland Building, Savings & Loan Association, upon certain real property in the mortgage described, and for the recovery of three fully paid up shares in said association, or their par value, to wit, \$300.

The complaint contains a copy of the mortgage, and the note for the payment of which it was security. Defendant answered December 30, 1896, and at the same time served and filed a cross complaint against plaintiff for judgment on the note, for the foreclosure and sale of the mortgaged premises, and for the sale of certain 15 shares of the capital stock of defendant's assignor, which had been pledged by the terms of the mortgage as further security. The court found as conclusions of law: That plaintiff was entitled to no relief; that there is due from plaintiff to defendant the principal sum of the note, to wit, \$1,200, and interest at 8 per cent. per annum from September 1, 1896, amounting to \$76; also attorney's fees, amounting to \$250, and to costs of suit; and that defendant is entitled to decree of foreclosure and sale of the land mortgaged and of the said shares. Judgment was accordingly entered, from which, and from the order denying his motion for a new trial, plaintiff appeals.

Defendant and its assignor were incorporated under title 16, pt. 4, div. 1, of the Civil Code of this state, the latter about October 3, 1889, and the former about April 24, 1890. Neither of said corporations elected to continue its existence under section 646 of the Civil Code, as amended by the act of March 31, 1891 (St. 1891, p. 252). The court found the following facts: That in October, 1889, defendant's assignor loaned to plaintiff the sum of \$1,200, plaintiff executing to it his promissory note for that amount, payable to said corporation or order six years after date, bearing 8 per cent. interest, payable monthly in advance, to be compounded if not so paid, and, in case of default in paying any monthly interest, the payee was given the option to deem the principal to be due. The note recited that it was secured by mortgage of even date, and a pledge of 15 shares of the capital stock of the mortgagee series No. 1. Defendant's assignor, mortgagee, "at a meeting of its directors, September 5, 1889, fixed the premium on all loans which it should make to borrowers at 20 per cent. on amount of loan made," and fixed the rate of interest at 8 per cent. Before plaintiff executed said note he was informed of this premium charge, and that the amount thereof (\$240) would be included in the amount of the note given by him, and that interest would be charged on the whole amount. He received the sum of \$960 and no more, but gave his note for \$1,200. The mortgage was first recorded October 16, 1889. Plaintiff paid to defendant's assignor, as provided in the mortgage, the sum of \$139.50, down to May 5, 1890, and no more, of which \$72 was paid for and applied to the interest on said note, and \$67.50 was paid and applied on account of the purchase price of said shares. Without the knowledge of plaintiff, defendant's assignor transferred to defendant the note and the security on May 5, 1890. De-

fendant had no knowledge of any agreements between its assignor and plaintiff, except as contained in the said written instruments, except that it was understood and agreed between plaintiff and defendant that if plaintiff should pay the interest as provided in the note, and should pay the monthly installments on said shares as provided in said mortgage, "then in that event, and as soon as and when the said fifteen shares of stock, with the installments paid in, and the interest and proportional profits of said shares of stock, should and would equal \$100 per share, said corporation would thereupon satisfy said mortgage, * * * and surrender to plaintiff three shares of said stock, * * * paid up." Beginning with the month of June, 1890, and to August, 1896, plaintiff paid to defendant, agreeably to the mortgage, the sum of \$1,162.50, and no more, of which the sum of \$600 was for interest on said note, and \$562.50 on account of the purchase price of said shares, and was full payment for interest and installments on said shares to and including August, 1896, but such payments were insufficient to mature said stock or make it of value of \$100 per share, or any value greater than \$70.20. No part of the principal of said note has been paid, and of the interest only to August 31, 1896, and no more. The monthly installments on said shares have been paid to include August, 1896, and no more. At the commencement of the action, defendant had no money in its possession belonging to plaintiff. Appellant contends that the evidence is insufficient to sustain the findings, specifying each separately. We will endeavor to deal with such as seem to present the salient features of appellant's contention.

1. Appellant claims that the debt was not due when the action was commenced. The note was dated October, 1889, and was payable six years after date, or October, 1895. The suit was commenced September 15, 1896, and the cross complaint was filed December 30, 1896. It is not disputed that on the face of the instrument the action to foreclose could be brought, but it is contended that by the provisions of the act of 1891, supra, it was prematurely brought. It is sufficient answer that neither defendant nor its assignor elected to continue its existence under section 646, Civ. Code. The provisions of the act of 1891 do not apply. It may be here observed, for it concerns the further examination of plaintiff's points, that we have nothing to guide us in determining the rights of the parties, except as we find it in the statute relating to these associations, and in the by-laws framed thereunder, and in the contracts entered into. Associations kindred in character to that of defendant and its grantor exist in many of the states of the Union, and also in England, where they had their origin. Although transplanted into this country in comparatively recent years, they have given rise to much litigation, and the

decisions on many questions are far from harmonious. Naturally, too, the decisions vary because of different statutory provisions under which the cases have been decided. Mr. Deering states that our Code provisions governing these associations are principally drawn from the act of May 20, 1861 (St. 1861, p. 567); and, as we have no previous decisions of this court on the subject, it appears to be necessary to give, at least, an outline of the statutory provisions under which defendant and its assignor were organized. They are found in sections 639 to 647, inclusive, of the Civil Code, as they stood prior to the amendments of March 31, 1891. The corporation may be organized with or without a capital stock, and may raise funds, in shares not exceeding \$200 each, payable in periodical installments. Section 639. It may borrow money to carry on its objects. Section 640. It may purchase real estate, and erect buildings for its members, and may make loans to its members for the purpose of aiding them to acquire and improve real estate. Section 641. It may insure the lives of its members and debtors. Section 642. It may purchase and hold real estate for purposes named. Section 643. Section 644 is the one most important in determining the questions before us. It provides that "the by-laws of such corporations must specify the amount of the periodical subscriptions or payments to be made by each member, the time and manner in which such payments are to be made; the fines and forfeiture for default; * * * the terms and conditions upon which loans may be made to its members and by them repaid to the corporation; the manner in which a person may become, and cease to be, a member; the conditions on which members may withdraw from the corporation, and the provisions for the payment to withdrawing members of the sums of money due to them, arising from subscriptions or payments, and the proportion of the profits such withdrawing member may receive on withdrawal." Section 645 requires the secretary, once each year, to prepare a full and explicit statement of the corporation affairs, and print the same in one or more newspapers, and circulate the statement among the members. Section 646 was repealed in 1874, as also was section 648. Section 647 provided for the consolidation of two or more such corporations, or the transfer of the engagements and the funds and property of one to another, but not to the prejudice of the right of any creditor of either corporation. It will be noticed that the provisions place but few restrictions upon the corporation. The legislative injunction of greatest importance to members is found in section 644, and that section, in effect and in terms, requires the corporation to outline and define its scheme in the by-laws. The act of 1891, *supra*, made many and important changes and additions to the law, apparently with some intelligent reference to the law in other states, and to

the better established systems for such associations. But with this later act we can have no concern, and much of the learning found in the decisions of the courts of other states, and many of the principles laid down elsewhere for the government of this class of corporations, are of but little value in the present case.

Plaintiff's action appears to have been brought upon the theory that at the end of six years, having made all his payments, he was entitled to have his mortgage canceled, and, as he had subscribed for 15 shares and borrowed only on 12 shares, he was entitled to have 3 shares returned to him fully paid. It is not improbable that representations were made that the series to which his shares belonged would mature in six years. The maturity of the mortgage debt points that way. But there is nothing in the evidence, and plaintiff offered no legal evidence, to show that there was any agreement that such would be the result. On the contrary, as we shall see, the by-laws plainly contemplated an uncertain period for the maturity of the stock.

2. Appellant contends that, if payment of the note could be enforced, he had the correlative right to offset his payments and his earnings, and that, if he is granted this right, it will appear from the evidence that the debt is paid. Appellant is mistaken as to the nature of the agreements into which he entered. He occupied the dual relation to the corporation of borrower and stockholder, each of which was distinct from the other. Under the scheme, he could not be a borrower without becoming a stockholder, but he could be a stockholder without being a borrower. The purposes of the corporation declared in its articles were to accumulate funds upon shares, not exceeding \$100 each, payable in one sum, or in periodical installments, and from fines, premiums, loans, and interest and other lawful sources, to borrow money, and to loan out funds of the corporation to members. A subscriber to the shares was required by article 2, § 2, of the by-laws to pay monthly installments of one dollar per share, "until each share of the series of stock upon which such monthly payments shall be made, together with the earnings of such shares, shall reach the value of \$100." (Amended as to borrowing members by allowing them the election to pay 50 cents per month instead of \$1.) If not a borrower, he could pay in full, if he preferred, and have his paid-up certificate. The scheme, however, was largely one for the loan of money to members, and was so contrived, at least in theory, that by payment of interest on the note, and by small monthly payments, a member could pay for his shares, and, if not otherwise in default, upon surrender of the shares, fully paid up, to the association, it operated to pay his loan. A member was entitled to borrow upon the security of his subscribed shares, and such

other security as was required, \$100 for each share. But the by-laws provided that the "mortgages, bonds, or other securities shall remain in force and on deposit as collateral security, until each member shall have received satisfaction in full for his or her claim of one hundred dollars per share, whereupon the mortgage or mortgages shall be canceled, and collateral bonds or other securities returned to said borrower or borrowers." As plaintiff subscribed for 15 shares, and only borrowed \$1,200, he would, if he had made all required payments, have been entitled to 3 shares fully paid up, and would also have been entitled to have the mortgage canceled. Provision was made for withdrawals, whereby a stockholder could withdraw and receive the amount of dues actually paid upon each share, with interest, after some deductions provided for; but no member could withdraw who had taken a loan until such loan was fully paid, unless by the consent of the directors. It was competent for the association to fix the terms on which members might withdraw, in the absence of statutory provisions. *End. Bldg. Ass'ns* (2d Ed.) § 31. The Code (section 644) gives the association the power to fix, by its by-laws, the terms on which a member may withdraw. I can find nothing in the by-laws, and nothing in the contracts entered into by plaintiff, warranting the claim that, notwithstanding he had defaulted in his payments on the mortgage, and also on his shares, he still had the right to offset his payments previously made against the amounts still due from him. The only clause in the mortgage bearing upon the point is one that, in case of foreclosure, gives to the mortgagee the option, without notice to the mortgagor, to apply on the mortgage note the cash surrender value of the shares, less all fines, penalties, etc., and thereupon the shares should become the property of the mortgagee. But this gives the mortgagor no right to make the offset, nor does it compel the mortgagee to do so. The mortgagor having ceased all payments, and by suit having sought to compel the cancellation of his mortgage, the mortgagee is within its rights in asking a foreclosure of the mortgage and a decree for the sale of the shares, and, presumably, they will bring their cash value, and plaintiff will have his credit therefor. That the relations of borrower and stockholder are separate and distinct, in associations such as defendant's assignor, seems to be well settled. *End. Bldg. Ass'ns* (2d Ed.) §§ 123, 477. And it is general law that payments on account of collaterals are not payments on account of the debt they secure. The pledging of shares as collateral security for the payment of the debt "is a recognition of the distinct standing of the member as a member and as a debtor." *Id.* § 477, and cases cited.

3. It is contended by plaintiff that the evidence does not support the finding that a pre-

mium on the loan was fixed at 20 per cent. or any other sum, and that there is no evidence that he agreed to pay a premium. He complains also that he was entitled to a loan of \$1,500, for which he applied, but received only \$960, and should be compelled to pay the latter sum, if any, and no more. It is true that plaintiff applied for \$1,500, and that the by-laws entitled him to a loan of \$100 on each share. It is true, also, that he received but \$960, for which he gave his note for \$1,200. The evidence is sufficient, we think, to support the finding that plaintiff knew he was to pay a premium. He had a copy of the by-laws, as all members had, and these by-laws provided that the premium bid should be deducted from the principal. He paid interest on the note and installments on the shares for several years, and must have known for what he was paying. The proceedings of the directors show that, at a meeting held September 5, 1889, when plaintiff's and other loans were allowed, the premium was fixed at 20 per cent. The note called for \$1,200, and included \$240 premium, leaving \$960 for the borrower. This was part of the plan for creating funds, in which plaintiff shared with other members, into which he entered with his eyes open. He testified that he would not have signed the note had he understood that he was to receive but \$960, and it appeared that the money was not in fact paid until after the note and mortgage were delivered. Still, plaintiff does not allege nor attempt to prove fraud, and he made so many payments voluntarily, after he must have known the full effect of his contracts, that his testimony that he would not have signed the note had he known the facts cannot avail him.

The proceedings of the corporation directors show that the loan was allowed to plaintiff for \$1,500. We cannot see that he can complain that the directors finally found that they could loan him but \$1,200. He certainly could not expect to receive \$1,500 on his note for \$1,200, and, if he had received \$1,200 in money, his note must have been for \$1,500, to include the premium. The by-laws required that the money should be "loaned out in open meeting to the highest bidder or bidders. The premium bid shall be deducted from the principal," etc. The premium in this case was not thus determined, but, as plaintiff consented to pay it as fixed by the directors, we do not see that he can complain of this violation of the by-laws. All the applicants for loans at that time were successful. No one of them suffered by the failure of the directors to invite public bids for the money. If the association suffered, the matter cannot be inquired into in this action. If, as we have said, the by-laws were not strictly pursued, the plaintiff cannot complain in this action. Indeed, as a member, having himself been a party to the violation and receiving the benefits thereof, he ought not to be heard to complain.

4. Appellant claims that it was error to allow attorney's fee, for the reason that the attorney of defendant was its regular salaried attorney; citing the by-laws, which prescribe the duties of the corporation attorney, and provide that he should receive such compensation as the directors should determine. Some of the early proceedings of the corporation defendant show that its attorney in this action was its regularly appointed attorney, but there is no evidence that he occupied that relation when this suit was brought, and, if there were any such evidence, it does not appear that he was paid a salary or other compensation by the corporation. The by-laws authorize such compensation to be made, but do not fix the amount. Plaintiff has not brought suit within the rule laid down in *Bank v. Treadwell*, 55 Cal. 379. The mortgage in terms provides, in case of foreclosure, the mortgagor shall pay reasonable attorney's fees, "and the payment of such costs and expenses and attorney's fees by the mortgagor is secured hereby." The cross complaint contains an averment setting forth the provisions of the mortgage, and alleging that the attorney's fees therein provided for were secured thereby, and the prayer asks for reasonable attorney's fees. There is no allegation that the sum claimed is reasonable, nor is there any finding of the fact, and therefore it is claimed defendant is not entitled to attorney's fees. It is found that plaintiff executed the mortgage, which is equivalent to a finding that he agreed to pay a reasonable attorney's fee for the mortgage so provided. The averment that the fee claimed was a reasonable amount is not necessary. *Carriere v. Minturn*, 5 Cal. 435. The attorney's fee was not the cause of action, but an incident to it. *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144, affirming *Carriere v. Minturn*. See, also, *Brooks v. Forrington*, 117 Cal. 219, 48 Pac. 1073. *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755, does not overrule or conflict with *Carriere v. Minturn*. As an averment was unnecessary, so also was a finding. The conclusion of law that defendant was entitled to recover attorney's fees rested upon the provisions of the mortgage, and the court could determine what amount would be reasonable without hearing any testimony thereon. *Insurance Co. v. Fisher*, 106 Cal. 234, 39 Pac. 758; *Clancy v. Plover*, 107 Cal. 272, 40 Pac. 394; *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796.

5. Appellant contends, also, that he was entitled to have an account taken, and all of the money paid by him credited on the debt, and a finding as to the duration of the association, and judgment against him for the amount he would have to pay at the winding up of his series; citing *End. Bldg. Ass'ns*, §§ 130, 134, 444, 445. It was proved by a witness, conceded by both sides to be an expert accountant and familiar with the workings of defendant and other like corpo-

rations, that plaintiff's shares had not matured September 15, 1896, when the action was brought, and that if the earnings continued to be what they had been in the past, i. e. what was termed 13⁵/₇ per cent. monthly compound, it would take 8³/₄ years from the time payments commenced for the shares to mature. But the witness said it could not be ascertained certainly in advance when the series would mature, for the obvious reason that the earnings were an unknown quantity for the future. We cannot see that there is anything in the plan upon which defendant and its assignor were operating that would permit a shareholder, who was a mortgagor, to default in payments of interest and principal of his note and installments on his shares, and still entitle him to claim the full benefit of all his previous payments whenever he chose to default. Nor can we see how an accounting could be taken of the unascertainable earnings of a going concern, the shares of which mature at no fixed period, so as to protect other shareholders. Nor can we see that any equitable principle would warrant our holding that defendant should pay back to plaintiff moneys which, by the terms of his agreement, were to be surrendered, upon his default, for the benefit of the other shareholders. We have already seen that he gets the present cash value of his shares by public sale, the proceeds to be credited on his notes. Whether the investment is a wise one to the borrower, who makes all required payments, we are unable to say, but it is clearly not so to one who cannot persist in his payments until the scheme closes, or until the series to which his shares belong has matured. We cannot find, however, either in the statute or in the by-laws, or in the contracts entered into, any authority for equity to interpose so as to aid the unfortunate borrower in the situation of plaintiff. Mr. Endlich says (section 149): "There is obviously a great difference between the case of a member who has fulfilled, faithfully, all the requirements of his undertakings with the building association,—of those which relate to the duties of membership generally, as well as those which pertain to his position as a borrower,—and that of a member who, after obtaining an advance, neglects both classes of obligations, and renders himself liable to compulsory proceedings on the part of the society, which the latter is bound to institute all the more rigorously, as the success of the whole scheme depends upon the performance of all his duties as a member. Whatever, therefore, may be the advantages allowed to members voluntarily repaying loans, these provisions have no application, and offer no immunities, to those who become defaulters, and are, upon that ground, sued by the association upon the covenants of their obligations. Having thus violated the rules of the society, they are not entitled to the benefits held out to those who keep them, nor are they within

the meaning of the statute designed to favor the conscientious borrowers." See the subject further treated at sections 480-482. We have seen that plaintiff will receive as a credit on his debt the value of his shares when sold, and, as these shares represent his interest in the association, he will thus receive all that he is entitled to as a defaulter, upon any principle of equity. This cash value was shown to be \$70.20 per share, or \$1,060.50 for 15 shares. In an elaborate and well-considered opinion, which Mr. Endlich regards "as definitely conclusive upon the controversy" (section 482), Paxson, J., in *Watkins v. Association*, 97 Pa. St. 514, holds that, in a suit brought against the borrower, the value of the defendant's stock, for the purpose of application to the extinguishment of his debt, is, "just what the defendant has paid on account thereof. This was all * * * the law gave him the right to apply. The value of stock beyond this consisted mainly of profits, in which a defaulting borrower has no right to participate." The learned justice then proceeds to show why this must be so. We are not called upon to affirm or deny this doctrine, and I refer to it to show that full equity is done in giving plaintiff the benefit of the value of his shares by sale in the open market. He paid on account of his shares \$630 in all, as found by the court. It is possible that the shares will sell for much more than this sum, as their cash value was proven to be \$1,060.50 at the time the action was brought.

Appellant assigns numerous errors occurring at the trial, most of which, however, depend more or less upon propositions already noticed. Appellant offered the testimony of plaintiff to show that when he purchased the shares he was told by some one, acting for the corporation, that his stock would mature in seven years. Again, he was asked whether Col. McMullen (one of the directors) ever represented to him as to the time when the stock would mature or the loan be discharged. Again, he was asked how he understood that he was to pay the note and mortgage and other similar questions as to his understanding of the transaction and his motive in entering into the engagement and like matters. We have examined this series of questions with some care, and while some of them, perhaps, were admissible, although their exclusion did no harm, the information sought was properly excluded. Under the issues in the case, plaintiff could not vary the effect of his contracts by showing that he did not comprehend their full meaning. We advise that the judgment and order be affirmed.

We concur GRAY, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

6 Cal. Unrep. 631
PEOPLE v. MENDENHALL. (Cr. 658.)¹
(Supreme Court of California. Jan. 15, 1901.)
ASSAULT WITH INTENT TO MURDER—MALICE
—INSTRUCTIONS.

On prosecution for assault with intent to murder, an instruction that the malice necessary to make a killing murder might be either express or implied, though technically correct, was inapplicable and erroneous, as the intent must be proved in such prosecution, and implied malice may show no actual intent.

Department 2. Appeal from superior court, city and county of San Francisco; F. H. Dunne, Judge.

William P. Mendenhall was convicted of assault with intent to murder, and appeals. Reversed.

Leon E. Prescott, for appellant. Tirey L. Ford, Atty. Gen., for the People.

HENSHAW, J. The defendant was charged with and convicted of the crime of assault with intent to commit murder, and appeals from the judgment given against him. The court instructed the jury as follows: "Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no deliberate provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." It is insisted that this instruction, while pertinent and proper in a charge upon the crime of murder, is improper and erroneous where the offense is an assault with intent to commit murder; that the charge of murder may be established in the absence of proof of an intent to kill, but that the charge of attempt to commit murder cannot be established by proof merely of implied malice. In this we think the appellant's contention is sound, and that, in the crime charged, the court erred in instructing the jury as it did. In *People v. Mize*, 80 Cal. 41, 22 Pac. 80, there came under the attention of this court the following instruction: "They [the defendants] cannot be convicted of an assault to commit murder unless the evidence shows beyond a reasonable doubt that, had the prosecuting witness been killed, defendants would have been guilty of murder. If the evidence shows that, had Henry Coffey been killed, one of the defendants would have been guilty of murder, then that one should be convicted." This court held the instruction to be erroneous, laying down the unquestioned proposition that while, to constitute murder, the guilty person need not intend to take life, to constitute an assault with intent to murder, there must be proved the intent to take life, and though the wrongdoer's act is such as, were it successful, it would be murder, if in truth he did not mean

¹ Reversed in banc. See 67 Pac. 325, 135 Cal. 344.

to kill he is not guilty of an assault with intent to commit murder. 1 Bish. Cr. Law, § 270; 2 Bish. Cr. Law, § 741. In *People v. Wallace*, 101 Cal. 281, 35 Pac. 862, an instruction identical with the one in the case at bar was complained of, but it was there said that, conceding the instruction to be erroneous, the defendant could not have been injured by it, as he was acquitted of the offense to which it applied. In *People v. Burtle*, 123 Cal. 303, 55 Pac. 998, defendant complained because the court instructed the jury upon express malice alone, properly excluding from their consideration the definition of implied malice. It was said by this court that it is doubtful whether the language of section 188 of the Penal Code should be given to the jury at all in the case of assault with intent to commit murder, and that it was intimated in *People v. Wallace* that the section should not be given, because "implied malice is not equivalent to that actual intent which is essential to the crime of assault with intent to commit murder." Under our Code a conviction of murder may be sustained either where a deliberate intent is manifested to take away the life of a fellow man, or where no considerable provocation appears, or where the circumstances attending the killing show an abandoned and malignant heart. Where a deliberate intent appears, there is present the express malice of the law. In the latter class of cases the malice is implied,—the law presuming it from the circumstances of the case,—though in fact the actual and deliberate intent to kill may not have been present in the mind of the wrongdoer. Therefore it is only in cases of murder of the first class, where express malice and deliberate intent are shown, that, the attempt failing, the wrongdoer may be found guilty of an assault with intent to commit murder. In murders of the other category the specific crime here charged is not contained.

Appellant further complains of the following instruction: "It is incumbent upon the prosecution to prove the intent, and if it appear that the alleged assault was committed under such circumstances as would, had death ensued, have mitigated the offense from murder to manslaughter, such intent was not premeditated, and you cannot find the defendant guilty of the charge preferred against him." This instruction is legally correct, though it is by no means a full exposition of the law. It is certainly true that in a case where, if death had ensued, a conviction of manslaughter alone would have been justified, the defendant (death not having resulted) could not be convicted of an assault with intent to commit murder; but, upon the other hand, as has been pointed out, even if death had ensued under circumstances which would have made the crime murder, he still could not be properly convicted of the lesser charge (the victim surviving)

unless it were a murder committed with express malice.

The error in the instruction first above quoted was manifestly prejudicial. It cannot be said that the error was cured and rendered harmless by other instructions. The judgment is therefore reversed, and the cause remanded.

We concur: TEMPLE, J.; McFARLAND, J.

(131 Cal. 80)

KLUMPKE v. BAKER et al. (S. F. 1,640.)
(Supreme Court of California. Jan. 22, 1901.)

In bank. Motion for rehearing denied.

For opinion in department, see 63 Pac. 137.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. If an indiscriminate assessment of the real property of different persons can be upheld upon any ground, it seems clear to me that it cannot be defended under the provisions of the Code respecting mistakes in the names of owners. A mistake in the name of the owner of a lot otherwise correctly assessed puts no obstacle in the way of payment of the proper tax by the real owner. But, if my land is assessed together with the adjoining property of another person, I cannot pay my tax without paying his tax. If I pay the whole tax, there is no means by which I can be reimbursed for the excess. If I do not pay, I must lose my land.

(131 Cal. 30)

PEOPLE ex rel. SILVA v. LEVEE DIST.
NO. 6 OF SUTTER COUNTY
et al. (Sac. 687.)¹

(Supreme Court of California. Jan. 19, 1901.)
LEVEE DISTRICT—SPECIAL LAWS—VALIDITY.

1. A levee district was organized under Act March 25, 1868, providing a method for the organization of such districts, and, such act being declared void as to the method of such organization, the legislature, by Act March 30, 1872, and Act March 31, 1891, p. 235, recognized the existence of such district. *Held*, that such legislative recognition gave legal existence to such district.

2. Act March 31, 1891, providing a new form of government for a certain levee district, is not in violation of Const. art. 11, § 6, and article 12, § 1, declaring that neither municipal nor private corporations shall be created by special laws, since such levee districts are not corporations, but mere governmental functions having attributes of corporations.

In bank. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Quo warranto, on the relation of John F. Silva, against levee district No. 6 of Sutter county and others. From a decision affirming a judgment for defendants (63 Pac. 342), plaintiff appeals. Affirmed.

Atty. Gen. Ford, Hart & Aram, and Kirby S. Mahon, for appellant. W. H. Carlin and M. E. Sanborn, for respondents.

¹ Rehearing denied January 19, 1901.

HENSHAW, J. The opinion of the department heretofore filed herein is modified so as to read as follows: "This is a proceeding in quo warranto to test the legal existence of levee district No. 6. The other defendants are the officers of the district. The case was heard and determined upon an agreed statement of facts, which are the findings in the case. Upon these facts judgment was rendered for defendants, and plaintiff appeals. Levee district No. 6 was organized under the act of March 25, 1868 (St. 1867-68, p. 316). By virtue of that act levee district No. 1 was created, and there was provided a scheme for the organization and government of other levee districts which might thereafter be formed. But section 21 of the act, setting forth the method of organization for such districts, has been declared unconstitutional and void. *Moulton v. Parks*, 64 Cal. 183, 30 Pac. 613; *Brandenstein v. Hoke*, 101 Cal. 134, 35 Pac. 562. It follows, therefore, and is conceded, that the organization of levee district No. 6, effected under section 21 of the act of March 25, 1868, was irregular and void. Notwithstanding this fatal irregularity in its organization, the legislature made distinct recognition of the existence of the district by an act approved March 30, 1872 (St. 1871-72, p. 734); and again by acts approved March 31, 1891 (St. 1891, p. 235, and St. 1891, p. 237). The first of these acts of recognition was passed under the constitution of 1849, the latter two under the present constitution. That they are positive acts of recognition sufficient to invest the district with the functions and attributes which it had assumed to exercise under the law of 1868 may not be doubted, under the authority of *People v. Reclamation Dist. No. 108*, 53 Cal. 346, and *Reclamation Dist. v. Gray*, 95 Cal. 605, 30 Pac. 779, unless it can be said that the legislature itself was without power so to validate the existence of a levee district thus irregularly organized. This is the contention of appellant. But legislative action in such matters is only circumscribed by the express limitations of the constitution. It is not questioned but that in the first instance, by direct enactment, the legislature could have carved out levee district No. 6 precisely as it did in the case of levee district No. 1. Where the exercise of a particular power is limited by the constitution, the legislature must act in the mode prescribed. But where there is no such limitation, if the legislature shall prescribe a mode for its exercise, which is, perchance, illegal, it may, by subsequent ratification or recognition, validate the acts done under the irregular mode. To illustrate: The present constitution forbids the creation of corporations for municipal purposes, except by general law. A special law creating a special municipal corporation would be violative of this constitutional inhibition, and no subsequent act of ratification or recognition by the legislature could validate that which, in the first instance, it had no power to do. But un-

der the constitution of 1849 corporations for municipal purposes could be created by special law. If, then, the legislature, acting under that constitution, should so, by special law, create a municipal corporation, and for some reason the law lacked validity, the legislature, having the power thus to create the corporation, could, by ratification or recognition of its corporate existence, erect it into a valid municipality. If, then, levee district No. 6 be considered as a corporation (a matter inviting later attention), it was a corporation created for municipal purposes, and, notwithstanding this irregularity of its creation, the legislature could, as it did, give it a legal existence by its positive acts of recognition.

"But appellant still further contends that levee district No. 6 was a corporation for municipal purposes under the act of 1868 and the act of 1872 recognizing its existence; that a new and distinct organization was perfected for it under the act of March 31, 1891, passed under the present constitution; that the district elected to come under this act, and to exercise the corporate functions provided for by the act; that the act itself is void, and that, therefore, the district is improperly exercising corporate functions, from using which it should be restrained. Since levee district No. 6 was a legal entity before the passage of the act of March, 1891, if that act be itself void, it would not interfere with the legal existence of levee district No. 6, and the utmost which the court could do would be to require it to exercise the powers which it had theretofore enjoyed under the act of 1868 and the acts amendatory thereto, and restrain it from exercising any new rights or powers under the act of 1891. But, upon the other hand, respondent insists upon the validity of the act of 1891, and upon its right to exercise the powers conferred upon it by that act, and thus a further consideration of the question is demanded. Appellant's argument against the validity of the act of March 31, 1891, is that levee district No. 6 is a corporation for municipal purposes; that under the constitution corporations for municipal purposes shall not be created by special laws; and that the act of March 31, 1891, dealing, as it does, with levee district No. 6 alone, and providing a new form of government for it, is a special law. Section 1 of article 12 of the constitution, having reference to private corporations, provides that they may be formed under general laws, but shall not be created by a special act. Article 11, § 6, of the constitution declares that corporations for municipal purposes shall not be created by special laws. The act of 1891 is unquestionably a special law. If levee district No. 6 be a corporation, it is certainly not a private corporation, and must come under the designation of article 11, § 6,—'a corporation for municipal purposes.' And if it be a corporation for municipal purposes within the meaning of that article and sec-

tion, then indubitably, the act of March, 1891, forcing upon a levee district a new, distinct, and different organization, is special and inhibited legislation. But is levee district No. 6 a corporation for municipal purposes within the meaning of the constitution? Expressions will be found in the cases where such organizations have been designated 'corporations for municipal purposes,' or 'public corporations,' or 'corporations for public purposes'; but these were convenient phrases of designation and description, rather than judicial declarations as to the nature and character of these agencies. The question propounded is conclusively answered by *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016. It is there held that a reclamation district, conceding it to be a corporation, is not a corporation for municipal purposes, within the meaning of the constitution. But as such levee districts or reclamation districts are distinctly not private corporations, it must follow that, if they be corporations, they are corporations in a class by themselves, and the general powers of the legislature for their creation, organization, and control are in no wise limited by the constitution of the state. The judgment appealed from is therefore affirmed."

We concur: TEMPLE, J.; McFARLAND, J.

131 Cal. 55

SPIELBERGER v. THOMPSON. (Sac. 734.)
(Supreme Court of California. Jan. 21, 1901.)

In bank. Motion for rehearing denied.

For opinion in department, see 63 Pac. 132.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing, and from the judgment of affirmance. The statement of facts contained in the department opinion is based exclusively upon the findings of the superior court, but those findings are assailed as being contrary to the evidence; and, in my opinion, several of those which are most material to the conclusion of the court are wholly unsupported by any evidence contained in the record. The uncontroverted facts are that Philip Oppenheimer was trustee of an estate of about \$70,000. He was also one of the beneficiaries, and the remaining beneficiaries were his mother, his brother Emanuel, the payee of the note in controversy here, and his sister, the maker of the note, and the defendant herein. Emanuel had induced his mother to commence an action to vacate the trust upon the ground of fraud. He and his brother and sister were made defendants in that action, but he, by answer and cross bill, took sides with his mother in favor of dissolving the trust. His sister and his brother Philip answered, defending the action. The litigation having reached this stage, all parties became anxious to settle

the controversy, and Emanuel represented to his sister that nothing stood in the way of a dismissal of the action and cross action except the refusal of his mother's attorney to allow a dismissal until he should be paid or secured in the payment of his fee, amounting to \$1,500; and he agreed that if she would give him her note for that amount "he would pay said attorney his fee, and obtain a judgment dismissing the said action." Upon this representation, and in consideration of this promise, the note in controversy here was executed and delivered. It appears very clearly from all the evidence in the case that the representation was false, and that the promise was never performed in its true and proper sense. As to the representation, if there had been nothing in the way of a dismissal of the action except the objection of the plaintiff's attorney, that, so far from being a formidable obstacle, was no obstacle at all; for nothing could have been easier than to substitute another attorney (as was afterwards done), who would make the motion to dismiss. But it will appear that the obstacles to dismissal were of another character, and the fault lay at another door. It is shown clearly by all the testimony, including the explicit admission of Emanuel himself, that he never took the note to his mother's attorney, and never informed him that he had it. On the contrary, he kept it among his private papers for about a month, and then pledged it as collateral for money borrowed of Charles Heisen, which money he used in his private business. The first thing this defendant heard of the note after delivering it was when it was presented, with a demand of payment, by Heisen's agent. She did not pay it, and afterwards Emanuel redeemed it and pledged it again to C. W. Clarke to secure other advances. This is what he did with the note which he had promised to use for the payment of his mother's attorney. Nevertheless he claims that he, by his attorneys, promptly moved to dismiss the action. He asserts that he and they made numerous attempts to procure the dismissal. He does not testify—and there is no evidence of any sort—that his mother's attorney moved to dismiss the action, or that he or she ever consented to a dismissal. And the finding of the court goes no further than the evidence on this point. It does not appear in the case anywhere, or in any way, that the plaintiff in that action ever consented to a dismissal, unless her consent is inferred from the finding that "the dismissal was delayed through the acts and conduct of the attorney representing the defendant herein in that action." But clearly this finding does not necessarily imply the consent of the plaintiff at the time of Emanuel's numerous attempts, which he claims to have made shortly after receiving the note. The final settlement and dismissal of the action was not reached for five months after the delivery of the note, and not until after a trial of the action and a

decision in favor of the defendants on the merits; and then it was based upon further negotiations, and apparently upon new considerations, independent of the payment of \$1,500 to the plaintiff's attorney. Some delay in this final settlement may have been due to the acts of defendant's attorney,—as, for instance, his successful defense of the action,—and at the same time it may be true that plaintiff did not consent in the beginning to a dismissal.

But if this fatal objection to the finding is waived, and it should be held that, taking the findings altogether, they may be construed to mean that promptly after receiving the note Emanuel did not only move to dismiss his cross action, but also procured his mother's consent and that of her attorney to dismiss her action, the only result is to put Emanuel in other difficulties. He confesses that he did not pay his mother's attorney, did not inform him that he had the note to secure him, but used the note to raise money for his private business. If, under these circumstances, the attorney nevertheless consented to a dismissal of her action, it proves that the representation made by this defendant that he would not consent to a dismissal without payment or security for his fee was false, and the whole transaction a fraud.

But, aside from this, it was no performance of his contract for Emanuel to make motions and efforts to procure a dismissal of the actions. His contract was to procure a judgment of dismissal, and that without unreasonable delay. The findings of the court with respect to this matter are that Emanuel did pay the fee of his mother's attorney, that the action was finally dismissed, and that the delay in dismissing it was caused by the acts of the attorney representing the defendant. All these statements are literally true, but they are true with such qualifications as to render them wholly immaterial. The action was finally dismissed, but not for five months after the delivery of this note, which during all that time Emanuel had been using to raise money for his own purposes; and in the meantime the case had been tried, and a decision rendered by the superior court that the trust was valid, advantageous, and free from fraud. Can it be claimed that a dismissal of the action under these circumstances was a compliance with Emanuel's agreement to procure a judgment of dismissal? When this defendant gave her note to secure a dismissal of that action, the advantages that would have accrued to her by an immediate dismissal were that she would have been saved the trouble and expense of a trial, and would have secured herself from whatever risk of being defeated in the litigation she may have had reason to apprehend. It may also be reasonably sup-

posed that it was a motive of controlling weight with her to avoid the pain and scandal of a public trial of charges of fraud preferred by her mother against her brother. By his failure to dismiss the action before it had been tried and he had been defeated on the merits, Emanuel deprived his sister of every possible advantage she could have expected when she gave her note.

But it is said in the opinion of this court that the delay in the dismissal was largely occasioned by the defendant herself. The only support for this statement is in the finding of the superior court, above quoted, which, it will be observed, does not say that the delay was caused by any fault of the defendant, but by the acts and conduct of the attorney representing the defendant in that action. This, as above remarked, is true in a literal sense, but with a serious qualification. The same attorney represented this defendant and her brother Philip in the defense of that action, and it does appear by the testimony of Philip in this case that his attorney (who happened also to be his sister's attorney in defending that action) did in his behalf, and upon grounds peculiarly affecting his interest, oppose the motion of Emanuel to dismiss. There is not the slightest atom of evidence that he opposed the dismissal on behalf of the defendant, or at her instance, or for any benefit to her; and if he deemed that the interest of Philip, who was absent from the state, was opposed to a dismissal, it is not easy to see how the defendant could have prevented his opposition, or why she should be held responsible for it. Besides, the agreement of Emanuel to procure a judgment of dismissal bound him to obtain the consent of Philip, so far as his consent was essential, and to comply with whatever conditions Philip attached to his consent. There is no hint or suggestion in the findings or evidence that the defendant conspired with Philip to exact unreasonable conditions as the price of his consent, and to hold her responsible for his action is unjust and unwarranted.

Finally, with respect to the settlement of the case and the payment of plaintiff's attorney: The case was settled when there was nothing left to settle except the costs of a litigation which had been instigated (unjustly as it appears) by Emanuel, and which he should have paid. He did pay his mother's attorney, but the amount was only \$800, instead of the \$1,500 he represented to be necessary, so that by his recovery in this action (he is represented here by his assignee) he makes a handsome bonus out of his sister, and practically escapes the consequences of his fault by throwing the entire expense upon her. I think a more equitable result might have been attained without doing violence to any rule of law.

131 Cal. 402

MILLER & LUX v. BATZ, County Treasurer.
(L. A. 800.)

(Supreme Court of California. Jan. 18, 1901.)

PUBLIC LANDS — SWAMP LANDS — COMPENSATION FOR RECLAMATION — STATUTE OF LIMITATIONS.

1. A mandamus proceeding against a county treasurer to compel the payment of a sum due for the reclamation of swamp lands was submitted on agreed facts which showed that the land was reclaimed by plaintiff's predecessor, but which failed to show an assignment of the claim to plaintiff, and the writ was denied because the purchase of the land did not amount to an assignment. Pol. Code, § 3477, requires such money to be paid to the original purchaser or his assignee. The judgment was affirmed on appeal, and a rehearing was granted on the representation that such question was not raised in the brief of either party, and the petition for rehearing stated that plaintiff was assignee of the person reclaiming the land. *Held*, that the cause would be reversed and remanded, with leave to plaintiff to amend his petition and present additional evidence.

2. Code Civ. Proc. § 338, requiring an action on a liability created by statute, other than a penalty or forfeiture, to be brought within three years, does not bar a proceeding to compel the payment of money due for the reclamation of swamp lands, since Pol. Code, § 3477, and the preceding sections requiring the payment of two dollars per acre to the purchaser of swamp lands when the reclamation is completed or so much money is expended therein, is a contract between the purchaser and the state, and is not a liability created by statute.

In bank. On rehearing. Reversed.

For opinion in department, see 61 Pac. 935.

HARRISON, J. The judgment appealed from was affirmed in department June 15, 1900 (61 Pac. 935), upon the authority of *Carpenter v. Savings Union* (Cal.) 61 Pac. 92. A rehearing was granted upon the representation that the question upon which the *Carpenter* Case was decided had not been presented by the plaintiff or by the defendant either at the trial in the court below, or in the briefs here upon the appeal. In view of this fact, and of the further fact that the plaintiff states in its petition for rehearing that the reclamation of all the lands in the district was made entirely by its immediate predecessors in interest, and not by the original purchasers of the lands, and that before the commencement of this action appellant's immediate predecessors in interest executed an assignment to it of the claim now involved, we have determined to remand the case, with leave to the plaintiff to amend its petition and submit additional evidence in support thereof, should it be so advised.

As the statute of limitations, which is pleaded as a defense, and has been argued upon this appeal, will doubtless arise upon the next trial, it is proper to consider the same. Counsel have discussed in their briefs the applicability of different statutes of limitation upon the plaintiff's cause of action, but as the defendant has pleaded only the statute prescribed in subdivision 1, § 338, Code Civ. Proc., it is only necessary to determine whether the action is barred by the

provision thus pleaded. That subdivision prescribes three years as the time within which an action may be commenced upon a liability created by statute, other than a penalty or forfeiture. The plaintiff's cause of action herein is not founded upon a liability created by statute, but is based upon a contract between him and the state, and is subject to only those provisions of the statute of limitations which are applicable to causes of action arising out of contractual relations. The state has, in effect, declared in section 3477 of the Political Code, and preceding sections, that the holders of certificates of purchase of swamp and overflowed lands may reclaim the same, either by themselves or through the agency of a reclamation district, and that whenever the works of reclamation are completed, or the sum of two dollars per acre has been expended in the work of reclamation, there shall be repaid to each purchaser or his assigns out of the swamp-land fund, after making certain deductions therefrom, his proportion of the amount which has been contributed to that fund. The purchasers are under no obligation to reclaim the land, but the state agrees that, if they do reclaim it, it will repay to them this amount of money. The obligation of the state to make this payment is not a liability created by statute, but arises from the acceptance by the purchasers of the offer made by the state, and the performance of the work which the state has prescribed as the condition upon which it will make the payment. This obligation in favor of the purchaser is of the same character and arises at the same time as does his right to receive a patent for the land. The fact that the obligation is evidenced by statute does not render the plaintiff's cause of action one "created" by statute. All contracts with the state have their authority in some statutory provision, but it is not to be assumed, in the absence of express provision to that effect, that the legislature intended to prescribe a different rule of limitations for actions against the state upon its contract from that for actions upon other contracts. The liability of the state to the plaintiff herein results from its agreement to repay the money, but it is not "created" by the statute, as is the liability upon a swamp-land assessment for reclamation purposes (*People v. Hulbert*, 71 Cal. 72, 12 Pac. 43), or the liability of a stockholder for his proportion of the corporate debts (*Bank of San Luis Obispo v. Pacific Coast S. S. Co.*, 103 Cal. 594, 37 Pac. 499), or the right to maintain an action for the recovery of taxes (*City of San Diego v. Higgins*, 115 Cal. 170, 46 Pac. 923). Such liabilities are "created" by statute, and exist only by express declaration of the statute. The distinction is clearly pointed out in *Higby v. Calaveras Co.*, 18 Cal. 176, where the court said in reference to the question then under consideration, and that it was governed by the statute which is here pleaded: "This duty is not cast by contract, but by the law;

and the same law provides the compensation, or, in other words, creates the liability upon the part of the county to pay the compensation." Although the action is against the respondent as treasurer of the county, it is for the purpose of recovering money which has been paid to the state, and which the state, for its own convenience, has deposited with the county, as one of its governmental agencies. The plaintiff's right to maintain the action against the respondent is measured by his right to maintain it against the state. See *Kings Co. v. Tulare Co.*, 119 Cal. 509, 51 Pac. 866. The nature of the cause of action, and not the form of the action, determines the applicability of the statute of limitations. *De Haven v. Bartholomew*, 57 Pa. St. 126; *Higby v. Calaveras Co.*, *supra*. The judgment is reversed, and the cause remanded, with leave to the plaintiff to amend its petition.

We concur: VAN DYKE, J.; GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.

(131 Cal. 376)

FOERST v. KELSO. (S. F. 1,448.)¹

(Supreme Court of California. Jan. 15, 1901.)

DAMAGES—PLEADING—AMBIGUITY—
DEMURRER.

Where the complaint prayed damages for injuries occasioned to plaintiff's person and property, real and personal, but did not specify the particular amount of damages sustained as to each, a demurrer to the complaint for ambiguity and uncertainty was improperly overruled.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Minna Foerst against John Kelso. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Edwin L. Forster, for appellant. F. J. Castelhun, for respondent.

HENSHAW, J. The complaint in this action prayed damages for injuries occasioned to plaintiff's property and person by reason of blasting operations negligently conducted by the defendant. It charged that the blasts showered a rain of rocks upon plaintiff's house and premises, "killing chickens and breaking boards of house, stable, woodshed, chicken house, and fence"; that upon one occasion "two immense boulders of rock were blown upon plaintiff's premises, one of which struck plaintiff's stable and passed through the roof, breaking rafters and boards, one of which struck and injured plaintiff's shoulder; that the other boulder went crashing through the rear wall of the plaintiff's house, through a sink into the middle of plaintiff's kitchen, in the second story, breaking windows, dishes, etc."; "that said blasting also caused plaintiff to become sick, ill, and nervous, to such a degree that she

has ever since suffered, and still suffers, from the effects thereof"; "that by reason of the premises plaintiff has suffered damages in the sum of \$5,000." To this complaint defendant interposed special demurrers for ambiguity and uncertainty, charging that it could not be ascertained therefrom for what injuries the plaintiff asks damages, —whether for personal injuries received by plaintiff, or injuries to her real property, or for the killing of her chickens, or for the shaking or damages of the houses in the neighborhood. To this respondent makes answer that it sufficiently appears from the complaint that the damages are sought for injuries to plaintiff's health and to her real estate and to her personal property, and that therefore the demurrer was properly overruled. In this reliance is placed upon the case of *Sloane v. Railway Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; but, so far as the question here involved was concerned, it was there decided merely that while it was necessary for the pleader to point out the particulars in which she had sustained injuries, namely, the humiliation and injuries to her health, in order that evidence thereof might be given at the trial, it was not necessary that she should designate the particular amount of damage which she had sustained by reason of the indignity, distinguished from the amount sustained from the injury to her health. "These elements of damage," it is said "were not capable of computation, nor would evidence of such amount have been admissible. This amount was to be determined by the jury in the exercise of an intelligent discretion." In the present case the demurrant asks, in effect, that the plaintiff be required to set forth with exactness, as it was easily possible for her to do, the amount of damage which she claims to have sustained by reason of the injuries to her real and personal property; for defendant might be willing to concede a good cause of action in plaintiff for these amounts, while denying her any right of recovery for injuries to health. It is true that demurrers for ambiguity and uncertainty, when improperly overruled, should not always work a reversal of the judgment, and will not do so when it appears that the matters complained of by demurrer were so trifling as not to have affected any substantial right of the demurrant. *Alexander v. Mill Co.*, 104 Cal. 532, 38 Pac. 410. But it is also true that when the demurrer for ambiguity or uncertainty, improperly overruled, affects the substantial rights of a party, he is entitled to a reversal of the ruling. Such were the cases of *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623; *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119; and *Mallory v. Thomas*, 98 Cal. 647, 33 Pac. 757,—with which cases this is identical in principle. It follows, therefore, that the judgment must be reversed, with directions to the trial court to sustain the demurrer to

¹ Rehearing denied February 15, 1901.

the complaint, with leave to plaintiff to amend and make more certain.

We concur: **TEMPLE, J.; McFARLAND, J.**

(131 Cal. 390)

BOSQUI v. SUTRO R. CO. et al. (S. F. 1,594.)

(Supreme Court of California. Jan. 16, 1901.)

CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—STREET RAILROADS—EVIDENCE—SUFFICIENCY—INSTRUCTION—QUESTION FOR JURY.

1. Whether experienced railroad men are more competent to testify as to the speed of an electric car, and therefore entitled to greater credence than ordinary passengers, whose testimony has been admitted unchallenged, is a question for the jury, and their finding on the testimony, if supported by real and substantial evidence, will not be disturbed on appeal.

2. Defendant's testimony, showing how the equipment of its electric road compared with the equipment of other roads, was properly excluded in an action by a passenger for personal injuries caused by the derailment of a car, when offered to show that defendant's cars could run over the track at a certain speed with safety.

3. The exclusion of defendant's testimony, showing at what rate of speed its electric cars could run with safety without derailment, was harmless, where defendant was permitted to show that the car on which plaintiff was a passenger could be run over the road at an excessive rate of speed without derailment.

4. An instruction to the effect that a carrier of passengers must exercise the care of a very cautious person, "surrounded by the same circumstances," is not objectionable as exacting a greater degree of care than can be reasonably exacted of a common carrier.

5. Whether the failure of a carrier of passengers to employ extremely cautious men is a breach of the carrier's duty to exercise the utmost care is *prima facie* a question for the court, and not for the jury, but the question whether such care has in fact been exercised is for the jury.

6. The rule that proof of the occurrence of an accident causing injuries to a passenger without fault on his part is proof of negligence on the part of the carrier applies to street-railroad companies operating cars by electricity or steam power.

7. An instruction stating a correct proposition of law, referring in no way to the evidence submitted, is not necessarily misleading.

Commissioner's decision. Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by Benjamin A. Bosqui against the Sutro Railroad Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Smith & Murasky and McKinstry, Bradley & McKinstry, for appellants. C. H. Wilson, for respondent.

CHIPMAN, C. Action for personal injury. The trial was by a jury, and plaintiff had the verdict. Defendant appeals from the judgment and from an order denying its motion for a new trial. The injury was caused by one of defendant's cars leaving the rails

and colliding with another of its cars coming from an opposite direction.

1. It is contended by defendant that the evidence is insufficient to justify the verdict. Counsel argues the point upon the assumption either (1) that the judgment can be sustained only on the theory that defendant failed to overcome the presumption of negligence arising from proof of the accident; or (2) that evidence "real and substantial" (*Driscoll v. Railway Co.*, 97 Cal. 553, 32 Pac. 591) was offered by plaintiff that the car was derailed because of its excessive speed; and defendant's counsel assume that plaintiff will not contend that the negligence of defendant was affirmatively shown in any way other than by proof as to the speed of the car. Plaintiff, however, contends, not only (1) that the car was being run at an excessive speed; but (2) that, with even ordinary care, the car could have been stopped after it left the rails, and before the collision; (3) that the incoming car should have been stopped before it collided with the car on which plaintiff was a passenger; (4) that the car was not derailed by gravel previously piled on the rails, as contended by defendant, but that any gravel found on them after the collision was thrown there by the car itself while running along the side of the rails; and (5) if it be true that some person, unknown to defendant, placed the obstruction on the tracks, still defendant was guilty of negligence in not stopping the car before the collision.

Defendant operates an electric street-railway line from the west terminus of the Sutter street car line to the Cliff House. Defendant's outgoing car 37 left its starting point going to the Cliff House at 8:35 o'clock p. m., April 9, 1897. On Richmond avenue, just beyond the crossing of Commonwealth avenue, and on a straight track, car 37 left the rails, and continued moving for a distance, variously stated as 70 to 100 feet, when it collided with defendant's incoming car 29. Plaintiff was riding on car 37, which was crowded with passengers, and received the injury complained of by reason of the collision. No question of plaintiff's contributory negligence arises, and the evidence is undisputed that the track was well constructed, and the appliances for operating the car in perfect order, and suitable for the purposes for which they were being used.

Upon the question of the speed of car 37 when it left the rails, it is conceded by defendant that the evidence is conflicting,—plaintiff's witnesses testifying to a speed of 15 to 25 miles an hour, and defendant's witnesses to a speed less than 8 miles an hour (the motorman put it at 7 miles),—but defendant claims that, its witnesses being experienced railroad men, "such testimony is entitled to more weight than that of ordinary railroad passengers." This view of the evidence seems not unreasonable, and, if the fact could be said to be one peculiarly within the knowledge of railroad men, should have

had weight with the jury; but we cannot say, as matter of law, that the jury should have disregarded the one and accepted the other class of evidence. Defendant cites the case of *Railroad Co. v. Huntley*, 38 Mich. 540, where it was held that "opinions of persons riding in cars, and not observing from the outside, should be excluded, unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable." We cannot agree with this statement, but, even if sound law, no objection was made to the testimony of plaintiff's witnesses upon this or any other ground. Their testimony went to the jury unchallenged. The question whether defendant's witnesses were more competent to testify to the point in issue than plaintiff's witnesses, and the reason for giving the greater credence to the opinions of defendant's witnesses, were considerations properly addressed to the jury, and with their conclusion, there being sufficient evidence to support it, we cannot interfere. But the unusual, if not a dangerous, speed of a street car on a straight track, unaccompanied by any other circumstance, is not negligence, and the court substantially so charged the jury. It was urged at the trial and is urged here that the evidence showed that gravel or loose macadam with which the street was paved had been piled on the rails by some person or persons unknown to defendant, and that the car was thrown from the track by this loose material, upon which the car came so suddenly that it was impossible for the motorman to check the speed, and prevent the car from running onto the obstruction. Plaintiff contended, and now urges, that the track was clear, and that this loose material, afterwards found packed upon the rails, was thrown there by the forward truck wheels as they passed along near the rails in the loose macadam, before swerving to the left towards the incoming car, and was run over by the rear truck wheels while still on the track, thus accounting for the crushed appearance of gravel on the rails after the accident. The motorman testified that he saw the obstruction when within 10 feet of it, and immediately set his brake; that the car ran over about 6 feet of the gravel on the track, and then left it, and collided with car 29 at a point about 70 feet distant; and that car 37 was running about 7 miles an hour when it struck the gravel. No other person saw any obstruction on the rails before the car went off, and there was evidence from which an inference might have been drawn that the gravel on the rails was pushed onto them by the car wheels after it left the rails. The motorman of car 29 testified that he saw car 37 jump the track when four lengths from his car, and he was traveling about 7 miles an hour up grade. The evidence was that both cars were so injured as to show that they came together with considerable force, so that, as testified by defendant's su-

perintendent, "the front of car 37 was broken in, the glass broken and the steps wrenched and broken, and the front poles or stanchions broken. The kingbolt was also bent. Car 29 was damaged in a similar manner."

These stanchions were $3\frac{1}{4} \times 2\frac{1}{4}$ inches dimensions, and by the concussion passengers in both cars were unseated, and several of them thrown off the cars. An experienced engineer, a builder and operator of electric roads, Mr. Leland, testified that a car weighing 12 tons, 35 feet long (these weighed 12 tons, and were 37 feet long), proceeding down a $5\frac{8}{10}$ per cent. grade (the grade at the point in question), at the speed of 25 miles an hour, could be stopped in 50 feet; at 20 miles an hour, in about 42 feet; at 7 or 8 miles an hour, in less than its own length. He further testified: "In cases of emergency, electric cars are stopped by throwing in the reverse current. It is called slugging the motors, and it causes the motors to act as generators of electricity, which causes the car first to stop, and then go backwards. It is a very simple operation, and, if the car at the time of the accident was proceeding motor off (as the motorman testified was the fact), could have been applied instantly. I have never known it to fail, and it should always be resorted to in cases of great peril or imminent danger. It stops the car very quickly." It is not pretended that defendant's motorman resorted to this expedient, or did more than apply the brake, which he testified, from what he said he afterwards learned, did not have any effect after the car left the track. It is quite probable that the motorman of car 29, coming up this grade, could have stopped his car in time to have avoided the collision, if Mr. Leland's testimony is to be believed, and it be true that car 37 was going no faster than 7 miles an hour when it left the track. He saw car 37 coming towards him, and off the track, 148 feet, or 4 car lengths, away, and at the speed he was traveling he could have stopped his car in less than its own length, and, whether car 37 went 70 feet or 100 feet, after it left the track, the two would not have come together. Motorman Knox, of car 29, also testified that he set his brakes and reversed his motors, and was "nearly stopped" when the collision happened. He testified further: "The other that was approaching me was not going over 7 miles an hour, and much less, I think, at the time it hit my car." Mr. Knox does not state how far his car traveled after he applied the brakes and reversed the motor, but it could not have been over 35 feet, according to Mr. Leland's testimony. This would show that car 37, after the brake was applied, while the car was on the track, and with the brake on afterwards, to more or less purpose, ran, with its trucks in loose macadam, over 100 feet, and was, when it collided with car 29, still going at considerable speed, judging from the effect upon the two cars. The inference drawn by the jury from this evidence must have been that when car

37 jumped the track it was going at a high rate of speed, as plaintiff's witnesses testified, and faster than the usual speed of defendant's cars, and much faster than the statutory limit of 8 miles an hour; and that, even though the car was derailed by means of the obstruction, the collision would not have occurred but for the excessive speed of car 37 at the time it left the track. Then, too, the jury may have believed Mr. Leland in stating that car 37 could have been stopped by the slugging process he described, but which the motorman failed to apply or account for not applying. The jury may also have believed from the testimony that Motorman Knox, of car 29, was negligent in not stopping his car in time to avoid the accident. It was certainly his duty to do so if reasonably within his power, and defendant would be equally liable for failure of duty on his part as for failure of duty on the part of Motorman Rogers, of car 37. The evidence was conflicting upon all these hypotheses, and, while we might differ with the jury as to where the preponderance of the evidence lay as to one or more of the theories upon which the jury must have determined the case, we are not at liberty to interpose our judgment for that of the jury where, as we think was true, there was some real and substantial evidence to support the verdict.

Defendant's counsel correctly state the general rule that the breach of duty upon which an action is brought must be not only the cause, but the proximate cause, of the damage to plaintiff; and as stated by Shear, & R. Neg. § 26: "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." This rule is sought to be applied on the assumption that the evidence shows beyond question that the proximate and only cause of the collision in the present case was due to the obstruction on the railway track. But the evidence is not all one way as to the fact, and, besides, it does not follow that the car would have left the track at all if the speed had been 7 or 8 miles an hour instead of more than twice that speed, as the jury were warranted from the evidence in believing it to have been. Furthermore, defendant's counsel ignore the evidence of a new cause for the collision arising after the car left the track. The nature of this evidence has already been suggested. For example, the excessive speed of car 37 may not only have caused it to leave the track when, at the usual speed, it would have safely passed over the gravel on the track (assuming that gravel was previously placed there), but, had the speed been 7 miles an hour instead of 15 or 20, the car would in all probability not have run 80 or 100 feet through the loose macadam, or, having done so, the two cars would have come together with little or no force.

2. Error is claimed in sustaining plaintiff's objection to the following question put to defendant's witness Superintendent Van Frank: "How did these rails used on this electric road compare with the rails used on other roads in town, both electric and cable?" In sustaining the objection, the court said: "You can go into probative matters as to how this road is built, if you want to show it is a safely built road and safely equipped." Counsel stated that their purpose was to show that on a road such as this, and with such cars as were there used, the cars could run over the track 30 miles an hour with safety. The court remarked: "I don't say you cannot prove that, but I don't think you can prove it in that way. You ask the witness now to compare the equipments of this road with equipments of other roads." We think the ruling was correct, and, besides, the record shows that counsel got what they wanted from the witness later on.

3. The same witness was asked the following question: "Now, at what rate of speed could those cars be run, if it were so desired, with absolute safety, so far as derailment was concerned?" The court sustained plaintiff's objection, and the ruling is claimed to be error. The court remarked that the objection was to the form only, and that counsel were entitled to some of the points suggested by the question, and counsel did immediately ask the witness whether a car such as No. 37 "could not be run over that road on a straightaway, barring curves, at a speed of thirty miles an hour, without derailment," and the witness answered that it could. Conceding error in the ruling, it was without injury.

4. Defendant asked certain instructions, marked "2" and "3," which the court gave, with modifications. The refusal to give the instructions as asked, and in giving them as modified, is assigned as error. The instructions involved were intended to guide the jury with reference to the duty of the motorman, and especially as to the degree of care required of him when suddenly confronted with an obstruction on the track whose presence there he could not reasonably have anticipated or foreseen. Defendant asked that the jury be told that defendant would not be liable if the motorman exercised such care as "would have governed an ordinarily prudent man in the same circumstances," etc. Again: That "the standard of care to be used by motormen * * * must be measured by the foresight and caution of the average prudent man standing in their shoes, and compelled to exercise care * * * in the same situation and surrounded by the same circumstances." The court defined the standard of care to be used by the motorman to be that of a "very cautious man standing in his shoes, and compelled to exercise care * * * in the same situation, and surrounded by the same circumstances." Again, the court said: "If he acted in the premises

with the same care as would be exercised under the same circumstances by an extremely cautious person," etc. It is conceded by defendant's counsel that carriers of passengers must exercise "great care, or the utmost care, or even the care of very cautious persons," and that an instruction so stating would not have been erroneous "without the additional reference to surrounding circumstances"; but it is urged that as given the instruction "exacts double-distilled care of the defendant common carrier." The objection is stated in another form as follows: "The reasonable and prudent man, in view of the circumstances which surrounded Rogers, the motorman of car 37, would exercise the utmost care, and this is all that can be reasonably exacted of the common carrier. The extremely cautious person, under such circumstances, would exercise extraordinary care, which the law does not require of a common carrier." And it is urged that "the effect of such a rule would be to make common carriers insurers of their passengers, since a jury might always find an accident could have been avoided if the motorman * * * had exercised, under all the circumstances of the case, * * * such care as a 'very cautious man,' or an 'extremely cautious person,' would have exercised." It is further urged that it was for the jury, and not for the court, to say whether a failure to employ extremely cautious men is a breach of the carrier's obligation to exercise the utmost care. It was said in *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, after citing certain cases decided by this court: "It thus appears to be settled law in this state that a proprietor of stagecoaches is liable for the slightest negligence in regard to the vehicle provided by him; that he is responsible to his passenger for the utmost care and diligence of extremely cautious persons." In speaking of the rule as applied to railroad companies, the court said: "The railroad company is bound for the utmost care and diligence of very cautious persons, and is responsible for any, even the slightest, neglect." Many cases are cited approvingly where such expressions are used as "extreme vigilance," "as far as human care and foresight can go," "greatest possible care," "is liable for the smallest negligence," "highest degree of care," and the like, as indicating the degree of care required. In *McCurrie v. Southern Pac. Co.*, 122 Cal. 558, 55 Pac. 324, the rule as to railroads was stated as follows: "The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them, while in the course of transportation, which might have been avoided by the exercise of such care." We cannot see that the instructions complained of intensified the rule by the use of any unwarranted adjectives. The use of the terms "very cautious person" and "extremely cautious person" finds ample justification in ad-

judicated cases of recognized authority, and the qualifying words, "under the same circumstances," seem to us rather favorable to defendant than otherwise, and, indeed, were used in the instruction asked by it. Negligence always is relative to the circumstances surrounding the case. *Franklin v. Road Co.*, 85 Cal. 63, 24 Pac. 723.

It was for the court to instruct the jury as to what constitutes negligence, and hence it was not error for the court to instruct as it did. It is not true that it was for the jury to say whether a failure to exercise the utmost care, or the care which an extremely cautious man would, under the circumstances, have exercised, would constitute negligence. This was the function of the court, while the jury was to say whether such care had in fact been exercised.

5. It is contended that the court erred in instructing the jury that "the proof of the occurrence of the accident without fault of the passenger is prima facie proof of negligence on the part of the company." The claim is that the rule is not applicable to street-railway companies; citing *Hastings v. Railroad Co.* (Sup.) 40 N. Y. Supp. 93, where the cars were drawn by horses. The rule, as the trial court gave it, has been applied in this state to stagecoaches (*Boyce v. Stage Co.*, 25 Cal. 460, and *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2); to elevators in buildings (*Treadwell v. Whittier*, supra); in the case of explosion in a dynamite factory (*Judson v. Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718), where the principle upon which the rule rests was clearly stated; in case of a steam railway while operating in the streets of a city (*McCurrie v. Southern Pac. Co.*, supra). There is no principle upon which an exception to the rule can be made in the case of street railways, especially where operated by electricity or steam power. The reason of the rule is equally applicable to electric cars operating in a city.

6. The court gave the following instruction: "If you find that there was an obstruction on the rails, the question arises, 'Would the accident have occurred if there had been no obstruction?' If you find that the accident would not have occurred without the obstruction, then, subject to what I have just told you, the obstruction was the proximate cause of the injuries to plaintiff, and he cannot recover from defendant, unless, on the whole case, it has been shown by competent evidence that defendant or its servants placed the obstruction on the rails, or unless the servants of defendant could, by the exercise of the care exercised by a very cautious person, have discovered the obstruction in time to have avoided the accident." There was no evidence whatever that defendant or its servants placed the obstruction on the rails, and it is contended that it was error to assume the possible existence of a state of facts which the jury had no right to find, there being no evidence of any such facts. In *Peo-*

ple v. Cochran, 61 Cal. 548, it was said: "If an instruction in a case is asked which refers to facts which there is no evidence to prove, it is not error to refuse to give it, and if given, although in fact erroneous in the abstract, it will not be regarded as an error for which the judgment will be reversed, unless it be manifest that the jury was misled by it to the prejudice of the defendant. Presumptively, however, an erroneous proposition of law, referring in no way to the evidence in the case submitted to the jury, has not prejudiced the defendant." If this latter statement be true, surely a correct proposition of law, under like circumstances, would not necessarily mislead the jury. In the present case there was not the slightest evidence or suspicion pointing to the defendant as having placed the obstruction on the rails, and we do not think the instruction assumes that any such evidence existed. We do not believe that the reference made to defendant in that connection could, in view of the evidence in the case, have made the slightest impression on the jury to defendant's prejudice. We advise that the judgment and order be affirmed.

We concur: SMITH, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

3. County Government Act 1893 (St. 1893, p. 359) § 25, subd. 36, declaring that the county board of supervisors shall have authority to authorize the district attorney to appoint an assistant district attorney, which office was thereby created, was not unconstitutional, since the assistant district attorney was but a deputy, and by section 61 of the same act the district attorney could appoint as many deputies as he saw fit, and, if not a deputy, the board had power to authorize the district attorney to fill the office when in their judgment the public interest required it.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Application by G. C. Freman against H. E. Barnum, as auditor of Fresno county, for a writ of mandate to compel defendant to issue a warrant in favor of plaintiff. From a judgment in favor of defendant, plaintiff appeals. Reversed.

L. L. Cory, for appellant. N. C. Caldwell, for respondent.

TEMPLE, J. This is an application for a writ of mandate to compel the defendant, who is auditor of Fresno county, to draw a warrant in favor of the petitioner for certain installments of salary alleged to be due him as assistant district attorney of said county. In the county government act of 1893 (St. 1893, p. 346), in section 25, it is provided as follows: "The boards of supervisors in their respective counties, have jurisdiction and power, under such limitations and restrictions as are prescribed by law: * * * Subd. 36. To authorize the district attorney to appoint an assistant district attorney, which office is hereby created," etc. Pursuant to this act, the supervisors of Fresno county, on the 19th day of November, 1895, duly authorized the district attorney to appoint such officer, and accordingly the appellant was appointed December 2, 1895, and immediately qualified, and has ever since continued to discharge the duties of the office. On the 16th of February, 1897, the board of supervisors of the county of Fresno made an order revoking and rescinding the order authorizing the district attorney to appoint an assistant. This action was brought to compel the payment of salary for the months of February, March, and April, 1898. In defense, the auditor contends that the statute giving the supervisors power to authorize the district attorney to make the appointment is void, and also that the rescinding of the order by the supervisors terminated the office. The last point above mentioned seems to possess merit, but, unfortunately, the auditor is in no condition to urge that defense. The plaintiff in his petition sets up, as an estoppel, a former judgment between the same parties in a proceeding to compel defendant to issue a warrant for salary which accrued in March, 1897. As a defense in that case, the auditor, who is also defendant in this, set up the order made February 15, 1897, re-

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FREMAN v. BARNUM. (S. F. 1,614.)

(Supreme Court of California. Jan. 16, 1901.)

JUDGMENT—RES ADJUDICATA—MATTERS LITIGATED—MATTERS NECESSARILY INVOLVED—SUBSEQUENT ACTION—STATUTES—DISTRICT ATTORNEYS—ASSISTANTS—CONSTITUTIONALITY.

1. Where, in a suit by an assistant district attorney against a county for salary for a certain month, the question whether an order of the county supervisors, terminating his office prior to such month, was valid, was litigated, the decision was conclusive of the question in a subsequent suit by the attorney for salary for other months.

2. While, in an action by an assistant district attorney against a county for salary for a certain month, the question as to the constitutionality of the statute authorizing his appointment was necessarily involved, and must have been determined, not having been actually litigated, the judgment in such action was not conclusive of the question in a subsequent suit by such attorney for salary for other months.

seinding and revoking the said order made November 19, 1895, in pursuance of which the plaintiff was appointed. It is averred that the issue so raised was duly tried and determined by the court, and judgment rendered, in effect, holding that said attempt to rescind the order of November 19, 1895, was ineffectual, and did not deprive plaintiff of his right to be paid for his services. These allegations as to the former adjudication are not controverted in the answer.

The matter, then, was directly put in issue in the former action, and it was there duly tried and solemnly adjudged that, notwithstanding the rescinding order, plaintiff was entitled to his salary. The law upon this subject is stated by Justice Field in *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 195. It was held that a judgment between the same parties is an estoppel in another suit upon a different cause of action as to points or questions actually litigated and determined. If the point or matter of fact has, by them or those to whom they are privy in estate, been once distinctly put in issue, and solemnly found against them, they are precluded from contending to the contrary.

But this estoppel in actions upon a different cause of action only extends to matters actually litigated and determined, and not to questions involved, and defenses which might have been, but were not, made. This applies to the question as to the constitutionality of subdivision 36 of section 25 of the county government act of 1893. It is true that matter was necessarily involved, and must have been determined, before judgment could have been entered in the former suit. But it does not appear from the record that such question was raised and litigated. This being a different action upon a different cause of action, the defendant is not estopped from raising the objection. But that matter is easily determined. The assistant district attorney was but a deputy, and, by section 61 of the same act, the district attorney could appoint as many deputies as he saw fit. The statute only authorized the board to pay an additional assistant. That they may do this follows from the views expressed in *Tulare Co. v. May*, 118 Cal. 303, 50 Pac. 427.

If the plaintiff was not a deputy, but was filling an office created by the subdivision alluded to, the result would be the same. The board then had the power to authorize the district attorney to fill the office when, in their judgment, the public interest required it. In my judgment, the board could also cause the appointee to be discharged when, in their judgment, his services were no longer required (*Ford v. Board*, 81 Cal. 19, 22 Pac. 278), but defendant is precluded from making that defense. The judgment is reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

131 Cal. 379

FIELD v. AUSTIN et al. (S. F. 2,387.)
(Supreme Court of California. Jan. 15, 1901.)
SALES—ACTION FOR PRICE—FINDINGS—SUFFICIENCY—DEFENSE—EVIDENCE.

1. In an action by a seller against a purchaser to recover on purchase-money notes, findings should be made on the issue of fraud raised by an answer setting up the defense of failure of consideration and fraudulent representations by the seller in making the sale, and showing that the purchaser has been damaged by the fraud, though the answer fails to allege a rescission, or offer to rescind, on the part of the defendant.

2. The seller's fraudulent representations in making the sale may be given in evidence as a defense to his action against the purchaser on purchase-money notes, and will be an answer to the whole demand, or to such extent thereof as the proof may justify, where the purchaser pleads failure of consideration and fraud as a defense.

3. Where a written contract recites an aggregate sum as the consideration for the transfer of several items of property, the actual consideration for each item may be shown by parol, and when that is done the transaction will stand as though it was so recited in the contract.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Action by Arthur G. Field against Paul P. Austin and another. From a judgment for plaintiff, defendants appeal. Reversed.

John E. Richards, John G. Jury, and J. H. Campbell, for appellants. H. C. Moore, N. Bowden, and Jackson Hatch, for respondent.

SMITH, C. The plaintiff recovered judgment in the court below for the sum of \$13,310, with interest and attorney's fee, alleged to be due on seven promissory notes made to the plaintiff by the defendants. The complaint is in the ordinary form. The defense was fraud in the procurement of the contract. The questions involved relate exclusively to the sufficiency of the findings. The answer of the defendant Potts—besides denying that the notes were given for valuable consideration, and alleging that they were wholly without consideration—"avers (1) that each of said notes was given for a part of the purchase price of certain shares of the Western Granite & Marble Company, a corporation, (2) all of which shares were then, and have ever since continued to be, and now are, entirely worthless and valueless; * * * (3) that each of said notes was procured by and through the false and fraudulent representations of the plaintiff, to wit, that said stock was of the value of \$50 per share, or more, and that a dividend of ten per cent. on that valuation had already been earned, and would be paid on or about May 1, 1893, all of which the plaintiff knew to be false, and without any foundation in fact; that no dividend has ever been paid on said stock since the making of said notes." The answer of the defendant Austin is to the same effect, but the fraud is alleged in more detail, and

additional circumstances are mentioned; as, e. g. that the plaintiff controlled the officers of the corporation, and caused them to make false and misleading statements and reports, etc. It will be sufficient, however, to consider only so much of his answer as corresponds to that of his co-defendant. The findings of the court, so far as material, are that the notes sued upon were made in pursuance of a written contract of even date, by the terms of which the plaintiff agreed to sell, and thereby did sell, certain office furniture and other property, specifically described, used in the plaintiff's business "of brokerage, insurance, and real estate," together with the business, and also 650 shares of the capital stock of the Western Granite & Marble Company, for the sum of \$45,750, to be paid \$10,000 in cash, \$25,000 by the joint notes of defendants, and \$10,000 by the several notes of each for \$5,000; "and that there was not then, nor had there been prior to that time, any confidential relation existing between them, and said Field did not at any time prior to the consummation of said contract or thereafter do or perform any act or thing tending to conceal from the defendants the value or standing of the properties for the purchase of which they were negotiating from him, nor did he in any way prevent, or attempt to prevent, any or either of them from making fair and full investigation on their account into the values of the several properties mentioned, * * * and that in fact the several properties so sold and transferred did possess an actual value, and were not valueless"; and, finally,—as in fact appeared from the absence of allegations on the point in the answers,—"that there had been no rescission or offer to rescind."

1. The above findings, it is quite clear, do not respond to the issues as to fraud made by the allegations of the answers, and the case therefore stands without findings as to these issues. Nor, as appears from the opinion of the court inserted in the bill of exceptions, was it designed to find on them. The theory of the court, as there expressed, is that the answers, owing to the failure to allege a rescission, or offer to rescind, or to allege damages, *eo nomine*, could not be regarded as cross complaints to rescind, or for damages for fraud or deceit; and hence that "the only defense set up to these notes is a want of consideration," or, as elsewhere expressed, "a total failure of consideration." But the facts alleged in the answers show that the defendants were damaged, and also the extent of the damage; and upon proof of those facts and of the fraud alleged they would have been entitled to recoup against the notes either to the whole amount of the notes, if the stock was entirely valueless, or to such less extent as the proofs might justify. The law on this point is well settled. Nor would the case be altered even had it been found that the stock given as the consideration of the notes had some value. This

Cal.Rep. 63-65 P.—13

would affect only the extent of the relief. "There are three methods by which, in cases like the present, a party defrauded may obtain relief: (1) Cancellation or rescission, etc. * * * (2) Affirmative relief by an action to recover compensation for the injury sustained by the fraud of the defendant, where no cancellation is necessary as * * * the basis of such recovery. (3) Defensive relief, whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability." *Toby v. Railroad Co.*, 98 Cal. 498, 33 Pac. 553. And in the last case "it is permissible for the defendant to recoup to a partial extent, or to defeat the action to the entire extent of the note, for fraud in the obtaining of the note or in its consideration [even] where it is admitted that the party who gave the note retained the goods, and made no offer to return them." *Bell v. Sheridan*, 21 D. C. 374. Or, in other words, "in cases like the present fraud may be given in evidence as a defense, and will be an answer to the whole demand, or in abatement of the damages, according to the circumstances of the case. This is the true, as well as a salutary, rule, and well calculated to do final and complete justice between the parties most expeditiously and least expensively." *Beecker v. Vrooman*, 13 Johns. 302. And to same effect, *Groff v. Hansel*, 33 Md. 163; *Applegarth v. Robertson*, 65 Md. 493, 4 Atl. 896; *Withers v. Greene*, 9 How. 230, 13 L. Ed. 109; *Whitney v. Allaire*, 4 Denio, 556.

2. The findings also fail to respond to the allegations of the answers as to the consideration. The allegations are: (1) That the consideration of the notes was the stock; (2) that this was entirely without value. On these points the court simply finds the terms of the contract, and that "the several properties so sold and transferred by the said Field did possess an actual value, and were not valueless." But this refers not specifically to the stock,—which, according to the allegations of the answer, constituted exclusively the consideration of the notes,—but, generally, to all the property sold, and would be equally true whether the stock be or be not of any value. It is true that in the written contract an aggregate sum is mentioned as the consideration for the transfer of the property generally, and that, as the court says, "no valuation was thereby placed upon any of the items composing the consideration"; and, consequently, that *prima facie* the contract was entire. But it was competent for the defendant to show by parol testimony what the consideration in fact was; that is to say, that the consideration of the notes was the stock, and the consideration for the other property the \$10,000 paid in cash. Code Civ. Proc. § 1962, subd. 2; Civ. Code, §§ 1614, 1615; 1 Greenl. Ev. §§ 284, 285, 304; *Hendrick v. Crowley*, 31 Cal. 476; *Stufflebeem v. Arnold*, 57 Cal. 11. On the proof of this fact the transaction would stand

precisely as though it were so recited in the contract, and the case would thus come under the general principle of construction applying to such cases, which is that a sale "of different articles at different prices is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless the transaction is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale, had such a failure been anticipated." *Norris v. Harris*, 15 Cal. 256. Or, as more tersely expressed: "Where a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance, yet the contract, for sufficient cause, may be rescinded as to part and may be enforced as to the residue. But this cannot properly be said to be an exception to the rule [applying to cases where there is a sale of several articles for one consideration. Civ. Code, § 1608], because, in effect, there is a separate contract for each separate article." *Miner v. Bradley*, 22 Pick. 459, citing *Johnson v. Johnson*, 3 Bos. & P. 162. Nor does it make any difference whether the facts are recited in the written contract, or proved by evidence aliunde,—as was held in the latter case, where the aggregate consideration only was recited, and proof was allowed that part of it corresponded to one of the properties sold, and the balance to the other. See, also, *Mayfield v. Wadsley*, 3 Barn. & C. 361; *Jackson v. Shawl*, 29 Cal. 272; *Treadwell v. Davis*, 34 Cal. 601. In the present case it appeared from the evidence of both parties that in negotiating the sale the property other than the stock was estimated to be of the value of \$10,000,—which was paid in cash,—and the stock itself at \$55 a share, making in the aggregate the amount of the notes; and there was other evidence tending to show that the consideration of the notes consisted wholly and exclusively of the stock. The defendants were, therefore, entitled to a finding on this point, and, in connection therewith, to a finding on their allegation that the stock was of no value, and on findings in their favor on these points would have been entitled to rescind without returning the stock (*Gifford v. Carvill*, 29 Cal. 593; *Canal Co. v. Roach*, 78 Cal. 554, 21 Pac. 304; *Gamble v. Tripp*, 99 Cal. 226; 33 Pac. 851; *Vineyard Co. v. Tuohy*, 107 Cal. 254, 40 Pac. 386); or, to state the point more simply, would have been entitled to judgment on the ground that there was a total failure of consideration for the notes. The findings are, therefore, insufficient, even on the theory adopted by the court that the sole issue was "whether there was a total failure of consideration"; for it was competent for the defendants to prove their allegations that the consideration of the notes was the stock, and that this was of no value,

and the court failed to find on either of these issues. We advise that the judgment and order be reversed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

131 Cal. 385

FINDLAY v. POTTS et al. (S. F. 2,388.)
(Supreme Court of California. June 26, 1900.)

PROMISSORY NOTES—NEGOTIABILITY.

Under Civ. Code, §§ 3087, 3093, providing that a negotiable instrument is a written promise or request to pay a certain sum of money in conformity with title 15, c. 1, art. 1, defining a negotiable note, a note with a stipulation for an attorney's fee in case of suit is not negotiable.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Action by James W. Findlay against Fred S. Potts and another. From a judgment for plaintiff, defendants appeal. Reversed.

John E. Richards, John G. Jury, and J. H. Campbell, for appellants. H. C. Moore, N. Bowden, and Jackson Hatch, for respondent.

SMITH, C. This action was brought by plaintiff, as assignee of Field, to recover \$10,000 alleged to be due on four promissory notes executed in pursuance of the contract involved in *Field v. Austin* (S. F. 2,387; just decided) 63 Pac. 692, and belonging to the same series as the notes sued on in that case. The notes all contain stipulations for attorney's fees in case of suit, and are, therefore, nonnegotiable. *Bank v. Babcock*, 94 Cal. 96, 29 Pac. 415; *Same v. Falkenhan*, 94 Cal. 141, 29 Pac. 866; *Adams v. Seaman*, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 224; *Chase v. Whitmore*, 68 Cal. 548, 9 Pac. 942; Civ. Code, §§ 3087, 3093. Otherwise the case is similar to *Field v. Austin*, and on the authority of that case the judgment and order denying a new trial should be reversed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

(131 Cal. 455)

HEDGE et al. v. WILLIAMS. (Sac. 724.)¹

(Supreme Court of California. Jan. 30, 1901.)

MASTER AND SERVANT—INJURY TO SERVANT
—INDEPENDENT CONTRACTOR—MASTER'S
LIABILITY—APPEAL.

1. Defendant's farm superintendent, who was also a member of a hardware firm, directed an employé of the firm to go to the farm, and repair a leak in a distillate tank, one of the appliances of the farm. By reason of the negligence of such employé in lowering a light into the tank an explosion occurred, by which plaintiff's decedent, a farm servant of defendant, was killed. *Held*, that under Civ. Code, § 2009, defining a "servant" as one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling, and who in such services remains entirely under the control and direction of the latter, that the hardware firm, notwithstanding defendant's superintendent's connection therewith, was an independent contractor, and not defendant's servant, and, the firm having entire control of the employé by whose negligence the accident

¹ Rehearing denied March 1, 1901.

occurred, such employé was not defendant's servant, so as to render him liable for the result of his act.

2. Where there is no substantial conflict in the evidence on an issue as to whether a servant was the servant of defendant or an independent contractor, a finding that he was defendant's servant is not binding on the appellate court, which, on appeal, must decide such issue as a matter of law, under the facts.

Department 1. Appeal from superior court, Tulare county; W. B. Wallace, Judge.

Action by Etta Hedge and others against J. H. Williams. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, he appeals. Reversed.

J. F. Boller and Bradley & Farnsworth, for appellant. Roth & McFadzean, J. E. Shuey, and Chas. G. Lamberson, for respondents.

GAROUTTE, J. This action was brought by the surviving wife and minor children for damages occasioned by the death of Joseph A. Hedge, the husband and father. Defendant appeals from the judgment and order denying his motion for a new trial.

The material facts in the case are as follows: Defendant was the owner of a large fruit farm near the town of Porterville. One A. H. Schultz was the superintendent of defendant in the management of the farm. A large tank, used to store distillate, was located upon the premises. Schultz discovered that the tank was leaking, and directed that the distillate be withdrawn therefrom, which was done, with the exception of possibly an inch in depth at the bottom of the tank. Schultz was also a member of the firm of Schultz & Wilson, dealers in hardware, tinware, plumbing, etc., in the town of Porterville. One Fontaine was in the employ of Schultz & Wilson, directly in charge of that portion of the business, including the repairing of tanks, etc., and had made this particular tank some years in the past. Schultz instructed Fontaine to repair the leak in the tank, and took him, with his implements of labor, to the place where the tank was located. The deceased, Hedge, was the servant of defendant, and was engaged in fixing a casing surrounding the tank. Upon the arrival of Fontaine at the tank, he climbed upon it, called for a lighted lantern and a string, opened the manhole, let down the lantern within, and immediately a disastrous explosion occurred. Hedge, Schultz, and Fontaine were all seriously injured. Hedge died; the others recovered. It will be seen from the foregoing statement that the facts are neither many nor complicated; yet the dual capacity in which Schultz was acting—his Jekyll and Hyde character, as it were—adds an additional element of interest to the case.

It is claimed by appellant that Fontaine stood in the position of an independent contractor; in other words, that Schultz & Wilson stood as independent contractors in re-

pairing the tank, and that Fontaine was their servant. It is next claimed that, if Fontaine was not the servant of Schultz & Wilson, he was the servant of defendant, and, Hedge being his fellow-servant, Fontaine's negligence could not form the basis of a recovery by Hedge's relatives. Of course, this contention is sound, unless defendant was guilty of negligence in selecting Fontaine to do the work. We return to the first proposition urged. Did Fontaine stand in the position of an independent contractor? If he did, then the defendant is not liable; for independent contractors alone must bear the damage occasioned by their negligence.

After viewing this evidence from every side, we are brought to the conclusion that Fontaine, in repairing this tank, was not the servant of defendant, and that his negligence in causing the explosion was not the negligence of defendant. First let us eliminate Schultz from the case in his dual capacity, and deal with him alone as a member of the firm of Schultz & Wilson. Then we have defendant personally going to the firm of Schultz & Wilson, and requesting that a man be sent out to repair the leaking tank. Defendant may go one step further, and request that Fontaine be sent out to repair the tank. Assuredly, Fontaine, under these circumstances, would be the servant of Schultz & Wilson, and not the servant of defendant. For nine years Fontaine had been in the employ of Schultz & Wilson, and as their employé he went with his tools to repair the tank. The firm had the power to discharge him at any moment, even at the very moment when the soldering iron was hot in his hand, and the solder ready to be applied. He was paid by the firm for his labor. Defendant could hold the firm liable if his work was negligently done. Looking at the case from this angle, Fontaine was not the servant of defendant. As the servant of Schultz & Wilson, he stood in the position of an independent contractor; and the facts fit the case of *Bennett v. Truebody*, 66 Cal. 509, 6 Pac. 329, where the owner of a building employed a plumber to repair the water pipes, and this plumber was held to be an independent contractor.

Again, let us eliminate Schultz from the case in his character as a dealer in hardware, etc. Then we have him as the superintendent of defendant, requesting the firm of Wilson & Co. to repair this tank; or we may go one step further, and say he requested the firm to send out their man Fontaine to repair the tank. Under these circumstances, Fontaine still would be the servant of Wilson & Co., and to no degree the servant of defendant. In the early English case cited in *Bennett v. Truebody*, supra, where a butcher hired a drover to drive a bullock, the drover was held to be an independent contractor, and not the servant of the butcher. Coleridge, J., said: "The thing done is the driving. The owner makes the

contract with the drover that he shall drive the beast, and leaves it under his charge, and then the drover does the act. The relation of master and servant, therefore, does not exist between them." It can hardly be claimed that the firm of Wilson & Co. were the servants of the defendant in repairing the tank; yet, if they were not defendant's servants, then their employé, Fontaine, certainly was not.

It seems to follow from the foregoing assumptions that, in the eyes of the law, the dual capacity in which Schultz was acting in no way affects the merits of this litigation. As to the law, the case would be the same if he were alone a member of the hardware firm, or alone the superintendent of the defendant. Schultz's dual capacity in no way changes the contractual relations between these various parties. Indeed, in no aspect of the case were there any contractual relations existing between the defendant and Fontaine as to the repairing of the tank. Defendant could not discharge him from the work. Only Schultz & Wilson could do so. Defendant was not paying him for his labor, for Schultz & Wilson were paying him. There being no contractual relation between Fontaine and defendant, it is impossible in law that Fontaine should be the servant of defendant.

Section 2009 of the Civil Code provides: "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." Schultz & Wilson were not the servants of defendant, tested by this section. Defendant could not be termed their master, for they were doing this work in the pursuit of an independent calling; and, this being so, they were independent contractors, and Fontaine was their servant. See *Shear. & R. Neg.* § 81. *Adam & Kibbe* employed *McGearey* to take down a flagstaff from their building. In an action for damages brought by a third party for injuries received in taking down the flagstaff, it was held that *McGearey* was an independent contractor, and alone liable. *Ahern v. McGearey*, 79 Cal. 44, 21 Pac. 540. That case is similar in principle to the case at bar. See, also, *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017. Upon the part of respondent it is insisted that the verdict of the jury is conclusive as to the capacity in which Fontaine was acting in repairing the tank. This contention could only be sound if there was a substantial conflict in the evidence. But here, as to this particular branch of the case, there is no conflict in the evidence. And upon a state of facts of that character it becomes the duty of the appellate court to decide, as matter of law, what the facts prove.

The declarations of Hedge, the deceased, made to third parties after the accident, form no part of the *res gestæ*, and should

not have been admitted against these plaintiffs. The case being remanded, it becomes unnecessary to consider the legal soundness of the instructions given to the jury upon the point. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

131 Cal. 452

In re DEVINCENZI'S ESTATE. (S.F.2,208.)¹

FIGONI v. DEVINCENZI.

(Supreme Court of California. Jan. 29, 1901.)

ADMINISTRATOR—SALE OF REALTY—ORDERS—
APPEAL—JURISDICTION OF AP-
PELLATE COURT.

Where an appeal was taken from an order annulling an administrator's sale of realty before the same had been entered of record, the appellate court acquired no jurisdiction, and hence an order entered by the superior court at the direction of the supreme court confirming such sale was void, since the first order of the superior court still stood, and the court acquired no jurisdiction to enter the second.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Application by Antonio Devincenzi, as administrator of the estate of Giovanni Devincenzi, deceased, for a confirmation of a sale of real estate. From an order confirming the sale Luigi Figoni appeals. Reversed.

Sullivan & Sullivan, for appellant. James A. Devoto and Devoto, Richardson & Long, for respondent.

HARRISON, J. The respondent made a sale of certain real estate of the above-named decedent under an order of the superior court authorizing him thereto, and thereafter made his return to the court setting forth that he had sold the same to the appellant herein. At the hearing upon this return the appellant filed objections to a confirmation of the sale, and the court made an order vacating and setting aside said sale, and declaring the same to be null and void. This order was dated July 8, 1896, and was filed with the clerk of the court July 10th, and entered at length in the minutes of the court July 27th. On July 10th the administrator served upon the appellant his notice of appeal from said order, and the same, together with an undertaking on appeal, was filed with the clerk within five days thereafter. Upon the hearing of the appeal in this court the order was reversed (119 Cal. 498, 51 Pac. 845), and the remittitur thereon was filed in the superior court, and entered in its minutes, February 2, 1898. Thereafter the administrator applied to the superior court for an order confirming the sale to the appellant, and, after notice thereof and hearing upon the same, the court made an order confirming said sale. From this order the present appeal has been taken.

At the date when the appeal from the order vacating the sale was taken, that order

¹ Rehearing denied February 26, 1901.

had not been entered of record. The appeal therefrom was, therefore, premature, and gave to this court no jurisdiction to entertain the same. In *re* Pearsons' Estate, 119 Cal. 27, 50 Pac. 929; In *re* Scott's Estate, 124 Cal. 671, 57 Pac. 654. Being without jurisdiction over the subject-matter of the appeal, the direction of this court for a reversal of the order of July 27, 1896, was unauthorized, and the order was not vacated by such direction, but remained in as full force as if no appeal therefrom had been attempted. When, therefore, in 1898, the administrator asked for a confirmation of the sale, the superior court was confronted with a valid order by which that sale had been annulled, and was without jurisdiction to grant the application. *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52, involved the validity of a judgment of the supreme court affirming a judgment of the superior court where the appeal was taken before the judgment had been entered. A formal judgment in favor of the plaintiff in the case of *Brady v. Page*, bearing date March 19, 1878, had been signed by the judge of the court, and findings and an order for judgment filed March 21, 1878. Judgment was not entered, however, until January 7, 1882. In November, 1878, the defendant appealed from said judgment to this court, and the judgment was affirmed. 5 Pac. 103. It was held that this court acquired no jurisdiction of the appeal, the court saying: "Until the judgment is entered, such court retains complete jurisdiction of the case, of which it cannot be divested by any unauthorized appeal to this court. If the attention of this court had been called to the fact that it had before it an appeal from a judgment which had never been entered, and which was still within the control of the lower court, the appeal would have been dismissed; but, whether this was done or not, the appeal was ineffectual, and this court was in fact without jurisdiction to entertain it. The appeal was futile, and the case remained in the lower court undisturbed." Under the principles of the foregoing cases it must be held that the superior court was without jurisdiction to make the order confirming the sale to the appellant. The order is reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

131 Cal. 125

STEWART v. CALIFORNIA IMP. CO. (S. F. 1544.)

(Supreme Court of California. Jan. 26, 1901.)

On petition for rehearing. Denied.

For former opinion, see 63 Pac. 177.

PER CURIAM. In the petition for rehearing, on the part of the defendants, it is suggested that, the attention of the court having been particularly directed to a consideration of the question as to who was the master or employer of the engineer,—whether the

city of Oakland or the California Improvement Company,—the real question, to wit, whether the engineer was liable at all, has been overlooked. The liability of the engineer is a necessary postulate to the discussion or inquiry in reference to who was his employer or master. If the damages resulted without any negligence on the part of the engineer, it would be altogether immaterial who employed him, or who was responsible for his acts. The court therefore could not and did not overlook that question. But, as the argument of the respective counsel was directed mostly to the controversy as to who employed the engineer, or was responsible for his acts, necessarily the opinion is mostly devoted to the consideration of that question. The court below finds that the injury to the plaintiff was caused by the negligence of the defendant, the engineer, Conger, without any fault or negligence on the part of the plaintiff, and that at the time the relation of master and servant existed between the California Improvement Company and said defendant Conger. These findings are supported by the evidence. Rehearing denied.

131 Cal. 481

FLINN et al. v. MOWRY. (S. F. 1,604.)¹

(Supreme Court of California. Jan. 29, 1901.)

CONTRACTS—RESCISSION—ABANDONMENT—SEPARATE INSTRUMENTS—PUBLIC WORK—STREET PAVING—CONSENT OF PUBLIC AUTHORITIES—NECESSITY—PRIVATE CONTRACT—PLEADING—AMENDMENT—INSTALLMENTS—MATURITY—FINDINGS—EVIDENCE—NEW TRIAL—SEPARATE ISSUES—DENIAL IN PART—FAILURE TO APPEAL—EFFECT.

1. Where plaintiffs, desiring to obtain a contract for street paving, prepared a contract which was presented to defendant, a property owner, and, after negotiations between plaintiffs, defendant, and her agent, she directed the agent to sign the contract, which he did, but at that time only one other property owner had signed the same, and, it being a private contract, it was necessary that the owners of a majority of the frontage should sign the same in order to obtain a permit for doing the work, the contract was inchoate at the time of signing, and only became binding after the signatures of other property owners had been procured.

2. Where a contractor, in order to obtain defendant's signature to a street improvement contract, gave her a receipt for the difference between the price stated in the contract and the price agreed, the contract providing that the balance should be paid in installments, the contract and receipt, being executed at the same time, were parts of the same contract, and should be construed together.

3. Where, in an action on a street improvement contract, a paragraph of the complaint alleged that the amount due from defendant was payable in installments,—\$200 60 days after the completion of the work, and \$200 each month thereafter,—and proof had been given of such provision, the fact that plaintiffs, after both parties had rested, struck out that paragraph of the complaint by leave of court, did not preclude defendant from availing herself of these provisions by amending her answer to allege such provision, there being no occasion for her alleging it in her original answer, it having been alleged in the complaint.

4. Where a contract for street improvement provided that a balance should be paid, \$200 60 days after completion of the contract, and \$200

¹ For modification of judgment, see 63 Pac. 1008.

each month thereafter until the amount due should be paid, and contained no stipulation that, if the owner failed to pay any installment on demand, the contractor should have the right to recover the whole amount, failure of such owner to pay an installment would not entitle the contractor to a recovery of the contract price before the last installment had matured.

5. Where a street improvement contract required the owner to pay for the same in installments, the first installment to become due 60 days after completion of the work, the contractor, after having fully performed, was not entitled to rescind or abandon the contract as to the provisions for payment on the owner's failure to pay a single installment when due, and sue for the recovery of the entire price.

6. Where, in an action to recover the contract price of a street improvement payable in installments, the only objection by defendant to payment was that plaintiffs had not done the work in accordance with the terms of the agreement, such objection was not equivalent to a refusal to pay for the improvement so as to support a finding that, when the first installment became due, defendant refused to pay any sum, and has ever since refused to pay for the work.

7. Where, in an action on a street-paving contract, the complaint contained a claim for constructing a rock sidewalk in front of defendant's premises, and defendant made no denial of the allegation with reference to the sidewalk, and judgment was rendered declaring a lien for the amount due for the sidewalk alone, personal judgment only being rendered for the paving, and on motion a new trial was granted with reference to the paving, but denied in all other respects, and no appeal was taken from that part of the decree with reference to the sidewalk, defendant was not entitled to deny the making of the sidewalk contract for the first time in an amended answer filed on the retrial of the demand for paving.

8. Street Improvement Act, § 7, subd. 10, which declares that owners of land may perform the "grading" on the street in front of their property "after obtaining permission from the council to do so," applies only to the grading of streets, and hence no permit was required from the board of supervisors to authorize abutting owners to contract for the private "paving" of a street.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by one Flinn and another against Ellen M. Mowry. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Modified.

R. Percy Wright, for appellant. J. C. Bates and D. H. Whittemore, for respondents.

HARRISON, J. The plaintiffs entered into a contract with defendant to do certain work upon Laguna street, in San Francisco, in front of her property, and brought the present action to recover, after its completion, the amount agreed to be paid by her, and to have the same decreed a lien upon her property. The court rendered its decision in favor of the plaintiffs, giving them a lien upon one parcel of the plaintiffs' land for a portion of their claim, and a personal judgment against the defendant for the remainder. A new trial was denied, and the defendant has appealed.

Negotiations had been had between the parties with reference to paving the street,

and a proposal therefor had been presented to the appellant on behalf of the plaintiffs, and a formal contract for that purpose, bearing date April 10th, was afterwards prepared by them, and submitted to her. By the terms of this contract she was to pay 24 cents per square yard for paving, but in the proposal originally made to her the plaintiffs had offered to do the same at the rate of 20 cents per square yard. Before the execution of this contract, viz. April 14th, the plaintiffs visited the appellant at her house, and while there the terms of the agreement were discussed,—Mr. Alpers, who appears to have acted in behalf of the appellant, and as her adviser, being also present,—and at that interview an instrument was prepared by the plaintiff Flinn, which purported to be a receipt from the appellant for the difference between 24 cents per square yard, as named in the contract, and 20 cents therefor, as had been agreed upon between them, and which also contained the following: "The balance of (\$1,305.59) thirteen hundred five and ⁵⁹/₁₀₀ dollars to be paid in installments of two hundred dollars per month, the first payment to become due four months from date of completion, and each subsequent payment to mature within thirty days next succeeding, all without interest." After this agreement had been signed by the plaintiffs, the appellant expressed herself satisfied, and directed Mr. Alpers to sign the contract, which he thereupon did, as follows: "E. M. Mowry, per C. Alpers." At this time only one property owner had signed the contract, and, it being a private contract, it was necessary that the owners of a majority of the frontage should sign it, in order to obtain a permit for doing the work. The contract was, therefore, inchoate, and was left with Mr. Alpers, who afterwards procured other property owners to sign it, and returned it to the plaintiffs. This evidence was sufficient to justify the court in finding that the defendant entered into the agreement with the plaintiffs set forth in the complaint.

1. The two instruments thus prepared and signed by the respective parties constituted the agreement between them in reference to the work to be done by the plaintiffs and the payment therefor by the defendant. They were parts of one transaction, related to the same matter, were signed at the same time, and are to be taken together, with the same effect as if the terms of both had been incorporated in one document, and signed by both parties (Civ. Code, § 1642), and are to be construed, so far as practicable, so as to give effect to every part of each instrument (Id. § 1641). The provision in the instrument first prepared, wherein the appellant agreed to make the payment "upon the completion of the work," and the provision in the instrument of April 14th, wherein the plaintiffs agreed that the payment should be made in monthly installments of \$200 each, are easily reconciled by considering that this change in the time of payment was agreed

upon after the instrument of April 10th had been prepared, and submitted to the appellant. The instrument of April 14th, being signed by the plaintiffs, is, under section 1654, Civ. Code, to be interpreted most strongly against them. Its terms are equivalent to an express agreement that the plaintiffs should not be entitled to payment, and would not demand it, except in monthly installments of \$200 each. That this was the understanding of the plaintiffs is shown by their complaint as originally filed, and upon which they presented their case to the court, wherein, after alleging as one of the terms of the instrument of April 10th, that each of the owners of property fronting on the street agreed to pay for the work "upon the completion thereof," they allege, in paragraph 8, "that at the time of entering into said agreement it was further modified as to said defendant, E. M. Mowry, so that the amount due from her thereunder should be paid as follows: \$200 to be paid 60 days after completion of said contract, and \$200 each month thereafter until the amount due thereunder should be fully paid"; and also by the fact that, after they had completed the work, they demanded from the appellant only the first installment of \$200. After both parties had rested, the plaintiffs, by leave of the court, amended their complaint by striking out the above paragraph 8, but the defendant was not thereby precluded from availing herself of the modification therein alleged. Inasmuch as this modification was originally alleged in the complaint, there was no occasion for setting it up in her answer, and, as it had been introduced in evidence, she had a right to avail herself of its provisions, after the complaint was thus amended, by amending her answer so that the allegations might conform to the proofs.

The contention of the respondents, that the failure of the appellant to pay this installment when it was demanded gave them a right to a recovery of the whole amount of the contract price, cannot be maintained. No stipulation of this nature is contained in the agreement, and such right did not arise from a mere failure of the appellant to make the payment. Certain cases have been cited by them in support of this contention, wherein it has been held that in contracts for the sale or manufacture of goods to be delivered in installments, and paid for at each delivery, a failure on the part of the buyer to make a payment may be under such circumstances as will justify the seller to consider the contract as repudiated, and to release him from further performance. It is also the rule that, where a continuing or executory contract has not been fully performed on either side, the repudiation of the contract by one party, or his refusal of further performance, will justify the other party in treating the contract as at an end, and give to him a right of action for damages for its breach. See *Hale v. Trout*, 35 Cal. 228. The rule

in these cases has, however, no application to a contract for labor which has been fully performed on one side, and there remains only payment therefor. There can be no rescission or abandonment of a contract by a party who has fully performed his part of it. The obligation of the other party is measured by the terms of his agreement to the same extent as in any other contract. If this obligation is for the payment of money, and by his agreement such payment is to be made in installments, a failure to pay the first installment will no more give a right of action to recover them all than in the case of an ordinary promissory note which is made payable in periodical installments, and in which there is no provision for the maturity of the whole amount upon the failure to pay one of the installments. The agreement in the present case is specific and unambiguous that the defendant should make the payment for the work done by the plaintiffs in monthly installments of \$200 each, and the finding of the court that the plaintiffs gave to the defendant "an option to pay the money due for said work in monthly installments of \$200" is not sustained by the evidence. Neither does the evidence sustain the further finding that "when said first installment became due defendant refused to pay any sum at all, and has ever since refused to pay anything for said work." The complaint merely alleges that she had not paid the sums due upon the contract. The only evidence tending to support any finding of nonpayment was that the plaintiffs had demanded payment of the first installment. The only objection that is shown to have been made by the defendant to the performance of her part of the contract was her claim that the plaintiffs had not done the work in accordance with the terms of their agreement. This is not the equivalent of a "refusal" to pay any sum at all. As only one of these installments had matured at the commencement of the present action, the court erred in deciding that the plaintiffs were entitled to judgment for the full amount of the contract price.

2. In addition to the claim upon the contract for paving the street, the complaint set forth a claim for constructing a bituminous rock sidewalk on the street in front of a portion of the appellant's land. Defendant filed her answer January 16, 1895, but did not deny the allegations in reference to this sidewalk. The case was tried upon these pleadings April 13, 1896, at which time the court found in favor of the plaintiffs, and that they were entitled to a lien for the amount due for laying this sidewalk, amounting to \$241, and also to a personal judgment against the appellant for the amount due upon the contract for paving the street. Upon motion of the defendant for a new trial the court set aside that portion of its decision upon the contract for paving, ordered a new trial as to the issue thereon, and denied the motion for a new trial in all other respects.

Another trial was had upon this issue in November, 1897, and the court again made its decision thereon in favor of the plaintiffs. After both parties had rested at this trial, the plaintiffs, by leave of the court, amended their complaint by striking out the above-named paragraph 8, and the defendant afterwards filed an amended answer, in which she denied that she had made any contract for laying the sidewalk. The findings herein recite the proceedings had upon the former trial, including the former decision in reference to the claim for laying the sidewalk. The appellant, in her statement on motion for a new trial, specified as one of the grounds for setting aside the decision that this finding in reference to the sidewalk is not sustained by the evidence. It was not necessary that the evidence in reference to this claim should be incorporated in the statement. No issue thereon was presented by the answer on which the cause had been originally tried, and the decision made thereon became a part of the records of the court, which it could adopt and include in its final decision. The order for a new trial excluded this portion of its decision from any further consideration, and by failing to appeal therefrom, or otherwise to seek to have the order modified, it became final as to the defendant, and was not affected by her afterwards filing an answer in which the allegation was denied. The right of the court to limit its order for a new trial to a portion of the issues in the case is well established. *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437.

3. It is urged by the appellant that the court erred in excluding certain questions tending to show that the street was closed by the plaintiffs while performing their work thereon, and that in the performance of their contract they dug up and disturbed the street. These questions are claimed to have been proper for the purpose of showing that, inasmuch as the plaintiffs did not obtain permission from the board of supervisors to do the work, the contract therefor was illegal, and could not be the basis of a recovery. *City and County of San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. 396, is relied upon in support of this contention. That case, however, was decided upon the provision in subdivision 10 of section 7 of the street improvement act, which declares that the owners of land may perform the "grading" upon the street in front of their property "after obtaining permission from the council to do so." The contract in the present case is for other work than grading, and this provision of the section has no application. A contract is not to be held unlawful unless it is either contrary to some express provision of the law or to its policy. Civ. Code, § 1667. This restriction on property owners from doing work upon the street in front of their property is limited to grading, and the provision in a subsequent portion of the section that "whenever any owner or owners of any lots or lands fronting on any street shall have

heretofore done or shall hereafter do any work (except grading) on such street in front of any block at his or their expense," the work so done shall be excepted from any order for improving the street, implies the right of the owner to do such work, and to contract therefor, without obtaining such permission. Under their general supervision of the streets of the city the board of supervisors have adopted an ordinance forbidding any one from digging up or disturbing a street without the permission of the superintendent of streets; but, as permission from the superintendent was obtained in the present case, the questions which were excluded by the court were immaterial. That portion of the judgment decreeing a lien against the lands of the defendant in the sum of \$238.76, and directing a sale of said lands in satisfaction thereof, is affirmed. The judgment against the defendant for the sum of \$1,146, with interest thereon, for the paving and curbing of Laguna street, is reversed, and a new trial is ordered of the issues upon which the said personal judgment was given. The order denying a new trial, so far as it applies to the issues upon which the judgment was rendered for laying the sidewalk, and decreeing a lien thereof, is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

131 Cal. 437

CONWAY v. SUPREME COUNCIL CATHOLIC KNIGHTS OF AMERICA et al.

(S. F. 1,535, 1,536.)¹

(Supreme Court of California. Jan. 25, 1901.)
MUTUAL BENEFIT INSURANCE—BY-LAWS—ASSIGNMENT OF POLICY—FINDINGS.

1. By-laws of a benefit insurance association form a part of the contract of insurance, and the association may require a substantial compliance with a by-law in regard to changing the beneficiary, or refuse to pay the benefit secured.

2. A beneficiary who has formally joined in a written assignment of a benefit certificate to secure an obligation of the assured is estopped from denying the sufficiency of the transfer.

3. Civ. Code, § 2911, provides that a lien is extinguished by lapse of the time within which an action can be brought in the principal obligation. *Held*, in an action on a life policy which has been assigned as collateral to secure a claim against the assured, where the issue was whether the claim was barred by limitations, that the failure to find on that issue was reversible error.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Thomas J. Conway against the Supreme Council Catholic Knights of America and others. From a judgment for all other defendants, and an order denying a new trial, the plaintiff and the defendant supreme council appeal. Reversed.

Black & Leaming and Wm. Caldwell, for appellants. D. R. Gale and John T. Campbell, for respondents.

¹ Rehearing denied February 19, 1901.

HENSHAW, J. In 1889 the defendant the Supreme Council of the Catholic Knights of America, a beneficial order incorporated under the laws of Kentucky, issued its benefit certificate to one John M. Conway, by which, upon the death of John M. Conway at a time when he was in good standing in the order, there should be paid to his nephew, Thomas J. Conway, the sum of \$2,000. The defendants Noonan, Shay, and Menihan became sureties for John M. Conway in the sum of \$1,600, and to protect and secure them an assignment and transfer was made to them of the policy. The assignment declared that the transfer was made as security, and it was executed by both the assured and his nephew, Thomas J. Conway. In June, 1893, the defendant sureties were compelled to pay \$1,600, the amount for which they were held upon their undertaking. In August, 1896, John M. Conway died in the state of California, of which he had been a resident for some years. This action was begun by the nephew, Thomas, against the benevolent order to recover the amount of the policy. The sureties were called in and made parties defendant. They asserted a right to the moneys due on account of the policy by virtue of the foregoing facts, or at least to sufficient to reimburse them for their outlay. After trial, judgment passed for the defendant sureties, and the plaintiff and the Supreme Council of the Catholic Knights appeal from this judgment and from the order denying them a new trial.

The by-laws of the Catholic Knights provide a specific mode in compliance with which the beneficiary named in the certificate may be changed. It has uniformly been held in organizations such as this that the by-laws form a part of the contract, and that the association may require a compliance with them, or refuse to pay. *McLaughlin v. McLaughlin*, 104 Cal. 177, 37 Pac. 865; *Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. 887; *Hass v. Association*, 118 Cal. 9, 49 Pac. 1056. In this instance there was no substantial compliance with the requirements of the by-laws, and it must therefore be held that, were these sureties merely seeking to enforce their demand against the order, the latter would be justified in law in its refusal to pay. But the actual situation here presented is somewhat different. All the parties in interest are before the court, and equity may be done. As between the original beneficiary and the Catholic Knights there is no dispute but that the nephew would be entitled to the money. He has a well-founded and strict legal claim to a recovery, but the equities of the defendant sureties are not to be overlooked. Having regard to them, it is clear that the plaintiff, who had formally joined in the written assignment upon the security of which the defendants Noonan and others paid out a large sum of money, would be compelled to reimburse them to the extent

of their outlay, with interest, and would be entitled to receive for his own benefit only the difference between the \$2,000 and that amount. In other words, there would be raised against him a clear estoppel in pais to deny the sufficiency and validity of the transfer. But another consideration enters into the matter. Both Conway and the Catholic Knights answered the pleadings of the defendant sureties, urging "that the claim and obligation so set up by said Noonan, Shay, and Menihan against said John M. Conway, deceased, is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of California, and the assignment of said benefit certificate made as collateral for said indebtedness has lapsed and is barred by said section, and has fallen and become of no force and effect whatever." The findings of the court are merely that the sureties were compelled to pay and did pay in June, 1893, and that John M. Conway died in August, 1896. By section 2911 of the Civil Code it is provided that a lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation. There is no doubt but that the principal obligation in this case was barred, under the provision of the section of the Code of Civil Procedure pleaded, unless it had been reduced to judgment, or in some other equally effective form had been kept alive and enforceable. The court has failed to find upon this vital question, and the judgment and order must therefore be reversed, and the cause remanded. It is so ordered.

We concur: TEMPLE, J.; McFARLAND, J.

131 Cal. 430

HABISHAW et al. v. STANDARD QUICKSILVER CO. (S. F. 1,459.)

(Supreme Court of California. Jan. 25, 1901.)

INJURY TO MINER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

An experienced miner, who had worked in a mine for a year and a half, was injured by a piece of rock falling on him, owing to insufficient lagging. He was provided with lights, by which he could see for a distance from 15 feet to 30 feet, and had worked in that part of the mine for a day and a half. There was testimony of a fellow workman that an examination of the condition of the lagging was made by deceased just before he commenced his work, on the day on which he was injured, but such witness was successfully impeached by showing that he had declared that he had knowledge which would entitle plaintiffs to win their case, but would not give it unless paid therefor. *Held*, that there was a conflict of evidence requiring the question of contributory negligence or assumption of risk to go to the jury.

Department 2. Appeal from superior court, Lake county; R. W. Crump, Judge.

Action by Bertram J. Habishaw and others against the Standard Quicksilver Company. From a judgment in favor of plaintiffs, and

from an order denying a new trial, defendant appeals. Affirmed.

C. W. Cross, for appellant. W. T. Baggett, Dan Jones, and T. J. Sheridan, for respondents.

HENSHAW, J. Plaintiffs, who are the surviving wife and children of Thomas Habishaw, deceased, sued the defendant to recover damages for the death of Thomas Habishaw, the husband and father, alleging that he was killed in defendant's mine through the negligence of the defendant and its servants and employes. The negligence pleaded consisted of the failure by the defendant to provide a flooring or lagging over Habishaw's head, so as to prevent rock or other material, which might become loosened in the operations of the mine, from falling upon him. For the want of such flooring or lagging, a rock of large size fell a distance of about 12 feet, and in its fall struck Habishaw, and caused his death. The verdict of the jury was for plaintiff, and from the judgment which followed, and from the order denying its motion for a new trial, defendant appeals.

The contention of appellant is that the deceased, an experienced miner, was either guilty of contributory negligence in working where and as he did, knowing of the absence of lagging or flooring, or that in so working, with knowledge of the conditions and situation of the mine, the risks he ran became known to him, that he assumed them, and that, therefore, the defendant is not liable. Appellant urges that Mr. Habishaw being provided with lights by which he could plainly see for a distance of from 15 to 30 feet, and being an experienced underground miner (who had worked in that particular mine about a year and a half), as such experienced miner he would know whether or not such lagging or flooring was necessary or proper for his protection from injury; and that, having worked in that particular place for a day and a half immediately preceding the injury, by the ordinary use of his senses under such circumstances he must have known, or should have known, that there was no covering or flooring or lagging at a distance of about one foot over his head (the seventh floor), or at a distance of about seven or eight feet over his head (the eighth floor), covering the set immediately over where he was working; and that, knowing such facts and the probable results, it was contributory negligence on his part to continue to work in that place without such flooring or lagging, if the same was reasonably necessary for his protection from injury. It is insisted by the appellant that the evidence upon these matters is uncontradicted, and that the question becomes, therefore, one of law. By the respondent it is asserted that upon the question of contributory negligence there is a conflict in evidence, and that in any event, conceding the facts to be undisputed, it is not a case

in which as a matter of law the court can say that the deceased was guilty of contributory negligence, but is a case in which the question is properly referable to the jury.

We think this latter position is sound. The deceased had worked in the mine for a year and a half, and in this particular portion of the mine where the accident occurred for a day and a half. It is conceded to have been the duty of the timber men at the mine to have provided for the security of the miners by timbering and flooring or lagging. That with the light which the deceased carried he could have seen for a distance of from 15 to 30 feet, and should, therefore, have known whether or not the proper lagging was in place; whether or not the place had been properly lagged before the accident, and the lagging had been removed or destroyed by blasting; whether or not Habishaw knew that it had been properly lagged in the first instance, and was guilty of contributory negligence in going to work at the time of the accident without again verifying his knowledge,—were all matters not so plainly pointing to contributory negligence as to justify the withdrawal of their consideration from the jury. The testimony of the witness Farmer, a fellow workman with the deceased at the time of his death, to the effect that an examination of the condition of the lagging was made by Habishaw just before he commenced work upon the fatal day, may well have been disbelieved by the jury, in view of the fact that Farmer was successfully impeached by a showing that he had declared that he had knowledge which would entitle plaintiffs to win their case, but would not give it unless paid therefor.

The case is one of those where the question of contributory negligence, or the question of the assumption of known risks, was proper for submission to the jury, whose verdict in this regard is final. *Sanborn v. Trading Co.*, 70 Cal. 261, 11 Pac. 710; *Magee v. Railroad Co.*, 78 Cal. 436, 21 Pac. 114; *Martin v. Railroad Co.*, 94 Cal. 331, 29 Pac. 645; *Davies v. Steamship Co.*, 89 Cal. 286, 26 Pac. 827; *Smith v. Steamship Co.*, 99 Cal. 467, 34 Pac. 84; *Davis v. Power Co.*, 107 Cal. 563, 40 Pac. 950; *Goggin v. D. M. Osborne & Co.*, 115 Cal. 437, 47 Pac. 248. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

131 Cal. 433

In re SMITH'S ESTATE. (S. F. 2,295.)

(Supreme Court of California. Jan. 25, 1901.)
DESCENT AND DISTRIBUTION—KINDRED OF
THE HALF BLOOD—RIGHTS OF
INHERITANCE.

By Civ. Code, § 1394, "kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such an-

cestor must be excluded from such inheritance." *Held*, that in the excepted case thereunder the kindred of the half blood were not absolutely excluded from inheriting, but merely postponed to those of the whole blood, and that the provision had no application between kindred in different degrees.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Judicial settlement of the estate of Francis D. Smith, deceased. Appeal from a decree of distribution. Reversed.

Rodgers, Paterson & Slack, for appellants. J. N. Young, for respondent.

SMITH, C. This is an appeal from a decree of distribution. The deceased, who died intestate, inherited the property distributed from her father. She left, surviving her, her husband, and two half-sisters on the mother's side, the appellants. The whole of the property was distributed by the decree to the respondent, and the appellants excluded. The case turns upon the construction of the provisions of the Civil Code governing successions, and especially of those of sections 1386 (2) and 1394. By the former provision it is especially provided, in the case here presented, that the husband shall take one half of the estate, and the sisters the other half; but it is contended that by the latter section the sisters are excluded, as not being of the blood of the ancestor from whom the defendant derived the estate; and it was so held by the court. But I do not think this contention can be sustained. The section in question consists of two clauses connected by the conjunction "unless," which, as said by Lord Mansfield (*Wilson v. Smith*, 3 Burrows, 1556), "means the same as 'except,' and hence implies merely an exception to the first clause." *Stand. Dict.*; *Cent. Dict.*; *Ryan v. Andrews*, 21 Mich. 234, 235; *In re Kirkendall's Estate*, 43 Wis. 173-175, 177, et seq.; *Rowley v. Stray*, 32 Mich. 75, 76. The last clause can, therefore, apply only to the class described in the first, or, in other words, to the class from which it constitutes an exception, which is kindred "in the same degree." Hence it can have no application to the relations between different classes as determined by degree of kindred or otherwise (as, e. g., between half brothers or sisters and remote collateral kin), or between grandparents and uncles or aunts,—as in *Ryan v. Andrews* and in *Re Kirkendall's Estate*, *supra*. The effect of the provision is, therefore, simply to subdivide each of the classes as determined by degree of relationship into two classes, namely, those of the full and those of the half blood, and in each class to postpone the latter to the former. Its effect, therefore, is precisely that of the Missouri statute cited in 61 Am. Dec. 664, or of the Indiana statute cited in *Robertson v. Burrell*, 40 Ind. 336. Hence the provision has no application as between kindred in different degrees, but

the relative claims of these are determined exclusively by the provisions of section 1386 of the Civil Code, where the term "brothers and sisters," and other terms denoting kindred of various degrees, are used in their proper sense, and "according to the approved usage of the language" (*Id.* § 13) must be held to include those of the half as well as of the whole blood. *Rowley v. Stray*, *supra*, and cases cited page 75. The two sections, therefore (1386, 1394), in no wise conflict, but together prescribe a system not only complete and harmonious, but also equitable, and in accordance with the general sentiments of mankind, on which in fact, and not on the obsolete feudal reasons on which the common-law doctrine of inheritance of real estate was based, our law of succession is based. This construction is supported by the cases cited above, in which substantially similar enactments were construed; and also by the case of *Robertson v. Burrell*, 40 Ind. 336, where the statute construed is different, but the principle of the decision is the same. In that case there was an old statute (cited *supra*) identical in effect with ours, which had been superseded by a new statute couched in less definite terms; and it was held that it would be unreasonable, the statute admitting of a different construction, to construe it as postponing the kindred of the half blood "until after there was a failure of all kindred of the intestate who have the blood of the ancestor from the estate descended, however remote in degree,"—a principle equally applicable here. There are two cases that seem to conflict with these views, viz. *Perkins v. Simonds*, 28 Wis. 90, and *Kelly's Heirs v. McGuire*, 15 Ark. 555. But the former is expressly limited, and in effect overruled, in *Re Kirkendall's Estate*, 43 Wis. 175. And again in *Shuman v. Shuman*, 80 Wis. 476, 50 N. W. 670, it was held that the provision construed did not apply to personal property, which was also in effect to overrule the decision; for neither in the laws of Michigan nor in our own is there room for such a distinction. It may be added that the attention of the court was not drawn to the grammatical construction of the question. Hence the court assumed that "the words of the section are general," not noticing the fact that the first clause refers only to the class specified, and that the latter could not have a more extensive application. The same remark applies to the Kansas case. The true rule is stated by Judge Cooley in *Rowley v. Stray*, *supra*, as follows: "Ours is but the expression of a general policy which has always characterized our legislation, * * * and which, * * * in most respects, has put the half blood on a footing of equality with the whole blood in the law of descents. * * * A discrimination against the half blood is the exception, and is not to be extended beyond the obvious intent. And nothing seems plainer to us than that under this statute the half blood are only excluded

when there are others in the same statutory class who are to be preferred by reason of being of the blood of the ancestor from whom the estate came to the intestate. This was the view taken by us when *Ryan v. Andrews*, 21 Mich. 229, was before us, and further reflection has confirmed us in it." It follows that the appellants are entitled to their shares of the estate as prescribed in section 1386, subd. 2. The order appealed from should be reversed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

(131 Cal. 115)

MURPHY v. FARMERS' & MERCHANTS' BANK OF LOS ANGELES. (L. A. 754.)

(Supreme Court of California. Jan. 25, 1901.)

Supplemental opinion. For former opinion, see 63 Pac. 368.

PER CURIAM. Upon further consideration we think that the part of the opinion hereinbefore rendered which refers to the right of respondent to an accounting in this present action should be omitted, and that the question as to such right is not now properly before us, and should be left for further consideration if ever presented, and that the judgment should be modified accordingly. It is therefore ordered that all of the last paragraph of said opinion following the sentence, "Our opinion is that the court erred in deciding that plaintiff owns an undivided interest in the land," be, and the same is hereby, stricken out. It is further ordered that the judgment hereinbefore entered be, and the same is hereby, modified so as to read as follows: "For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed."

(131 Cal. 426)

In re GRANT'S ESTATE. (S. F. 2,334.)¹
(Supreme Court of California. Jan. 24, 1901.)

ADMINISTRATOR'S ACCOUNTING—ALLOWANCE—EFFECT—RES JUDICATA—FAILURE TO APPEAL.

Under Code Civ. Proc. § 963, subd. 3, authorizing an appeal from an order settling an administrator's account, and section 1637, declaring that the settlement of the account by the court or on appeal is conclusive against all persons interested in the estate, it was error for the court, on the hearing of an administrator's third annual account, to set aside the order settling the second annual account, where the same had been made after the proper notice to all parties, and after consideration by the court, and no appeal taken therefrom, since the statute applies to an annual accounting as well as to a final accounting.

Department 2. Appeal from superior court, city and county of San Francisco; **J. V. Coffey**, Judge.

From an order settling his third annual account, and from an order directing him to pay a certain claim, the executor of the estate of **Mary C. Grant**, deceased, appeals. Reversed.

Sullivan & Sullivan, for appellant. **Moses G. Cobb**, for respondent.

McFARLAND, J. The transcript presents two appeals by the executor,—one from an order entered March 23, 1899, settling his third annual account, and the other from an order entered at the same time directing him to pay the claim against the estate of **Peter A. Kearney**, amounting, with interest, to \$613. The main question involved in the appeal first above mentioned is whether the court erred in disregarding a former order made November 24, 1897, settling appellant's second account, and in expressly setting aside said former order and resetting the former account, and disallowing nearly all the items of credit therein which had been allowed and settled by the former order. The facts necessary to be stated are these: Appellant filed his first account as executor in December, 1894, with a report of his administration, the account showing that he had on hand \$102.47; and after due notice of the hearing on February 6, 1895, the court on that day made an order settling and allowing the account as presented. On June 15, 1897, he filed his second account, in which, beginning with the \$102.47 balance on hand as per the first account, a great many items of receipts and expenditures are set forth. The items of expenditures consisted mainly of interest on a mortgage on the real property of the estate, taxes and insurance on the same, repairs on the buildings on the property, which was rented, necessary to keep the same in proper condition, water rates, etc. The account showed total receipts, \$1,022.47, and total expenditures, \$737.62, leaving a balance on hand of \$284.85. An order of court was duly made setting the hearing of this account for the 28th of June, 1897, at 10 o'clock a. m., at the court room of the court, and notifying all persons interested in the estate "then and there to appear and show cause, if any they have, why the said account should not be settled and allowed." Thereafter, on August 3, 1897, the court made an order in which it was declared that proof had been made to the satisfaction of the court "that notice of said settlement had been given as required by chapter 10, tit. 11, pt. 3, of the Code of Civil Procedure, and as ordered by the court," and, further, that "it appearing that said account is true and correct, and is supported by proper vouchers, it is ordered that said account be, and the same is hereby, settled and allowed as presented and filed." On December 30, 1898, the executor filed his third account,—the one from the order settling which this appeal is taken. This account begins with the \$284.85 on hand at

¹ Rehearing denied February 19, 1901.

the settlement of the previous account, and sets forth various items of expenditures, mainly of the character of the expenditures set forth in the second account; and it shows a balance in the hands of the executor of \$373.30. To the settlement of this account Dr. Peter A. Kearney, a creditor of the estate, whose claim had been allowed, filed objections, in which he attacked the second account which had been allowed as afore-said, and averred that the second account was settled without proper showing or filing of vouchers; that certain payments which appear by the second account to have been made were in fact not made; that certain expenditures set forth in said second account do not truly represent expenditures actually made by the executor; that vouchers were taken for services rendered and materials furnished for repairs on the property for more than the amounts which the executor actually paid; that, even if said expenditures were made, they had become necessary through the negligence of the executor, etc. Due notice was given according to law of the settlement of this third account, and it came on regularly to be heard on the 14th day of February, 1899. Certain evidence was taken, and the court made the order settling said third account, from which order this appeal is taken. In this order the court recites that the executor had been negligent in not selling the real property of the estate under an order which had been made authorizing him to do so, and that therefore all the disbursements which he had made for interest on the mortgage, repairs, insurance taxes, etc., since October 5, 1895, and which had been allowed in the second account which had been settled as hereinbefore stated, should be disallowed, and that "the former order of November 24, 1897, settling the said executor's annual account, is hereby set aside on that account, and the said second account is hereby now settled and allowed, showing a balance in the hands of the said executor on the 15th day of June, 1897 * * * amounting to \$711.42, which said sum of \$711.42 is to be added in said executor's third account to the sum of \$475, rents with which he charges himself as having been received, making a total credit to the estate in the hands of the said executor on the 30th day of December, 1898, when said third account was rendered, of \$1,186.42, instead of \$789.85; and the disbursements charged as made in said third account are allowed to the amount of \$37.50, and no more, leaving a balance in the hands of said executor on the 30th day of December, 1898, when said third account was rendered, of \$1,148.92." At the same time the order was made, without notice, directing the payment of the claim of said Kearney.

An order "settling an account of an executor or administrator" is appealable (subdivision 3, § 963, Code Civ. Proc.); and it is

clear that, when proper notice has been given, it is conclusive as to all items contained in it, except as against persons laboring under some legal disability. It is so expressly provided in section 1637, and has been so declared in numerous cases. In re Stott's Estate, 52 Cal. 403; Reynolds v. Brumagim, 54 Cal. 254; In re Coutts' Estate, 87 Cal. 480, 25 Pac. 685; Tobelman v. Hildebrandt, 72 Cal. 313, 14 Pac. 20; In re Coutts' Estate, 100 Cal. 400, 34 Pac. 865; In re Marshall's Estate, 118 Cal. 381, 50 Pac. 540; In re Fernandez's Estate, 119 Cal. 579, 51 Pac. 851. In this respect there is no difference between a final account—that is, one made with a view to the immediate distribution of the estate—and any other account. The Code makes no distinction between them as to their appealability, or as to the conclusiveness of orders settling them, except that section 1634 provides that if the account be for a final settlement, accompanied by a petition for distribution, the notice must state those facts, and must be for at least 10 days. In some of the cases above cited the account dealt with was a final account; but in the two cases, In re Coutts' Estate, 87 Cal., 25 Pac., and 100 Cal., 34 Pac., in Re Marshall's Estate, and in Re Fernandez's Estate, the court was dealing with accounts rendered and settled prior to the final settlement. In the Fernandez Case the court said, "The settlement of the said annual accounts, not having been appealed from, is conclusive." (It is to be noticed that courts have fallen into the habit of calling accounts filed prior to the account on final settlement "annual" accounts, although the Code does not use that word.) Therefore in the case at bar the court erred in disregarding the order settling the second account, in setting the same aside, and in reopening and determining matters against appellant which had been conclusively adjudicated in his favor in the former order. And as the order settling the third account, from which the appeal is taken, is based mainly on matters that had been formerly adjudicated, it must be reversed. In the second appeal from the order directing the payment of Kearney's claim, that order is attacked upon various grounds; but, as it is based on the order settling the third account, which was erroneous for the reason above stated, the two orders must fall together. Both the orders appealed from are reversed.

We concur: HENSHAW, J.; TEMPLE, J.

131 Cal. 421

WHEELER v. BULL. (S. F. 1,261.)

(Supreme Court of California. Jan. 23, 1901.)

NOTES—PAYMENT—DELIVERY—REQUEST OF MAKER—EVIDENCE.

1. A note in form the individual note of the president of a corporation was in fact the obligation of the corporation, and executed for its benefit. A firm thereafter agreed with the corporation to pay the note at maturity, and,

if necessary, to advance the amount "for the purpose of paying the same." On the maturity of the note a member of the firm told the corporation's president that, if he would sign an agreement relating to the reimbursement of the firm, they would "pay off the note as agreed," and he signed it. W. indorsed the firm's note to D. to borrow the money to take up the corporation's note. W. and the above member of the firm went to the bank holding the note for collection, and the former paid the amount to the bank, whereupon the note was stamped "Paid," without objection, and retained by W. The president of the corporation received a note from the member of the firm stating, "The note is paid." W. afterwards sued on the note. *Held*, that the trial court's finding that the note had never been paid was contrary to the evidence.

2. The fact that a note paid by a third party was not turned over to the maker did not affect the extinguishment of the obligation thereon, since such party had a right to retain it as evidence of a claim for reimbursement.

3. A firm agreed to take up a corporation's note. In reply to questions from W. and a member of the firm, the president of the corporation showed the sources from which returns were expected in a few days, and said the corporation would reimburse whatever would be advanced for taking up the note when such returns came in. W. borrowed money from D. with the firm's note indorsed by him as security, and paid the corporation's note with it. *Held*, that the evidence did not sustain the finding that W. took up the corporation's note at the special instance of the president, so as to authorize a recovery against him.

In bank. Appeal from superior court, city and county of San Francisco; James M. Trout, Judge.

Action by Judson Wheeler against Franklin P. Bull. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

A. W. Crandall, for appellant. J. C. Bates, for respondent.

HARRISON, J. The appellant executed his promissory note, June 21, 1889, for the sum of \$3,750, payable 90 days after date, to the order of Frank C. De Long. De Long placed the note with the First National Bank of San Francisco for collection, and on the day of its maturity the plaintiff paid to the bank the sum of \$3,825, the amount then due thereon, with accrued interest, and thereupon the bank marked the note "Paid," and delivered it to him. The present action is brought to recover from the defendant the amount of the note, with interest thereon according to its terms, the plaintiff alleging that he had made the payment and taken the note out of the bank at the request of the defendant, and upon his representation that it was an obligation of the corporation Home & Land Company, of which he was president, and had guaranteed its repayment. The defendant, in his answer, denied these allegations, and alleged that the note had been paid and discharged. The court found that the plaintiff took up the note at its maturity at the special instance and request of the defendant, paying therefor to the bank, who was its holder, its face value, with ac-

crued interest, and at that time received the note from the bank, and had ever since been the holder and owner thereof; that the note had never been paid, and that the whole amount thereof was due from the defendant to the plaintiff. Judgment was thereupon rendered in favor of the plaintiff for the amount of the note, and the defendant's motion for a new trial was afterwards denied. The present appeal is from the order denying a new trial.

The question upon which the rights of the parties depend is whether the transaction between the plaintiff and the bank constituted a purchase and transfer of the note, whereby its vitality was preserved, or whether it was a payment, by which the obligation of the note was extinguished. No importance is to be attached to the fact that the transaction is in some parts of the record called "taking up" the note, rather than a payment. The effect of the transaction is to be determined by the circumstances under which it took place, and not by the term which the parties may have given it. The maker of a note is frequently said to take it up when he pays it. It sufficiently appears from the evidence that, although the note is in form the individual note of the appellant, it was in fact an obligation of the corporation Home & Farm Company, of which he was the president, and that it was executed for its benefit and account. After its execution, and prior to its maturity, this corporation had entered into an agreement with the firm of D. J. Wheeler & Co., by which that firm was employed to make sales of its lands, and in which it agreed to pay this note at its maturity if a sufficient amount therefor should at that time have been received from the sales of the land; and the firm of D. J. Wheeler & Co. agreed therein that, if the funds received by the corporation were not sufficient therefor, they would advance the amount to the corporation "for the purpose of paying the same," and the corporation agreed that the amount so advanced should be returned as soon as the money received from the sales would permit. When the note matured, the sales of the land had not yielded enough to enable the corporation to pay its amount, and on that day, at the request of Mr. Koscialowski, one of the members of the firm of D. J. Wheeler & Co., the plaintiff accompanied him to the office of the corporation in reference to taking up the note. Upon arriving there a conversation thereon was had with the appellant, in which, in reply to questions from them, he showed the sources from which returns from sales were expected within a few days, and told them that upon their receipt the corporation would reimburse whatever should be advanced for taking up the note according to its agreement with the firm. The plaintiff at first refused to have anything to do with the transaction, and left the office. Very soon after, Koscialowski returned, and presented an agreement

in the form of a letter addressed to D. J. Wheeler & Co., and said to Mr. Bull that, if he would sign that agreement, "they would get the money, and pay off this note, as they had agreed." The agreement, in addition to other matters, stated: "As to the amount of \$3,825 advanced by you, it will be returned to you out of the amount due from De Voto on the 1st of October, 1889." Bull thereupon signed the agreement in the name of the corporation, and as its president. Thereafter the plaintiff and Koscialowski went together to the bank, where the note had been placed for collection, for the purpose of taking it up, and the plaintiff paid the amount to the bank, upon which the clerk stamped the word "Paid" upon the face of the note, and it was taken away by the plaintiff. The money which the plaintiff paid to the bank had been obtained by him that afternoon from Maurice Dore upon the promissory note of D. J. Wheeler & Co., indorsed by himself. Koscialowski thereupon sent a note to Bull stating, "The note is paid." Upon these facts it must be held that the finding of the court that the note has never been paid by any one is not only not sustained by the evidence, but is contrary thereto. The firm of D. J. Wheeler & Co. had agreed that at the maturity of the note they would advance the money "for the purpose of paying the same," and they sought the aid of the plaintiff in order that they might carry out this agreement. They gave their note to Maurice Dore that they might obtain the money for this purpose, and for the purpose of securing Dore thereon the plaintiff indorsed their note. Koscialowski went with the plaintiff to the bank for the purpose of taking up the note, as his firm had agreed. The bank simply held the note for collection, and had no authority to deal with it, except to receive its amount in payment. Nothing was said at the bank by either party indicating that the transaction was other than a payment, and upon the receipt of the money the bank stamped the note "Paid" without any objection, and handed it to the plaintiff. This was a full performance of the obligation on behalf of D. J. Wheeler & Co., whose duty it was to pay the note, and was accepted by the bank, and the obligation was, therefore, extinguished. Civ. Code, § 1475; *Moran v. Abbey*, 63 Cal. 56; *Lancey v. Clark*, 64 N. Y. 209; *Burr v. Smith*, 21 Barb. 262. This extinguishment of the obligation of the note is not affected by the fact that the note was not surrendered to the maker. It was proper for the plaintiff to retain it until the corporation should comply with its agreement for reimbursement, as evidence in support of a claim therefor.

Neither does the evidence sustain the finding that the plaintiff took up the note at the special instance and request of Bull. It does not appear that Bull ever made any request of the plaintiff to take up the note, or to furnish the money therefor, or made any statement to him other than in accordance

with the agreement that had been made with the firm of D. J. Wheeler & Co. His statement that the corporation would soon be in funds with which to reimburse the advance that might be made for taking up the note was only the expression of an opinion, and the facts upon which his opinion was based were exhibited at the time, and it was given in reply to interrogatories put to him. The plaintiff had full knowledge of the contract between the firm and the corporation, and acted at the instance of the firm for the purpose of enabling it to carry out the terms of that agreement. The statements of Bull were with reference to a reimbursement of the advance that might be made on behalf of the firm under that agreement, but, whether the money should be advanced directly by the firm, or by another at its instance, did not change the obligation of the corporation to reimburse the firm in accordance with the terms of its agreement. The order denying a new trial should be reversed.

We concur: TEMPLE, J.; HENSHAW, J.; GAROUTTE, J.; VAN DYKE, J.

131 Cal. 447

FENNELL v. DRINKHOUSE (ELLIOTT, Intervener. S. F. 2,441).

(Supreme Court of California. Jan. 29, 1901.)

EXECUTORS AND ADMINISTRATORS—PROBATE COURT—JURISDICTION—HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTIONS—EVIDENCE—LIMITATION OF ACTIONS.

1. Code Civ. Proc. § 1723, provides that if a woman dies owning community property, which passes on her death to her surviving husband, any person interested in the title thereto may file in the probate side of the superior court a verified petition, which court shall determine the issue and make a decree, and a verified copy of which may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded. *Held*, that this section relates to real estate only, and does not give to the probate department of the superior court, in which the settlement of a wife's estate is pending, exclusive jurisdiction to determine a surviving husband's claim to money deposited by her in a bank during their marriage as community property.

2. Where a wife died leaving money in a bank, which was deposited after her marriage, and the administrator of her estate, who has taken possession of the money, is sued by her surviving husband to recover the money as community property, the presumption is that the money was community property, and the burden is on defendant to show the contrary; hence, there being no question as to the identity of the fund, plaintiff is not required to identify any specific part of it as community funds.

3. Where a wife died leaving money in a bank, which was deposited after her marriage, part of which was the proceeds of the sale of her separate real estate, the presumption that the balance was community property is not rebutted by evidence that the husband did little work and did not earn it, since the deposit was nevertheless community property, though it consisted wholly of the earnings of the wife while living with her husband.

4. The statute of limitations does not commence to run against the claim of a husband

that money in the possession of his wife was community property until the death of the wife, as the possession of community property by the wife is the possession of the husband.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. R. Webb, Judge.

Action by William Fennell against John A. Drinkhouse, special administrator of the estate of Winifred Fennell, deceased, and Maria Teresa Elliott, special administratrix appointed to succeed defendant, intervener. From a judgment for plaintiff, and from an order denying a new trial, intervener appeals. Affirmed.

George F. Shelton, for appellant. Emil Pohli and A. Ruef, for respondent.

HAYNES, C. Winifred Fennell, deceased, was the wife of the plaintiff, William Fennell. She died in the city and county of San Francisco, November 28, 1899, leaving estate therein, and the defendant Drinkhouse was duly appointed special administrator of her estate. On February 15, 1900, as such special administrator, he took possession of the sum of \$4,223.57 then on deposit with the Hibernia Savings & Loan Society in the name of Winifred Chapple (by which name the deceased was sometimes known), and this action was brought by the plaintiff against said Drinkhouse to recover said money, claiming that it was acquired by the plaintiff and said Winifred after their marriage, and that it was community property, to which he was entitled. After the appointment of defendant Drinkhouse as special administrator, a will executed by said deceased in her lifetime was found and probated, and Maria Teresa Elliott was duly appointed and qualified as executrix; but, said William Fennell having taken an appeal from the order probating said will, her letters were revoked, and she was appointed special administratrix of said estate, succeeding defendant Drinkhouse, and as such she filed a complaint in intervention in this action, claiming that the whole of said moneys were the separate property of said Winifred in her lifetime, and belonged to her estate, and that she, as special administratrix, was entitled to the possession of the whole thereof. The plaintiff answered said complaint in intervention, the cause was tried by the court, and findings were for the plaintiff, to the effect that he was entitled to \$1,815.77 (part of said sum of \$4,223.57) and costs, and that the intervener was entitled to the remainder of the fund, less disbursements made by defendant Drinkhouse as special administrator, and judgment was entered accordingly. This appeal is by the intervener from the judgment, and from an order denying her motion for a new trial.

Appellant formulates three propositions upon which a reversal is claimed, and states that the various assignments of error range themselves under one or the other of them. These grounds will be noticed in their order:

1. "That plaintiff has mistaken his forum and his remedy." It is contended that the department of the superior court in which the settlement of the estate of Winifred Fennell was pending alone had jurisdiction of the subject-matter of this litigation, under section 1723 of the Code of Civil Procedure, and that the remedy therein provided is exclusive. Said section has no application. It appears to relate to real estate alone. There would seem to be no reason for recording in the recorder's office a certified copy of a decree determining whether the money here in controversy belonged to the plaintiff or to the estate. Nor, under the facts of this case, is it a proper subject of litigation in the probate department of the superior court. If the money in question was, in fact, community property in the possession of Mrs. Fennell at the time of her death, it is no part of her estate. It is still in the hands of the special administrator; but that fact does not create a debt against the estate in favor of the plaintiff, for which he must present his claim and take chances as to the solvency of the estate. If the community property in question were horses or cattle, there can be no doubt that plaintiff could recover possession of them in an action of claim and delivery, and it is equally clear that he could not in such cases have that remedy in the probate proceedings concerning Mrs. Fennell's estate.

2. Appellant further contends that "plaintiff cannot recover in this action because he failed to identify the specific fund for which he sues." Counsel, I think, shows quite conclusively that "this cannot be treated as a suit on a claim against the deceased," not only because no claim against the estate was presented, but because it is not a suit against the estate, but is an action against John A. Drinkhouse "for money had and received, to and for plaintiff's use and benefit, in the said sum of \$4,223.57." There is no question about the identity of the fund received and held by defendant Drinkhouse. The only questions are: Is it community property, or, if part only is community property, how much? Appellant contends that the evidence is insufficient to justify the finding that any part of the money deposited in the bank by the wife was community property. All the money found in the bank and received by the special administrator was deposited after the marriage of plaintiff and Mrs. Fennell, and the presumption, therefore, was, in the absence of other evidence, that all of it was community property, and the burden of proof was upon appellant. This presumption can be overcome "only by evidence of a clear, certain, and convincing character establishing the contrary, and the burden of this showing rested with the parties claiming the separate character of the property. In the absence of such proof, the presumption as to the community character was absolute and conclusive." In *re Boody's Estate*, 113 Cal.

682, 686, 45 Pac. 858, and cases there cited. There was evidence tending to show that a portion of the money deposited by Mrs. Fennell in the Hibernia Savings & Loan Society was the proceeds of the sale of some real estate which was her separate property, and it also appeared that certain rents thereof entered into the account; but beyond that the evidence was confused and conflicting, and wholly insufficient to overcome the presumption that it was community property. Evidence that the husband did little work, and therefore did not earn the remainder of the money after deducting the proceeds of the real estate, was inconclusive, if not immaterial, since, if the deposit consisted wholly of the earnings of the wife while living with her husband, it was nevertheless community property.

3. It is further insisted that "the right of plaintiff to claim the money as community property is barred by the statute of limitations." The possession of community property by the wife is the possession of the husband. The right of the survivor does not depend upon the custody or possession of the community property prior to the death of the deceased spouse. No other questions are discussed. I advise that the judgment and order appealed from be affirmed.

We concur: GRAY, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(131 Cal. 469)

In re CAMP'S ESTATE. (Sac. 701.)¹

CAMP v. THOMAS.

(Supreme Court of California. Jan. 30, 1901.)
ADOPTION OF CHILD—COLLATERAL ATTACK.

Under Civ. Code, § 227, designating the judge of the superior court as a tribunal to determine application for adoption of a minor child, the determination by such judge that the child sought to be adopted had been abandoned by its parents was a jurisdictional fact to be determined by the judge on the evidence, and the recital in his order of adoption that it had been so abandoned cannot be collaterally attacked in an application for administration on the death of the party seeking to adopt him.

Department 1. Appeal from superior court, Kings county; J. W. Mahon, Judge.

In the matter of the estate of George W. Camp. From an order appointing W. M. Thomas, public administrator, administrator of the estate, W. H. Camp appeals. Affirmed.

Dixon L. Phillips, for appellant. Rowen Irwin and Hudson & Pryor, for respondent.

HARRISON, J. Applications for letters of administration upon the estate of the above-named decedent were presented to the superior court of Kings county by the public administrator of that county, the respondent herein, and also by the appellant, a brother

of the deceased. Upon the hearing thereon the court made an order appointing the respondent as such administrator, and directing letters of administration to issue to him. The brother has appealed.

The deceased died intestate, leaving several brothers and sisters and a surviving widow and two adopted children, who at the hearing of the petition were aged, respectively, about 11 and 8 years. The widow died shortly before the petitions were presented. At the hearing the proceedings taken in the lifetime of the decedent for the adoption of the children, including the order of the judge sanctioning their adoption, and declaring that they should thereafter be regarded and treated as the children of the decedent and his wife, were read in evidence. In reply thereto the appellant offered to introduce evidence showing that at the time the proceedings were had the children had not in fact been abandoned by their parents. The court excluded this evidence, and the appellant urges that in this ruling the court erred. While the proceedings for the adoption of a minor child do not constitute judicial proceedings, and the order of the judge therein is not the judgment of a court, yet under section 227, Civ. Code, the judge of the superior court has been designated as a tribunal for that purpose, and in the performance of his duties thereunder exercises judicial functions. It is a well-settled rule that when the jurisdiction of an inferior or special tribunal, or its power to act in any particular case, depends upon the existence of a fact which is to be established before it by extrinsic evidence, the determination of that fact by the tribunal cannot be questioned in a collateral attack upon its order. Wells, Jur. § 61; Brittain v. Kinnaird, 1 Brod. & B. 432; Evansville, I. & C. S. L. R. Co. v. City of Evansville, 15 Ind. 421; Barnard v. Barnard, 119 Ill. 92, 8 N. E. 320; In re Grove Street, 61 Cal. 438; Levey Dist. v. Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085. Whether the children had been abandoned by their parents was a jurisdictional fact to be determined by the judge, upon the evidence presented to him, before he was authorized to entertain the petition for their adoption; and the recital in his order that it appeared to his satisfaction that they had been abandoned by their parents was a determination of this fact which cannot be questioned in a collateral attack upon the order. Otherwise, the existence of this fact and the status of the children would be always uncertain, since the evidence might not be the same at all investigations, and might be regarded with different effect by different tribunals, and the adoption be held by one court to have been valid, while another court would hold it to have been of no avail. Whether the parents of the child in a direct proceeding against the adopting person for the recovery of the persons of the children would be bound by this determination of the

¹ Rehearing denied March 1, 1901.

judge is not involved herein. It is very clear that, if an action had been brought against the decedent in his lifetime for necessities supplied for the support of the children, he would not have been permitted to show in his defense that at the time of the proceedings for their adoption the parents had not in fact abandoned them. He would have been estopped by his recital of their abandonment in his petition. Inasmuch as the rights of the appellant herein are derived solely through and under the decedent, he can have no greater right to question the validity of the order than would the decedent. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE,
J.

131 Cal. 406

DOON et al. v. TESH et al. (Sac. 853.)

(Supreme Court of California. Jan. 22, 1901.)

PUBLIC LANDS—MINERALS—ADVERSE CLAIMS
—APPEAL—DILIGENCE—JUDGMENTS
—ESTOPPEL.

Rev. St. U. S. § 2326, declares that, where an adverse claim is filed during the period of publication of a claim to mineral lands within the public domain, all proceedings shall be stayed until the controversy shall have been settled by some court of competent jurisdiction, and that the adverse claimant shall within a specified time commence proceedings in a court of competent jurisdiction to determine the right to possession. *Held*, that where plaintiffs in an action under the statute served a statement on motion for a new trial August 13, 1887, and then took no further steps, and on April 13, 1898, a motion by defendants to dismiss the proceedings for want of prosecution was denied, and thereafter, on April 20, 1900, a similar motion was made, on appeal from the denial of such motion the judgment of the trial court would not be sustained on the ground that the denial of defendants' first motion was conclusive of their right to a dismissal; it not appearing on what evidence the first motion to dismiss was denied, and it being probable that defendants could not obtain a patent until the motion for a new trial had been disposed of.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Lee Doon and others against Daniel Tesh and others. From an order denying defendants' motion to dismiss for negligence to prosecute with diligence, they appeal. Reversed.

R. S. Taylor, for appellants. H. B. Gillis, for respondents.

CHIPMAN, C. Motion by defendants to dismiss for neglect to prosecute with diligence. In 1882 plaintiffs brought the action to determine their right to the possession of certain mining ground, as against defendants' right to possession. The action was brought under section 2326, Rev. St. U. S. Defendants had judgment on demurrer in January, 1882. An appeal was taken to this court, and the judgment was reversed as to one of the plaintiffs, with instructions to overrule the demurrer to his complaint, with leave to defendants to answer thereto, and as to the other plaintiffs the judgment on the demurrer was affirmed. Subsequently, in 1886, the cause was tried by the court with-

out a jury, findings made in favor of defendants, and it was adjudged that the plaintiff, as to whom the action remained, take nothing, and judgment was entered for defendants November 29, 1886. Plaintiffs served a statement on motion for a new trial August 13, 1887, proposed amendments to which were served by defendants September 2, 1887. No further steps were taken on the motion for new trial. The judge who rendered judgment and made the findings went out of office, and on July 3, 1897, a motion was made before his successor by defendants' counsel "to dismiss proceedings now pending in said action." The notice of the motion stated that "said motion will be made upon the records, files, and papers in said cause, and upon the ground of plaintiffs' neglect to prosecute said action with diligence." The motion was to dismiss all proceedings now pending in the action, and the court denied the motion April 13, 1898, and no appeal was taken from the order. Defendants on April 20, 1900, gave notice of a motion "to dismiss said cause and all proceedings now pending therein," stating that "said motion will be made upon the records, files, and papers in said cause, and upon the ground that plaintiffs have neglected and refused to prosecute said action in refusing and neglecting to settle the statement on motion for a new trial, or to take any step for its settlement for the period of ten years." A motion was made in accordance with the notice, and on May 8, 1900, was denied, and the appeal is from this order.

Respondents make no objection to the form of the record, and treat all the matters set out in the transcript as properly here, and we shall also do so.

Respondents concede that the order now here was appealable. *McDonald v. McConkey*, 57 Cal. 325. But they contend that, defendants having failed to appeal from the order denying the first motion to dismiss, made April 13, 1898, that order became res judicata, and terminated defendants' right to move for a dismissal. We do not think defendants were precluded from again making a motion to dismiss, under the facts shown in this case. Here plaintiffs gave notice of intention to move for a new trial, and served a proposed statement, and defendants served their proposed amendments, and there the plaintiffs halted. Defendants had applied at the United States land office for a patent, and plaintiffs interposed adverse claims and filed a protest in the land office, claiming a portion of the land claimed by defendants. Under section 2326, Rev. St. U. S., this protest stayed proceedings "until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." The statute makes it the duty of the adverse claimant "within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction, to deter-

mine the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim." The statute also provides that after final judgment the party entitled to possession of the claim may file a certified copy of the judgment roll with the register of the land office, and, upon complying with certain other provisions, patent may then issue. It is probably true that the filing of the judgment roll would not entitle the claimant to a patent under the United States statute, in the face of evidence that an appeal had been taken or was being taken, or that proceedings for a new trial were pending; and hence defendants could not avail themselves of their judgment until the motion to dismiss was disposed of. Where a motion for new trial is to be made on a statement of the case, the moving party must serve the proposed statement on the adverse party within a certain time, and, if the statement is not agreed to by the adverse party, the latter must within a certain time serve his proposed amendments. If the amendments are adopted, the statement shall be amended accordingly, and then presented to the judge for settlement. If not adopted, the moving party must present the proposed statement and amendments to the judge (Code Civ. Proc. § 659, subd. 3); and thereupon such proceedings for the settlement of the statement shall be taken by the parties as are required for the settlement of bills of exception by section 650. This latter section requires the moving party to present the proposed bill and the amendments to the judge who heard the case, and it becomes the duty of the judge to fix the time to settle the bill and notify the parties, and he must then settle the bill. If he should neglect or refuse to do so, the party desiring the bill settled may then come to this court and have the bill settled. Code Civ. Proc. § 652. Section 660 requires an application for a new trial to be heard, after the statement is filed, "at the earliest practicable period after notice of the motion; * * * and may be brought to a hearing upon motion of either party" after the statement is filed. In the present case the proposed statement was served, and so, also, were proposed amendments, but there the proceedings ended. Whether the proposed amendments were adopted or not, it was the duty of the moving party to present the statement and amendments to the judge. Defendants did all they were required to do when they presented their proposed amendments. They had no opportunity to call up the motion for a hearing, as the statement was not filed with the judge. When the first motion to dismiss the proceedings was heard and denied it was upon evidence of which we are not advised, and it must be presumed it was sufficient. Plaintiffs may have made a counter showing satisfactorily explaining the long delay in the matter of the motion for a new trial. At the

hearing of the last motion to dismiss, two years of still further delay appeared, and nothing was shown to have been done by plaintiffs in the meantime or at any time to bring forward their motion for a new trial. There was no counter showing by plaintiffs in any way explaining or excusing their neglect for 10 or 12 years to proceed with their motion for a new trial. Their reliance seems to have been wholly upon the order denying the first motion to dismiss as a bar to the second motion. We think the evidence adduced by defendants in support of their motion showed gross and inexcusable neglect on the part of plaintiffs, and, unless satisfactorily explained, was such as constituted a denial of defendants' motion an abuse of discretion, unless the first order barred the relief. Before we could say that the last order was barred by the first order on the doctrine of *res judicata*, it would have to appear that the last order was made upon the same facts which existed when the first motion was made, and the burden was on plaintiffs to make this showing. The power of the court to dismiss the proceedings looking to a new trial seems to be conceded, and we do not, therefore, pass upon that question. The court clearly could not dismiss the action on this motion, as it had gone to final judgment. We think, however, that the court should have granted the motion to dismiss the proceedings taken under the motion for a new trial. It is advised that the order be reversed, with directions to dismiss the proceedings relating to the new trial.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed, with directions to dismiss the proceedings relating to the new trial.

131 Cal. 461

LOS ANGELES COUNTY v. EIKENBERRY.
(L. A. 960.)

(Supreme Court of California. Jan. 30, 1901.)

COUNTY BOARD—POWERS—STATUTORY PROVISION—INTOXICATING LIQUORS—LICENSE TAX—ORDINANCE—VALIDITY.

1. County Government Act 1893, § 25, subd. 27, authorizing boards of supervisors to license, for the purpose of regulation and revenue, all kinds of business transacted in the county, is not unconstitutional, in that it authorizes supervisors to license all kinds of business for purposes of regulation and revenue in cities where like power is vested in corporate authorities.

2. The payment of a license tax imposed by a city ordinance for carrying on the business of retail liquor dealer does not exempt the licensee from paying a tax imposed by a county ordinance for carrying on the same business.

3. An ordinance requiring payment of a license tax for engaging in the occupation of retail liquor dealer is not void, as imposing a tax on sales, and not on the business.

4. An ordinance is not void because its subdivisions are not all numbered in consecutive order.

5. An ordinance requiring payment of a license tax of \$13 per month for carrying on the business of a retail liquor dealer is not unreasonable.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the county of Los Angeles, by John A. Gish, tax collector, against S. O. Eikenberry. From a judgment for plaintiff, defendant appeals. Affirmed.

Moye G. Norton, for appellant. Tirey L. Ford, Atty. Gen., for respondent.

COOPER, C. This action was brought in a justice court to recover the sum of \$26 license tax for carrying on the retail liquor business in the city of Los Angeles during the months of June and July, 1899. Defendant in his answer raised the question of the legality of the ordinance under which it was sought to collect the license, and the case was transferred by the justice to the superior court for trial. Findings were filed and judgment entered for plaintiff. Defendant has appealed from the judgment on the judgment roll. Many minor questions are raised and discussed by appellant's counsel, all of which we have examined, but we will discuss only those deemed material to the case as appears from the record here. On the 11th day of August, 1897, the board of supervisors of Los Angeles county duly passed an ordinance entitled "An ordinance imposing licenses, and fixing the rates thereof in the county of Los Angeles, state of California." The portions of said ordinance so far as material here are as follows:

"Section 1. It shall be unlawful for any person or persons, whether as principal, clerk, servant, agent or employé, to engage in, conduct or carry on any business, exhibition, or occupation in this ordinance specified, without first having procured a license so to do, as in this ordinance provided; and every person who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor."

"Sec. 9. A license must be procured immediately before the continuance hereunder or the commencement of any business or occupation liable to license tax, as herein provided."

* * * No license issued under this ordinance shall authorize any person to carry on any business within the limits of any incorporated city or town having power to impose or levy any city or town license tax, unless in addition thereto the license required by such city or town be also first procured."

"Sec. 13. It shall be the duty of the tax collector, in the name of Los Angeles county as plaintiff, to bring suit for the recovery of any license tax herein imposed, against any person required by this ordinance to first procure a license before engaging in any business, as herein defined, who carries on or attempts to carry on such business without such license."

"Sec. 15. For the purposes of this ordinance a retail liquor establishment is defined to be: (a) Any place where spirituous, vinous, malt or mixed liquors are sold, served, or given away by the drink or glass. (b) Any place where spirituous, vinous, malt or mixed liquors are sold, served or given away in any quantity to be drunk upon the premises.

* * * Any person who, either as owner, agent or otherwise, conducts or carries on, or assists in conducting or carrying on, a retail liquor establishment, as such establishment is herein defined, is for the purposes of this ordinance declared to be carrying on the occupation of a retail liquor dealer."

"Sec. 26. The rate of license for engaging in the occupation of a retail liquor dealer, as defined by section 15 of this ordinance, is hereby fixed at thirteen dollars per month, and such license may be transferred upon the consent of the board of supervisors to said transfer first being obtained."

It appears from the findings that at the time the above ordinance was passed, and while defendant was carrying on the business for which the license tax is sought to be collected, there was in force in the city of Los Angeles (being the place where defendant was carrying on business) a valid ordinance of the city, passed by the city authorities, whereby a license tax of \$50 per month was imposed upon defendant, and that such license tax under said city ordinance was paid by defendant for the identical months for which it is sought to charge him in this action. The main contention of defendant is that subdivision 27 of section 25 of the county government act of 1893 is unconstitutional, because it authorizes boards of supervisors to license all kinds of business for the purpose of regulation and revenue in incorporated cities, where like power is vested in the corporate authorities of the city. The portion of the section claimed to be unconstitutional reads: "To license for purposes of regulation and revenue all and every kind of business not prohibited by law and transacted and carried on in such county; * * * to fix the rates of license tax upon the same and to provide for the collection of the same by suit or otherwise." St. 1893, p. 358. We do not think the above provision is in conflict with the constitution. It has been held that the payment of a license tax under a valid ordinance of a city does not exempt the party so paying from paying a license tax to the county under an ordinance of the board of supervisors. In re Lawrence, 69 Cal. 610, 11 Pac. 217; Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775. If there be a conflict between the ordinance of the city of Los Angeles and the county of Los Angeles in the regulations prescribed for carrying on of the business in the exercise of a police power, the ordinance of the city has superior force within the corporate limits of the city. Ex parte Roach, 104 Cal. 272, 37 Pac. 1044; Ex parte Mansfield, 106 Cal. 403, 39 Pac. 775. In Ex parte Roach,

supra, this court said: "The constitution recognizes the division of the state into counties, and has authorized the legislature to establish for them a uniform system of government; but it has also authorized the creation of other municipalities within the boundaries of the several counties, and has given to such municipalities the same power of legislation upon these enumerated subjects as is conferred upon the counties themselves; and the power thus conferred by the constitution is to be construed, if possible, in such a way as to give full effect to its exercise by each of the designated bodies. It is no more necessary that there be a conflict between the power thus to be exercised by the county and the city than if the authority of each had been derived through an act of the legislature." In the case from which we have just quoted, the defendant was arrested for a crime, in violating the county ordinance of Kings county prohibiting the sale of intoxicating liquors between the hours of 10 o'clock p. m. and 5 o'clock a. m. The defendant had paid a city license in the city of Hanford, which contained no such restriction as to time. It was held that there was a conflict between the two ordinances as to the police regulation, and that the county ordinance must give way to the ordinance of the city. In the case at bar the attempt is to collect revenue by a civil action, and there is no conflict as to revenue. Defendant is, under the authorities cited, liable both to the city and to the county for the revenue imposed upon him by the respective authorities of such city and county. It is said by defendant's counsel that the power is given to license "for regulation and revenue," and not for one alone. Conceding this to be true, the power may be exercised, but the regulation or police power must not conflict with a similar regulation of an incorporated town or city. But, aside from the county government act, ample and full power is given to the board of supervisors by section 11, art. 11, of the constitution: "Any county, city or town, may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." It will be observed that the only limitation upon the exercise of the powers so given is that the regulations to be made shall not be in conflict with the general laws. The ordinance in question is not in conflict with any general law. The ordinance passed by the city of Los Angeles is not a general law, within the meaning of this section of the constitution. Ex parte Campbell, 74 Cal. 25, 15 Pac. 318. The power given by the said section of the constitution is ample, regardless of the county government act. Ex parte Roach, 104 Cal. 274, 37 Pac. 1044. It is said by this court in Ex parte Haskell, 112 Cal. 416, 44 Pac. 725, 32 L. R. A. 529, in speaking of the duty of courts in upholding ordinances: "Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law."

making power, and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs, within the law, of course; and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof." In the case at bar, we do not think the ordinance transcends the power of the board of supervisors under the constitution, nor does it conflict with any regulation of any ordinance of the city of Los Angeles.

It is next urged that the ordinance is void for the reason that it attempts to license the sales, and not the business; and we are referred to the case of *Merced Co. v. Helm*, 102 Cal. 159, 36 Pac. 399. In that case the ordinance imposed a license tax for the sale of enumerated articles, and the right to collect the tax by suit was limited to instances in which the persons commence, carry on, engage in, or conduct some "business" for which a license was required. In this case no such objection appears. It is evident, from reading the sections of the ordinance quoted, that the license is for engaging in the business of retailing liquors. By section 1 it is made unlawful to conduct or carry on certain enumerated businesses without first having procured a license. By section 26 the rate per month for engaging "in the occupation of a retail liquor dealer," as defined in section 15, is fixed. By section 15 any person who carries on or conducts a retail liquor establishment, as defined in other parts of the section, is declared to be carrying on the occupation of a retail liquor dealer. It has been said that the rule in *Merced Co. v. Helm* went to the extreme verge of strictness, and the court has been disposed to limit rather than extend its application. *Ex parte Seube*, 115 Cal. 630, 47 Pac. 596; *Ex parte Mansfield*, 106 Cal. 404, 39 Pac. 775. We think the ordinance valid under the authority of the above cases.

It is claimed that the ordinance was never published as required by law. The argument in support of this contention is that section 32 is missing, and that it was therefore published leaving out section 32. Evidently the number of section 32 was by some mistake omitted from the copy of the ordinance; for section 31 embraces two subjects,—pawnbrokers and persons or corporations engaged in the business of loaning money,—and each subject is embraced in separate and distinct sentences. But it is sufficient to say that there is nothing in the record to show that the original ordinance ever had any section numbered 32. It is stipulated that the ordinance as annexed to the defendant's answer and printed in the transcript "was published, as per the copy attached to defendant's answer and cross complaint, on the 14th, 16th, 17th, 18th, 19th,

20th, and 21st days of August, 1897; that said ordinance went into effect August 27, 1897." We know of no rule that would make an ordinance void because the subdivisions of it were not all numbered in consecutive order. The ordinance did not go into effect until 15 days after its passage. The court found that it was passed August 11, 1897. It went into effect August 27, 1897. The ordinance is not unreasonable. If other business carried on in the city of Los Angeles is taxed too low, or even if no license tax at all is imposed upon such business, it might be well for the defendant to bring the matter to the attention of the city and county authorities; but it is not an argument here sufficient for us to hold that \$13 per month is unreasonable for carrying on the business of selling liquors at retail. It has been held here that \$50 per month for such license was not unreasonable. *Ex parte Hurl*, 49 Cal. 557; *In re Guerrero*, 69 Cal. 88, 10 Pac. 261.

The defendant points out and attacks several other different and independent sections of the ordinance which he claims are unconstitutional. It will be sufficient for this court to determine the constitutionality of these sections when some proceeding is here in which they are involved. Defendant is here sought to be charged with a license tax for carrying on the business of retailing spirituous liquors. He has carried on the business, and has not paid the license. Under the views we have expressed, the section of the law under which the license tax is imposed is valid. This is sufficient as to defendant. The judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

131 Cal. 410

KIERNAN v. SWAN, County Auditor.
(Sac. 784.)

(Supreme Court of California. Jan. 22, 1901.)

CONSTABLES — FEES — COUNTY GOVERNMENT
ACT—CHANGING COMPENSATION.

County Government Act 1893 (St. 1893, p. 481, § 196, subd. 14) provides that constables in counties of the thirty-fourth class shall have such fees as are now or may hereafter be allowed by law. St. 1895, p. 271, fixes a fee for such constables for making arrests, for mileage, etc., but provides that in criminal cases he shall not receive more than \$100 in one month, nor more than \$1,000 in any one year. *Held*, that though the act of 1895 was unconstitutional and invalid, so far as it contravened the act of 1893, in changing the compensation by limiting the amount to a fixed sum for a stated time, it was nevertheless valid so far as it regulated the fees for specific services; hence such constable was entitled only to the fee and mileage for arrests as therein provided.

Commissioners' decision. Department 1. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by T. F. Kiernan against C. D. Swan, county auditor, for fees. Judgment for defendant, and plaintiff appeals. Affirmed.

L. W. Fulkerth and C. A. Stonesifer, for appellant. J. M. Walthall, for respondent.

HAYNES, C. This is an agreed case submitted under section 1138 of the Code of Civil Procedure. The defendant had judgment, and the plaintiff appeals.

The plaintiff is a constable in Stanislaus county, and performed services, as such, in criminal cases for which he is entitled to compensation; and the question is whether such compensation is fixed by the act of 1895, establishing fees of county, township, and other officers (St. 1895, p. 267), or whether he is entitled to compensation under the county government act of 1893 (St. 1893, p. 481, § 196, subd. 14). The board of supervisors allowed his claim under said county government act, and the defendant, who is county auditor, declined to audit the demand, claiming that plaintiff's fees were fixed by said act of 1895. The court below held that the constable was entitled to the fees in criminal cases provided in said act of 1895, "so far as such act regulates the fees to be collected for specific services, but not so far as such act limits the amount of fees to be collected in any one month," and gave judgment for the defendant. A statement of the services rendered, and the charges made therefor, is made a part of the agreed case, and shows services rendered from May 4th to May 14th, inclusive, amounting to \$11.30, all in cases of misdemeanor. The demand for said services was made July 6th, and allowed by the board of supervisors July 11th. The charges made by plaintiff for making arrests was \$2, and for mileage in going to place of arrest 30 cents, and for returning with prisoner 30 cents, per mile. The county government act of 1893, in counties of the thirty-fourth class, in fixing the compensation of officers, provides: "Constables, such fees as are now or may be hereafter allowed by law." Section 196, subd. 14. The said act of 1895 (St. 1895, p. 271) fixes the fees of constables "for arresting prisoner and bringing him into court, one dollar," and "for each mile necessarily traveled within his county in executing a warrant of arrest, both in going and returning from place of arrest, fifteen cents." Said act of 1895, however, provided that in criminal cases the constable shall not receive more than \$100 in any month, and not more than \$1,000 in any one year; and it further provided "that the board of supervisors may reject all bills presented to the county by justices of the peace and constables for fees in criminal cases in all cases of proceedings in which the district attorney has not, in

writing, approved the issuance of the warrant of arrest." The county government act of 1893 fixed the compensation of constables in counties of the thirty-fourth class (of which Stanislaus was one) by giving them fees for the services rendered, i. e. all "the fees then or thereafter allowed by law," for all their services; while the act of 1895 gave them the fees therein fixed, provided such fees did not amount to more than a certain sum per month or per annum, thus limiting the fees they might appropriate to their own use, and thereby changing the "compensation" of the officer, which the constitution required should be fixed, and was fixed, by a classification of counties according to population.

It is not questioned that the provisions of the act of 1895 (commonly known as the "Fee Bill") which limit the amount of fees a constable may retain, or which give to the district attorney a supervisory power over the fees he may receive, in effect change the compensation to which he is entitled under the county government act, and are to that extent unconstitutional and void. But it does not follow that those provisions of the act of 1895 which fix the amount that the citizen or the public shall pay for each item of service rendered by the officer are also invalid. The county government act of 1893, in fixing the compensation of constables in counties of the thirty-fourth class, determined that a just compensation to the officer was to give him the fees then or thereafter fixed by law for each item of service rendered; no more, no less. The legislature could not change that provision otherwise than by an amendment of it, since to do so would be to fix the compensation of the officer by some standard other than that fixed by the constitution, viz. the classification of the counties according to population.

But the provisions of the act of 1895 which violate the constitution may be eliminated from the act without affecting its provisions as to the fee which may be charged for each particular item of service. Such fee bill was contemplated by the county government act, and is essential, not only to the ascertainment of the just compensation of the officer, but to the ascertainment of the just charge to be paid by the citizen or by the public from the county treasury. The attempted limitation of the gross amount of fees which the officer might take to his own use is a distinct matter, having no necessary connection with the proper charge for the particular items of service performed. In view of the diversified provisions of the county government act, made for the different classes of counties, what we have said must be understood to apply only to the case before us, or to cases depending upon similar provisions of said act of 1893, which do not fix the fee of the officer for each item of service otherwise than by reference to some other statute. Our conclusion is directly sustained by *Dwyer v. Parker*, 115 Cal. 544,

47 Pac. 372, where it is said: "With the act under consideration no difficulty is experienced in saying that after eliminating the objectionable provisions fixing compensation, as being in conflict with the constitution and the county government act of 1893, there still remains a full and complete fee bill, establishing the fees which all county and township officers are entitled to charge and collect. It would follow therefrom, in accordance with the harmonious plan indicated by the constitution, that the compensation of the officers in question is regulated by the act of 1893. So far as that compensation is governed by the fees which they may retain, that, also, is embraced within the act of 1893. So far as that compensation is dependent upon the fees which may be charged and collected, those fees are fully provided for and established by the act of 1895."

Both parties in the case at bar cite and rely upon *Dwyer v. Parker*, supra. The error of counsel for appellant results from want of attention to the facts of that case, which, however, were not stated fully in the abstracts of the briefs printed in the Reports. The plaintiff in that case was a justice of the peace in Santa Clara county. The act of 1893 gave the justice "such fees as are now or may be hereafter allowed by law," but limited the amount he might retain in criminal cases in any one year to \$2,000. The act of 1895 allowed the justice for all services in a criminal action or proceeding \$3, but not to exceed \$75 in any one month. In May, 1895, the justice disposed of 47 criminal cases, for which he presented his bill for \$141, being the amount allowed under the fee bill of 1895; but that act limited his compensation to a sum not exceeding \$75 per month. He therefore claimed that he was entitled to the fee fixed by the act of 1895 and the compensation which that fee would give him under the limitations of the act of 1893, and this court sustained that contention. I advise that the judgment appealed from be affirmed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

131 Cal. 440

TAYLOR v. FORD. (S. F. 1,602.) 1

(Supreme Court of California. Jan. 26, 1901.)

PARTNERSHIP—SALE OF FIRM BUSINESS—VALUE OF ACCOUNTS—MUTUAL MISTAKE—FALSE REPRESENTATION—COERCION—TRIAL—INSTRUCTIONS—STRIKING OUT PLEADING—HARMLESS ERROR.

1. The only material difference between the answer to a cross complaint and an answer which was stricken out was that the latter stated that, by reason of defendant's alleged acts, plaintiff was damaged in a specified sum, no part of which was paid, satisfied, or discharged in any way, and the former merely

prayed that plaintiff be allowed to recoup against defendant any damages sustained as alleged. Both otherwise contained a full statement of the facts out of which the alleged damages arose, and evidence thereof was allowed as fully as if the rejected answer had remained on file. Held, that plaintiff could not complain of the court's refusal to permit his answer to stand exactly as he desired.

2. In an action on a note made by one partner to his co-partner in buying out the business, a claim that there was a failure of consideration was not sustained, where it is undisputed that the stock was of the value at which it was appraised in the contract of sale, and it was shown that the accounts were valuable, the buyer having collected a majority thereof.

3. Knowledge of the value of book accounts could not amount to more than an opinion, which, in an action on a note given for part of the price thereof, would not support the defense of a mutual mistake or of false representation in relation thereto.

4. Instructions which were unnecessary repetitions or inapplicable to the facts in the case were properly refused.

5. Coercion of a partner in buying out his co-partner cannot be based on threats of the seller to sell out to a stranger in violation of the partnership articles.

Department 1, Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Henry W. Taylor against C. D. Ford. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Charles F. Hanlon, for appellant. Martin Stephens and Bishop & Wheeler, for respondent.

VAN DYKE, J. This action was brought to compel defendant to set forth the nature and extent of his claim on a certain promissory note purporting to have been executed by plaintiff to defendant, and to have the same determined by the court to be of no force and validity. Plaintiff and defendant were partners in the lumber business in West Berkeley, and defendant sold his interest in the business and property of the partnership to the plaintiff, and received the promissory note in suit as part payment on the sale. The note originally was for the sum of \$8,509.87, and was given in accordance with a contract previously entered into between the parties, which contract reads as follows:

"This agreement, made this 25th day of August, 1885, between C. D. Ford, party of the first part, and H. W. Taylor, party of the second part, witnesseth, that whereas, the said parties have been heretofore associated as equal partners under the firm name of Ford and Taylor, sometimes known as the West Berkeley Lumber Company; and, whereas, the said parties are desirous of dissolving the said partnership and of transferring the interest of the said party of the first part in the property of said partnership to the said party of the second part: Now, therefore, these presents witnesseth: That the said partnership be, and the same is here-

¹ Rehearing denied February 26, 1901.

by, dissolved, to take effect on the first day of August, 1885. That an inventory of all the property of said partnership shall be forthwith taken, and valuation placed thereon at the following rates, to wit:

"Add 50 cents. Surface redwood, No. 1, per thousand feet, \$23.00.

"Per M, surface redwood No. 2, per thousand feet, \$17.00.

"Cost of rough redwood, No. 1, per thousand feet, \$13.00.

"Add 50 cents per M. costs of—

Surface redwood, No. 1, per 1,000 feet \$23 00

Surface redwood, No. 2, per 1,000 feet 17 00

Rough redwood, No. 1, per 1,000 feet.. 13 00

"Piling same—

Rough redwood, No. 2, per 1,000 feet.. 9 00

Shingles, per 1,000 feet..... 1 55

—Doors, sash, lime, and hardware at cost price, freight added. Horses, wagons, trucks, office furniture, and other personal property at cost price. That an account of the business of said partnership shall at once be taken up to the said 1st of August, and the profits or losses equally divided between the parties hereto. That all the book accounts due said firm shall be inventoried at their face value, and that, upon the payment of the promissory note hereinafter mentioned, said party of the first part shall execute and deliver to the said party of the second part a bill of sale of his interest, to wit, an undivided one-half interest, in all the property therein described. The consideration for this indenture, and for the agreement of the said party of the first part of transfer said property to the said party of the second part, is as follows, to wit: \$5,000 cash paid on the execution of these presents, the receipt whereof is hereby acknowledged by the said party of the first part, said payment to be on account of the sum found to be due from such inventory; and a promissory note executed by the said party of the second part, payable to the order of the said party of the first part, for such sum as may be found to be the difference between one-half of the inventoried valuation of said property and the said sum of \$5,000 paid on account upon the execution of these presents. Said note shall be payable three months after date, and bear interest at the rate of seven (7) per cent. per annum. In witness whereof, the parties hereto have hereunto set their hands and seals this 25th day of July, 1885. Charles D. Ford. H. W. Taylor."

The \$5,000 mentioned in the above contract was paid as therein agreed, and also the sum of \$6,000 was paid on said note in November, 1885, leaving a balance unpaid on the note at that time of \$2,660.44. In addition to the answer by defendant to the plaintiff's complaint, he filed a cross complaint counting upon the promissory note in question, and praying for judgment for the balance alleged to be due and unpaid thereon. In his answer to the cross complaint the plaintiff pleaded want of and fail-

ure of consideration for the note, alleging that he was induced to sign it on the strength of a warranty by defendant, Ford, that certain book accounts and claims forming the consideration of the note were good and collectible, dollar for dollar; also, that plaintiff was coerced into signing the note by threats of the defendant to sell his interest in the partnership in the lumber business "to an entire stranger." He also set up a mutual mistake as to the value of said book accounts, and that they were treated as of their face value, when in fact they were worthless. The cause was tried with a jury, and a verdict rendered in favor of the defendant on his cross complaint for the sum of \$4,382.52. Special issues were also submitted to the jury and answered as follows: "Did the defendant assure the plaintiff at or prior to the execution of the note in question that all of the book accounts outstanding, except the three items stricken out, were good and collectible? A. No. Did the defendant at or prior to the time of the execution of the note in question assure the plaintiff that all the book accounts, except the three items stricken out, were good and collectible, so far as he knew? A. Yes. Did the defendant ever agree with the plaintiff that, if any of said book accounts were not collected, that he (defendant) would allow plaintiff to deduct one-half the amount thereof from the note? A. No." The appeal is taken from the judgment entered on the verdict in favor of the defendant, and from an order denying plaintiff's motion for a new trial.

1. The plaintiff filed an amended answer to the defendant's cross complaint without leave of court, which upon motion was stricken out by the court, and the court also refused leave to file the same amended answer after notice given. The appellant contends that this is error on the part of the court. The court, however, did permit appellant to file an amended answer to the cross complaint, setting up the defenses to the note, substantially as already stated, and praying that the defendant take nothing on said promissory note, and that plaintiff be allowed to recoup against the defendant any damage sustained as alleged. The only material difference which appears between the amended answer on which the case was tried and the one stricken out by the court was that the latter contained the statement that "by reason of which said acts the plaintiff, Henry W. Taylor, has been damaged in the sum of \$3,500, and that no part of said damages have been paid or satisfied or discharged in any way whatever." Both of the answers contain a full statement of the facts out of which the alleged damages to the plaintiff arose, and at the trial the plaintiff was allowed to give evidence of these facts as fully as he could have done if the rejected answer had remained on file. Appellant suffered no injury, therefore, by the

refusal of the court to permit his answer to the cross complaint to stand in the exact form that he desired. If the evidence presented at the trial would not support the defenses to the note which were pleaded, it necessarily follows that it could not support a counterclaim or recoupment for damages arising out of the facts so alleged.

2. The appellant contends that the verdict is not supported by the evidence. The main question in dispute between the parties was whether the defendant positively and falsely represented the accounts which formed part of the consideration to be good, and warranted or guaranteed their collectibility. Upon this question there was a substantial conflict of evidence. The note given was only a part of the entire consideration for the purchase by the plaintiff of defendant's interest in the partnership. There is no contention that the lumber is not of the value at which it was appraised in the contract. It is also shown that the accounts mentioned in the contract were valuable, as plaintiff has succeeded in collecting a majority of them. The contract being entire, there was a good and valuable consideration for the note. From the evidence the jury were warranted in finding adversely to the appellant on his contention as to the failure of consideration.

3. The case does not support the alleged defense of mutual mistake. Knowledge on the subject of the value of these book accounts could not amount to more than opinion, and this will not support the defense of a mistake or false representation. *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Nounan v. Land Co.*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; *Lee v. McClelland*, 120 Cal. 148, 52 Pac. 300. In *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, the holder of a promissory note sold it through a broker shortly after the maker had made an assignment for the benefit of creditors, but neither the seller nor buyer nor broker knew that fact, but all supposed that the maker was still doing business; and it was held that there was no such mistake as to the subject-matter of the sale as to avoid the contract, and there was no implied warranty that the note was that of a solvent firm. In the opinion the court says: "The mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient, if the thing delivered is existent, and is the identical thing in kind which was sold." *Benj. Sales*, § 54. In *Dortie v. Dugas*, 55 Ga. 484, it was held that an erroneous opinion, common to both parties, as to the value of a partnership interest, is not such a mistake of fact as will warrant a rescission in equity of the sale of such interest. In this case a distinction is drawn between a mistake of fact and a mere mistaken opinion, the court saying: "One theory of the complainant's bill is that an

erroneous opinion, common to both parties, as to the real value of the interest sold, especially if that interest was absolutely worthless, would be such mistake of fact as would warrant a rescission of the contract and a return of the purchase money. We think, on the contrary, that the very nature of the enterprise touching which the partnership existed would be full notice that the value of a partner's share was contingent, and that an estimate of it made in a general way would partake of the loose nature of conjecture, rather than of the definite characteristics of fixed fact." The verdict was against the appellant on the contention that there was a warranty or guaranty on the part of the defendant, and this verdict is supported by the evidence. In fact, the written contract out of which the making of the promissory note grew contains no guaranty of the book accounts, and no agreement that anything was to be deducted from the value of said accounts, as fixed in said contract, for a failure to collect any of them.

4. The instructions given by the court, read together, fairly cover the law of the case, and those which were refused were either unnecessary repetitions or inapplicable to the facts in the case. The jury was not misdirected as to the defense of want of consideration, but the law on that subject was properly given to them; and the same may be said in reference to the defense of breach of warranty, which was specially submitted to the jury, as already shown. At the conclusion of the instructions to the jury, one of the jurors asked: "I would like to ask the court if ignorance on the part of plaintiff or defendant constitutes any point of law. Ignorance of what plaintiff or defendant might be doing when a certain thing is done; can it be brought up as a matter of law?" The court answered this, and a colloquy took place, as follows: "The Court: The presumption is, where the transaction is between grown-up people, that they do know what they are doing. Mr. Hanlon: I ask an instruction that although that is the presumption, that they knew, that we can show to the contrary that either party was not in such condition. The Court: If they show that one of the parties was imbecile or not of sound mind, or that there was fraud or duress. Mr. Hanlon: Or coercion. The Court: It is not claimed that he was coerced. Mr. Hanlon: It is claimed that he was taken advantage of. The Court: All right; or that he was taken advantage of. Mr. Hanlon: We except." We can see no error on the part of the court in the foregoing. The only coercion claimed by the plaintiff is that he was forced to enter into the contract and give the note in question by reason of defendant's threats to sell out to a stranger in violation of his contract for a five-years partnership. That would not amount to coercion in law.

There are no other points presented on the

part of the appellant requiring special notice. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

VAN LOBEN SELS v. BUNNELL et al.

(Sac. 759.)¹

(Supreme Court of California. Feb. 1, 1901.)

MORTGAGES—FORECLOSURE SALE—VACATION—IRREGULAR NOTICE—CONFLICTING ORDERS OF SALE—PRIOR LIEN—CROSS COMPLAINT—SUFFICIENCY—JURISDICTION OF COURT—ATTORNEY FOR DIFFERENT DEFENDANTS—PROPER PARTIES.

1. Where, after a foreclosure sale, one of the defendants had redeemed the property, an order vacating such sale was within the power of the court, since its jurisdiction of the subject-matter and the parties did not cease until the foreclosure was completed by a failure of the parties to redeem.

2. A purchase-money mortgage on realty was foreclosed, and the judgment directed the proceeds of the sale to be applied in satisfying a lien prior to the purchase-money lien. On the issuing of the order of sale an injunction was obtained by the wife of the mortgagor restraining the sheriff from selling the property on the claim that it was a homestead. The judgment rendered in this proceeding, in which the parties to the foreclosure suit were not joined, dismissed the injunction, and ordered the proceeds of the sale to be applied to the payment of the purchase-money lien, and the balance paid into court. A new order of sale was issued, and the sheriff's notice of sale was advertised, whereby the money was to be applied according to the order made in the injunction proceeding. *Held*, that the sale was invalid, since it was not authorized by the original decree, nor was the judgment as modified valid as against the parties to the foreclosure suit, since they were not parties thereto.

3. Where, in a foreclosure proceeding, one of the defendants filed a cross complaint setting up a prior lien for assessments, though not containing a sufficient cause of action, and not served on all the parties, the court acquired jurisdiction to adjudicate as to this lien, since the parties were already in court, and the allegation of the cross complaint of the existence of the lien for assessment and the prayer for general relief was sufficient to identify the subject of the action.

4. Where, in a foreclosure proceeding, one of the defendants filed a cross complaint, it was proper for the same attorney to appear for the cross complainant and another defendant, since the latter admitted the prior lien of the former.

5. Where, in a foreclosure proceeding on realty, a prior incumbrancer is joined, his rights may be adjudicated, and he is entitled to file a cross complaint to foreclose his lien, he being a proper, though not a necessary, party.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Action by P. J. Van Loben Sels against C. Bunnell and others. From an order vacating a foreclosure sale, defendants appeal. Affirmed.

Devlin & Devlin and Henry C. Ross, for appellant. A. L. Shinn and H. W. Johnson, for respondents.

SMITH, C. The appellants are the defendants C. Bunnell and the Germania Build-

ing & Loan Association, and Elizabeth Bunnell, who is not a party to the suit. The defendant Bunnell derived his title from the plaintiff under a deed reserving a lien for certain moneys, part of the consideration which is the lien foreclosed. The building and loan association is a junior mortgagee. It answered, setting up its mortgage, but not praying for foreclosure. The reclamation district No. 551—a defendant—had a lien for an assessment upon the land prior to that of the plaintiff, which it set up by answer and cross complaint. Judgment of foreclosure was rendered directing the sheriff to sell the premises, and out of the proceeds, after retaining his fees, etc., to pay first to the defendant the reclamation district the amount due to it (\$1,707.41), and afterwards to the plaintiff the amount due to him (\$755.78), with attorney's fee (\$150), and costs. This judgment, on the appeal of the building and loan association, was affirmed by this court May 20, 1898. 120 Cal. 680, 53 Pac. 266. An order of sale on the judgment was issued July 8, 1895, and thereupon the appellant Elizabeth Bunnell, wife of the defendant Bunnell, claiming the land as a homestead, commenced an action in the same court against the sheriff, Johnson, the plaintiff, Van Loben Sels, and the reclamation district to enjoin the sheriff from selling; and a temporary injunction was issued. The suit was afterwards dismissed by the plaintiff as to the defendants Van Loben Sels and the reclamation district, and judgment was rendered November 26, 1898, dismissing the injunction and directing the sheriff to proceed with the sale under the judgment in Van Loben Sels against Bunnell and others, but further directing him, after retaining his costs, to pay the proceeds first to the plaintiff Van Loben Sels, and the overplus, if any, into court, thus ignoring the judgment in favor of the reclamation district. Accordingly, a new order of sale was issued December 20, 1898, referring to the judgment, of which a copy was attached; and the sheriff advertised the property for sale, the notice, so far as material, being as follows: "Notice is hereby given by F. T. Johnson, sheriff of the county of Sacramento, state of California, that under and by virtue of a judgment rendered by the superior court of the said county July 8, 1895, in an action therein pending, wherein P. J. Van Loben Sels is plaintiff and C. Bunnell, Germania Building & Loan Association (a corporation), Edward Bunnell, and reclamation district No. 551 (a corporation) are defendants, which said judgment was rendered in favor of said plaintiff and against said defendants Bunnell and Germania Building & Loan Association for \$757.80 and \$150 attorney's fees, together with expenses and costs in said action, and interest upon said amount of said judgment from the date thereof to the date of sale at 7 per cent. per annum, and by virtue of an order of

¹ Rehearing denied March 2, 1901.

sale issued out of said court upon said judgment on the 20th day of December, 1898, and to satisfy said judgment, I will, on Monday, the 16th day of January, 1899, at the hour of 10 o'clock a. m., at the front door of the court house at the corner of Seventh and I streets, in the city of Sacramento, California, sell at public auction, to the highest and best bidder for cash in gold coin of the United States, the following described real property, to wit [describing the property]." At the sale—which was made on the day and at the place named in the notice—the plaintiff became the purchaser for the amount of his debt, and the proceeds were applied in satisfaction thereof. From the return of the sheriff—to which a copy of the notice with affidavit of service was attached as part—it appears that the sale was made under and in pursuance of this notice. The defendant the building and loan association redeemed from the sale January 23, 1899. Thereafter, May 12, 1899, on the motion of the reclamation district, an order was made by the court, May 12, 1899, vacating the sale, which is the order appealed from.

There can be no doubt, I think, of the power of the court to make the order complained of, or of the propriety of its exercise. With regard to the power, the jurisdiction of the court in cases of this kind over the parties and the subject-matter continues until the foreclosure is completed by failure to redeem, and its jurisdiction extends to the purchaser, who, by his bid, submits himself to it. *Requa v. Rea*, 2 Paige, 339; *Cazet v. Hubbell*, 36 N. Y. 677; *Andrews v. O'Mahoney*, 112 N. Y. 567, 20 N. E. 374; *Boggs v. Fowler*, 16 Cal. 559. The sale involved here was not authorized by the foreclosure decree as rendered, but the sheriff proceeded as though the decree had been modified by the subsequent judgment in the suit of *Mrs. Bunnell* against him, which, as to the parties to the foreclosure suit, was of no validity. It was, therefore, if not absolutely void,—a point we need not determine,—at least grossly irregular. Nor can we say that the parties here were not injured thereby. On the contrary, the inadequacy of the price for which the land was sold was in all probability the direct result of the error, for under the decree as rendered it would have been to the interest of the plaintiff to bid more than that amount, as the property appears to have been worth more than the amount due to the reclamation district. So, also, the sheriff seems to have been innocent in this matter; and in reporting the sale not absolutely, but for confirmation, he did all that he could do to relieve himself from the contradictory mandates of the court. It would be unjust to impose upon him a liability to the reclamation district for damages, or at least for the statutory penalty of making the sale without giving the proper notice. Moreover, if the proceedings be regarded as be-

ing under the original judgment, its mandates were not obeyed. It does not appear that any money was paid by the purchaser except for the expenses of the sale, and, as the sheriff, under the directions in the judgment of *Mrs. Bunnell* against him, had applied the balance of the bid upon the judgment in favor of the purchaser, instead of paying it to the reclamation district, it might with reason be contended that there had been no sale. The payment of the purchase money is an essential part of a judicial sale.

It is claimed, however, by the appellants that the judgment in favor of the reclamation district was void for want of jurisdiction in the court, from which it would follow—assuming the proposition to be correct—that the judgment was, in effect, merely a judgment in favor of the plaintiff (as it was afterwards construed in the injunction suit and by the sheriff), and hence that in fact no mistake was made by the sheriff in the sale. The grounds of this contention are that the prior lien of the reclamation district could not be litigated in the suit, and that the cross complaint was insufficient to give the court jurisdiction to foreclose the lien of the district. On the latter point the objection is that no defendants are named in the cross complaint, that none were served except the plaintiff, and that the averments of the cross complaint were insufficient to constitute a cause of action. But none of these defects—if they exist—could affect the jurisdiction of the court. Who the defendants are sufficiently appears from the title of the case and the allegations of the cross complaint. It does not appear that the co-defendants of the cross complainant were not served, but only that the plaintiff was served; and the presence of the attorneys of the parties is recited in the decree. Nor could the failure to serve one of the parties affect the question of jurisdiction, for they were already in court, and subject to its jurisdiction. Nor could the jurisdiction of the court be affected by the insufficiency of the cross complaint to state a cause of action. The cross complaint alleged the existence of a lien for assessment, and prayed for general relief. This was sufficient to identify the subject of the action, and to give the court jurisdiction. *Blondeau v. Snyder*, 95 Cal. 523, 31 Pac. 591; *In re James' Estate*, 99 Cal. 376, 33 Pac. 1122; *Edwards v. Hellings*, 103 Cal. 206, 207, 37 Pac. 218. The only irregularity that clearly appears is that the same attorney, according to the recitals in the judgment, appeared for the cross complainant and the defendant *Bunnell*. This, if the latter admitted the lien of the former, was not improper. As far as can be judged from the record, this was in fact the case; and, indeed, the claim of the reclamation district seems to have been admitted by all the parties, for no objection was made to

the judgment or appeal taken by one of the defendants, and, by the other, who did appeal, no attack was made on this part of the judgment. With regard to the other objection, there is no doubt of the jurisdiction of the court to adjudicate the claims of a prior incumbrancer if made a party. Such incumbrancers are not necessary parties, but they are always proper parties, and it is good practice to join them for the purpose of liquidating their claims. *Heimstreet v. Winnie*, 10 Iowa, 430; *Story, Eq. Pl.* § 193; *Jones, Mortg.* § 1439; *McComb v. Spangler*, 71 Cal. 424, 12 Pac. 347; *Johnston v. Savings Union*, 75 Cal. 140, 141, 16 Pac. 753. Whenever the prior incumbrancer is made a party, it is his right to file a cross complaint to foreclose his lien. *First Nat. Bank v. Salem Flour-Mills Co.*, 12 Sawy. 490, Fed. Cas. No. 580. The order appealed from should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

131 Cal. 472

In re BENTON'S ESTATE. (Sac. 854.)

(Supreme Court of California. Jan. 31, 1901.)

WILLS — CONTEST — FRAUD — UNDUE INFLUENCE — WIDOW'S RIGHT TO CONTEST — FINDINGS — SUBMISSION — ULTIMATE FACTS — EVIDENTIARY FACTS — PRESUMPTIONS — INTENT TO DECEIVE — KNOWLEDGE — DISJUNCTIVE FINDING — BELIEF BY TESTATOR — PROBATE — DENIAL — MATERIAL ISSUE — FAILURE TO FIND — REVERSAL — EVIDENCE — FORMER TRIAL — REPORTER'S TRANSCRIPT.

1. Where a petition for the probate of a will is contested by testator's widow, and contestant's petition shows her to be an heir at law of decedent, it sufficiently shows her right to attack the will, though she would receive a larger share of the estate under the will than she would take as an heir.

2. Where an application for the probate of a will is contested and tried before a jury, ultimate facts only for the jury's finding, as to whether decedent was competent to make a will, and whether his mind was free from fraud, should be submitted, and not mere evidentiary facts, from which the court is required to reach a conclusion as a matter of law.

3. Where, in a will contest, special findings of evidentiary facts were submitted to the jury and answered, the court, in passing judgment, is not entitled to indulge in any inferences of fact in support of the facts so found, but, as a matter of law, must say that, from the facts found, the judgment must be one rejecting or allowing probate.

4. Under Civ. Code, § 1572, declaring that fraud shall consist in acts committed by a party, or with his connivance, "with intent to deceive another," a finding in a will contest that testator at the time of making the will was actuated and controlled solely by representations of proponent, and that such representations were false and fraudulent, was not sufficient to show that the will was induced by proponent's fraud; there being no finding that the representations were made "with intent to deceive" the testator, or "with intent to induce him to execute the will."

5. Where a will was contested on the ground that it was induced by false representations, findings that it was so induced, but without a finding that proponent knew the representations were false, or that he did not believe them to be true, were insufficient to establish that the will was induced by fraud.

6. Where a will is contested for fraud in inducing its execution, a finding that proponent's representations to testator, inducing the will, were "false or fraudulent," in the disjunctive, is insufficient.

7. Where the probate of a will is contested on the ground that proponent induced its execution by fraud, findings of fact that proponent did make such representations were insufficient to show fraud, in the absence of a finding that the representations were false, made with intent to deceive or induce testator to make the will, or made before its execution.

8. Where a will was contested by a widow on the ground that proponent had induced its execution by fraud, a finding that proponent by false or fraudulent statements caused testator to accuse contestant of theft was immaterial, since, standing alone, such a finding did not indicate the practice of actual fraud.

9. Where a will was contested by a widow on the ground of proponent's fraud in inducing its execution, a finding that testator knew contestant was a dutiful wife, etc., not only failed to show fraud, but tended to show that, whatever representations proponent might have made, they had no effect on testator's mind.

10. In a will contest, a finding that proponent made statements to his father against contestant, testator's wife, which proponent knew to be false, was insufficient to show fraud inducing the execution of the will, in the absence of a finding that proponent made the statements with intent to deceive his father or induce him to make the will, and that the father believed the statements and acted on them.

11. Where a will is contested for fraud, a finding that no fraud or misrepresentation was practiced on testator "at the very time" he signed the will and codicil was immaterial, since, on an issue of fraud, the particular time at which the fraudulent representations were made is immaterial.

12. Where, in a will contest, contestant's petition charges fraud inducing its execution, but the precise question was not directly presented to the jury in the issues on which they were required to return findings, and there was no finding of fact on such issues, though there were various findings on evidentiary facts not sufficient in themselves to show fraud, a judgment denying probate will be reversed for want of a finding on a material issue.

13. Code Civ. Proc. § 273, providing that the report of the official reporter of any court, when written out and certified as a correct transcript of the testimony and proceedings in a case, shall be prima facie correct, does not authorize the introduction of a stenographer's report of the evidence of testator in a divorce suit tried some years before his death, in a subsequent will contest by his widow; the transcript amounting to no more than testator's declarations, which, if admissible at all, might have been proved by the reporter's oral testimony as authorized by Code Civ. Proc. § 2047.

Department 1. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Application by Herbert A. Benton for probate of the will of T. N. Benton, deceased, to which Elizabeth N. Benton, testator's widow, filed objections. From an order denying probate, proponent appeals. Reversed.

J. G. Swinnerton and J. J. Fitzgerald, for appellant. Nicol, Orr & Nutter and Budd & Thompson, for respondent.

GAROUTTE, J. The widow is contesting the probate of the will of her deceased husband, Tolman N. Benton. The proponent of the will is Herbert A. Benton, a son by a previous wife. At the trial before a jury the issues were limited to incompetency, and also fraud practiced upon the deceased by the proponent of the will in the making thereof. Fifty questions purporting to bear upon the issues raised were submitted to the jury, and answers returned thereto. Upon the strength of these answers the will was denied probate, and this appeal is taken from that judgment, upon a bill of exceptions.

It is first asserted that the petition of contestant is substantially insufficient, in not showing that she is beneficially interested in defeating the probate of the will. It is only necessary to say that she shows herself to be an heir at law of decedent, and that fact gives her the right of contest. As bearing upon this right, it is immaterial that the will attacked possibly gives her a larger share of the estate than she would take as an heir at law.

There appears to be some doubt in the minds of counsel in this case, and also in the mind of the trial court, as to the character of the issues which may or should be presented to the jury in a case of the present character. Yet, in view of the provisions of sections 1312 and 1314 of the Code of Civil Procedure, we see no reason for doubt as to the proper procedure to be followed; as, for example, in this case, counsel and court may have submitted to the jury the questions: (1) Was the decedent competent to make a last will and testament? (2) Was the mind of the decedent, at the time of the execution of the will, free from fraud practiced upon him by Herbert A. Benton? These were the ultimate facts in the case. A negative finding by the jury upon either of them would have required a denial of the will to probate. While counsel could, in addition to the ultimate facts, submit issues bearing specifically upon certain branches of the evidence, yet that course is not at all necessary; and in many instances the submission of the ultimate fact to the jury for a finding, when accompanied by clear and explicit instructions as to the law which should govern the jurors in applying the evidence and arriving at a verdict, is the better practice to pursue. If the verdict of the jury condemns the will, a judgment rejecting its probate necessarily follows. If the verdict supports the will, then the court should take evidence upon the matters not involved in the contest, and thereupon, by virtue of the facts declared by the verdict, conjointly with those found

by the court, adjudge that the document be admitted to probate.

We here have the question presented, do the issues determined by the jury justify the judgment made by the court, rejecting the probate of the will? The issue as to the competency of the decedent was found in favor of proponent, and the issue of fraud is the single one remaining. The findings of the jury upon the issues submitted to them stand the same as the findings of fact made by the court in a civil action; that is, when we are brought to the consideration of their sufficiency to support the judgment rendered. In the one case the jury makes the findings, and in the other the court makes them; and as said in *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576, quoting from the syllabus: "Where probative facts only are found, yet, if the ultimate fact flows as a necessary conclusion therefrom, the findings are sufficient; but, in order to warrant the appellate court in inferring an ultimate fact from probative facts, it must inevitably follow from the facts found." So, in a case where the probate of a will is contested, if the issues presented to the jury involve simply probative facts, then, to justify the court in rejecting the probate of the will, the ultimate fact of fraud, undue influence, or mental incompetency must appear conclusively from the probative facts found. In other words, the trial court may not indulge in inferences of fact in order to support the judgment it makes. It must weigh and test the facts alone that are presented to it by the jury. Presumptions of law may be indulged in, but the indulgence in inferences of fact as to matters bearing upon the issues presented to the jury are denied to it. The trial court must be able to say, "As matter of law, from the facts found by the jury, the judgment in this case must be one rejecting the probate of this will." If an ultimate fact of fraud or mental incompetency or undue influence be found by the jury, then the court is bound to declare that a certain particular judgment follows as matter of law. So must the court be able to declare from the probative facts found. It is said in the case of *In re Sander-son*, 74 Cal. 208, 15 Pac. 757, "In cases of contest of a will the issues must be such as that the determination of them will leave to the court no office except to enter a judgment admitting the will to probate or rejecting it." The court is here speaking alone of the issues involving the ultimate facts alleged and denied by the pleadings.

We pass to a consideration of the issues found upon by the jury, and discussed by counsel in their briefs: "Was Tolman N. Benton, at the time of and in the making of the two papers in contest, actuated and controlled solely by representations to him at any time made by Herbert A. Benton, and were such representations false or fraudulent? A. Yes."

Then follow many questions and answers, of which the following are a fair illustration: "(1) Did Herbert A. Benton at any time represent to Tolman N. Benton that the contestant, Elizabeth Benton, was stealing from him, said Tolman N. Benton? A. Yes. (2) Did Herbert A. Benton at any time represent to Tolman N. Benton that contestant, Elizabeth N. Benton, was making use of the property of Tolman N. Benton for the benefit of others? A. Yes." We then have questions and answers of which the following are fair illustrations: "(1) Did Herbert A. Benton, by any false or fraudulent statement, ever cause Tolman N. Benton to accuse contestant of theft? A. Yes. (2) Did Herbert A. Benton, by any fraudulent or false statements, induce or persuade Tolman N. Benton to apply to contestant any vile names or opprobrious epithets? A. Yes." We then have the following questions and answers: "(1) Did Tolman N. Benton at all times know that contestant had been at all times to him, said Tolman N. Benton, a dutiful wife? A. Yes. (2) Did Tolman N. Benton at all times know that contestant had never at any time given him, said Tolman N. Benton, any cause to act towards her or treat her in any manner other than in kindness? A. Yes." We also have these questions and answers: "(1) Did Herbert A. Benton ever make any statements or representations to Tolman N. Benton about contestant which he, said Herbert A. Benton, knew to be false? A. Yes. (2) Did Tolman N. Benton ever make any will solely by reason of any false representations made to him, Tolman N. Benton, by Herbert A. Benton? A. Yes. (3) Was any fraud or misrepresentation practiced by any person on Tolman N. Benton at the very time he signed the paper purporting to be a will, and dated October 9, 1896? A. No."

That which will vitiate a contract will vitiate a will. In re Kohler, 79 Cal. 313, 21 Pac. 758. And section 1572 of the Civil Code provides: "Actual fraud within the meaning of this chapter consists in any of the following acts, committed by a party to a contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion as to a fact of that which is not true, by one who does not believe it to be true." Tried in the crucible furnished by this section, do the facts found by the jury establish that the proponent of this will was guilty of fraud practiced upon decedent in the making thereof? Upon a careful consideration of those facts, we have become entirely convinced that they do not constitute a fraud which vitiates the will of decedent. The most important finding of the jury is the one first quoted. Yet it falls far short of showing a case of actual fraud, within the meaning of the aforesaid section of the Civil Code. It is, in substance, a finding that the deceased executed the will and codicil, actuated and controlled solely by representations made to

him by Herbert A. Benton, and that these representations were false or fraudulent. In this statement of facts the all-important element is lacking, to wit, that Herbert A. Benton made these representations with intent to deceive the decedent, or with intent to induce decedent to execute his will. An intent to do one of these things is always an element, and a necessary element, in any given state of facts, in order that those facts may constitute actual fraud. This particular intent is the leaven which permeates the whole, and gives it the name of fraud. Again, there is no finding that these representations were known by Herbert A. Benton to be false, or that he did not believe them to be true. These, also, are elements necessary to a showing of actual fraud. Again, the finding is that the representations were false or fraudulent. As a finding of fact, that is neither one thing nor the other. Perchance these representations were all fraudulent only. The word "fraudulent," as here used, has no well-defined legal meaning, and this part of the finding as to the representations being false or fraudulent amounts to nothing. This answer by the jury is consistent with a finding by it that although the testator, in making the will, was actuated and controlled by the representations of Herbert A. Benton, and that these representations were false, yet that Herbert A. Benton believed them to be true, and made them with the best of motives. It would not be fraudulent for him to seek to control the testator in making his will, so long as his purpose and the effect thereof was proper; and, if he believed that the representations he made were true, his conduct would not be fraudulent, nor would the will, in this respect, be executed by reason of any fraudulent representation. We next have findings as to the representations made by Herbert A. Benton to decedent. These representations do not appear to have any connection with or relation to the representations referred to in the previous finding; and even if, by inference or conjecture, it might be held that they were the same representations, still there is no finding that they were false, or that they were made with intent to deceive the deceased or induce him to execute his will. Neither is there any finding that these representations were made prior to the execution of the will. As to the finding that Herbert A. Benton by false or fraudulent statements caused Tolman N. Benton to accuse contestant of theft, and others of like character, we see no importance whatever in them as casting light upon the question of fraud. Standing alone, they wholly fail to indicate the practice of an actual fraud, and when joined to the other findings they fail to add any strength to them. The next findings, to the effect that Tolman N. Benton at all times knew that contestant was a dutiful wife, and lived up strictly to her marital relations, etc., only serve the purpose of showing that Herbert A. Benton's repre-

representations to deceased, tending to the contrary, had no effect upon decedent's mind. As to the finding that Herbert A. Benton made statements to his father about contestant which he (Herbert), knew to be false, there is no finding that he made these statements with intent to deceive his father or to induce him to make his will; neither is there a finding that the father believed these statements or acted upon them. It does not even appear that they were made prior to the execution of the will. While the next finding declares that Tolman N. Benton made a will by reason of false representations made to him by Herbert A. Benton, there is no finding that these representations were known by Herbert to be false when made. Again, it is left as a pure matter of conjecture that the language "a will" refers to the will and codicil here under consideration. We do not attach any special importance to the findings declaring that no fraud or misrepresentation was practiced by any person on Tolman N. Benton "at the very time" he signed the will and codicil. Any particular moment of time is a matter wholly immaterial to the issue of fraud.

We are led to the conclusion that the findings of fact returned by the jury do not establish a case of fraud in the execution of the will and codicil here involved. While the petition of contestant charges fraud, for various reasons, not apparent to the court, the question was not directly presented to the jury, in the issues upon which they were required to return a verdict. But, upon the other hand, we find no declaration of the jury that the proponent was not guilty of the practice of fraud upon the decedent in the execution of the will. While we have findings indicating that at the "very time" Tolman N. Benton signed the will and codicil the proponent practiced no fraud upon him, still this finding falls far short of a finding that the making of the will was not had under the influence of proponent's fraud. The case then presents itself exactly as a case where there is no finding of fact upon a material issue, and the judgment must be reversed for that reason.

The official reporter identified a certain document as a certified copy of the testimony of Tolman N. Benton, given by him in an action for divorce tried some years prior thereto. We know of no section of the Code that justifies the admission of this evidence. Section 273 of the Code of Civil Procedure is relied upon to effect that purpose, but it does not go to that extent. The evidence here sought to be introduced stood simply as the declaration of Tolman N. Benton; and, if his declarations were competent and admissible evidence, they could have been placed before the jury by oral testimony of the reporter who heard them, and his recollection as to the testimony may have been refreshed from his notes taken at the time. Section 2047, Code Civ. Proc.; *People v. Gardner*, 98 Cal. 132, 32 Pac. 880. The said

section 273 refers to reports of the official reporter required to be filed in the court. This question is discussed in *Reid v. Reid*, 73 Cal. 208, 14 Pac. 781, and it was there declared: "The unfiled transcript is certainly not a public record, but must be put upon the footing of a private memorandum. * * * We think, therefore, that section 273 does not make the transcript itself admissible in evidence."

The court is convinced that all the testimony tending to the point that contestant was kind to proponent's family, waited upon them, etc., is foreign to any question involved in the issues upon trial. The court is also satisfied that the deed of trust given by Tolman N. Benton was likewise immaterial as evidence. The lease given by the father to proponent also stands upon the same footing. The court is well satisfied that the questions here discussed may be considered upon a bill of exceptions taken upon appeal from the judgment. The court is also convinced that the demurrer to the petition of contestant was properly overruled. For the foregoing reasons, the judgment is reversed and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

(131 Cal. 495)

CARPY v. DOWDELL et al. (S. F. 1,670.)¹
(Supreme Court of California. Feb. 4, 1901.)

CONTRACTS—NOVATION—APPEAL—INCONSISTENT FINDINGS—IMMATERIAL QUESTION—MORTGAGES—FORECLOSURE—DECREE—CORRECTNESS—PRESUMPTION ON APPEAL.

1. Defendants gave notes to a bank, secured by chattel mortgages on certain wine and their manufacturing plant. Afterwards a part of the wine was sold, with the consent of the bank, on the agreement that all payments thereon should be made to the bank and credited on the mortgagor's account. The notes and mortgages were assigned by the bank. *Held*, on foreclosure of the mortgages, that the contract of sale was not a novation, under Civ. Code, § 1531, providing that novation only takes place by substitution of a new obligation between the same parties with intent to extinguish the old obligation, or by substitution of a new debtor in place of the old one, with intent to release the latter, since the purchaser was not substituted as a debtor with intent to release defendants.

2. Where there was neither an estoppel against plaintiff's maintaining an action to foreclose a mortgage on part of mortgaged property, nor a novation as to the obligation secured by the mortgages, and the decree of foreclosure did not include certain mortgaged wine sold with the mortgagee's consent, a finding that, under the contract of sale, none of the mortgaged property was released from the mortgages, though inconsistent, does not constitute reversible error, since it is immaterial.

3. Where, on appeal from a judgment of foreclosure of chattel mortgages, there was no bill of exceptions, and the description of the property included in the decree coincided with the description in the mortgages, in the absence of a showing to the contrary the decree will be presumed to be correct.

¹ Rehearing denied March 6, 1901.

Department 1. Appeal from superior court, Napa county; F. D. Hamm, Judge.

Foreclosure of chattel mortgages by Charles Carpy against James Dowdell and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Rodgers & Paterson and F. E. Johnston, for appellants. Bigelow & Titus, for respondent.

GAROUTTE, J. This case has been before the court in the past. *Carpv v. Dowdell*, 115 Cal. 677, 47 Pac. 695. The facts involved in the litigation are set out in detail in the decision rendered at that time, and we will now only state those which are necessary to a consideration of the questions presented upon this appeal. Defendants are appealing from a judgment of foreclosure rendered against them upon two certain notes and chattel mortgages. Plaintiff, as assignee of the notes and mortgages from the Bank of St. Helena, brings this action of foreclosure.

It is first contended that the findings are substantially the same as those upon the previous appeal, and that by the decision rendered upon that appeal it was held that plaintiff was estopped from bringing the action. By that decision it was held, first, that the acts of the cashier of the bank were the acts of the bank; and, second, that this plaintiff, the assignee of the bank, stood in its shoes. But it was not held that an estoppel existed which barred the prosecution of this action for every part of the mortgaged property.

The salient facts important here are these: Defendants sold 368,000 gallons of wine to Chevalier & Co., to be delivered in 50,000-gallon installments, the purchase price to be paid as the wine was delivered. The Bank of St. Helena held chattel mortgages upon defendants' personal property, which included this wine, other wine, manufacturing plant, etc. The sale by defendants to Chevalier & Co. was evidenced by an instrument in writing which the bank prepared; and at the bank's suggestion and request, and with the consent of both parties to the contract, the following clause was inserted in that writing: "All payments on said wines to be made to the Bank of St. Helena for our account, the cashier of said bank to receipt for the same." As suggested, the substance of the decision upon first appeal as to the question of estoppel is a contested matter here. And, while isolated excerpts may be taken from that decision tending to show that a complete estoppel upon the entire cause of action stood against plaintiff, yet, if the decision as a whole is considered, it is plain that such a holding was never contemplated or intended by the court. In the absence of language in the opinion pointing directly to a declaration of that character, we will not so hold now, for the reasoning

by the court at that time does not demand it, and neither the facts of the case nor general principles of law justify a conclusion that such is the law. The reasonable and fair construction of the decision is therefore that the estoppel only involved the 368,000 gallons of wine. When the cause went back for a second trial, plaintiff was free to litigate his rights as to the balance of the property covered by the mortgages.

It is contended that "the contract between the defendants and Chevalier & Co., consented to by the bank, was a complete novation, by which the new obligation of Chevalier & Co. to pay these moneys to the bank, to be credited by the bank to the account of the defendants, was substituted for the original obligation of the defendants to the bank." Under section 1531 of the Civil Code, a novation in this case could only take place "(1) by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; (2) by the substitution of a new debtor in place of the old one, with intent to release the latter." There is no question here of the substitution of a new obligation between the bank and these defendants. Hence the principle found in subdivision 1 of the aforesaid section cannot be invoked. We deem it equally clear that Chevalier & Co. was not substituted as a new debtor in place of these defendants with intent to release them. The findings in this case neither justify the conclusion that the parties intended to substitute a new debtor nor to extinguish the old obligation. The agreement of Chevalier & Co. to pay these moneys, the various installments of the purchase price of the wine, to the bank for the account of defendants, has none of the essentials of a novation, as demanded by the aforesaid section of the Civil Code. Even conceding this covenant of the contract to be so broad that under it the bank was authorized to credit the payments thus made by Chevalier & Co. upon defendants' notes, still that fact alone does not fill the measure furnished by the statute. We cannot find an intimation in the contract that the bank intended to release defendants from the notes and mortgages, and look to Chevalier & Co. alone for the money due upon them, and the contract has no such legal effect. An intent upon the part of the bank to release these defendants from their original obligations is a vital element going to make up a novation in this case. That intent is lacking, and for this reason alone the claim of novation must fail.

Even conceding the finding of fact made by the trial court to the effect that the bank, under the Chevalier transaction, did not release any of the mortgaged property from the effect of the mortgages, may be inconsistent with some other finding, still the mere presence of an inconsistency in findings does not constitute reversible error.

The Chevalier wine was not included in the decree of foreclosure. Hence appellants have no cause to complain, looking at the case from that standpoint. There being neither an estoppel against plaintiff's prosecution of this action as to the remainder of the mortgaged property, nor a novation as to the original obligations held by the bank, this finding of which complaint is made cuts no figure in the case.

The description of the property included in the decree of foreclosure coincides with the description found in the instruments of mortgage, and, in the absence of some showing to the contrary, this being an appeal from the judgment without a bill of exceptions, the decree will be presumed to be correct. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

131 Cal. 499

CARPY v. DOWDELL et al. (S. F. 1,837.)

(Supreme Court of California. Feb. 4, 1901.)

APPEAL AND ERROR—REJECTION OF EVIDENCE—SUBSEQUENT ADMISSION—MORTGAGES—FORECLOSURE SALE PENDING APPEAL—EFFECT—EVIDENCE—IMMATERIAL—REJECTION.

1. Where evidence was received proving substantially the same facts that rejected evidence was offered to prove, no error amounting to prejudice was committed.

2. Where, pending appeal from a judgment foreclosing chattel mortgages, no stay bond was given, and part of the mortgaged property was sold under the foreclosure, the proceeds being paid to the plaintiff therein, and the judgment was reversed and the cause remanded, such sale and payment of the proceeds did not amount to a payment of the notes, so as to bar a subsequent foreclosure, since by the reversal of the judgment the litigation took the form it had prior to its entry, and the notes stood unpaid.

3. Where certain wine was not included in a judgment foreclosing a chattel mortgage thereon, and also on other property, it was not error to reject evidence, relative to such wine, which was immaterial on the question of estoppel, except as to that wine, and did not tend to establish a novation.

Department 1. Appeal from superior court, Napa county; E. D. Hamm, Judge.

Foreclosure of chattel mortgages by Charles Carpy against James Dowdell and others. From an order denying a new trial, defendants appeal. Affirmed.

Rodgers & Paterson and F. E. Johnston, for appellants. Bigelow & Titus, for respondent.

GAROUTTE, J. This is an appeal from an order denying defendants' motion for a new trial in cause No. 1,670, this day decided upon appeal from the judgment. 63 Pac. 778.

While the original appeal (115 Cal. 677, 47 Pac. 695) was pending in this court, defendants having given no stay bond, a portion

of the personal property mortgaged was sold under foreclosure proceedings. The judgment upon that appeal was subsequently reversed, and the cause remanded for a second trial. Thereupon, defendants filed a supplemental answer, setting out that the notes and mortgages forming the subject-matter of the litigation had been fully paid, satisfied, and discharged. At the present trial in the superior court, for the purpose of establishing this allegation of payment, defendants offered in evidence the execution and proceedings had thereunder pending the first appeal. This evidence was rejected, but evidence was received which proved substantially the same facts; and for that reason no error amounting to prejudice was committed by the trial court, even conceding the ruling erroneous, which proposition we do not decide. It is not disputed but that the sale took place pending the appeal, and that the proceeds of the sale, to the amount of the judgment, were paid over to the plaintiff. But the contention of respondent is that those acts did not, in law, amount to payment of the notes. With that contention we agree, and the court so found the fact and the law. The sale under foreclosure, subsequently followed by a payment of the proceeds thereof over to the plaintiff, may indicate that he has a large amount of money belonging to defendants, but it falls short of proving payment of the notes involved in this litigation. There is no pretense that defendants in any way consented to this sale, but, on the contrary, one of them testified that they did not consent. The judgment upon which the sale was based was reversed and set aside by this court. The foundation upon which the order of sale and all the proceedings had thereunder rested was taken away. By the reversal of the judgment the litigation took the form it had prior to its entry, and the notes stood unpaid. Thereafter the parties stood in the same position as if no judgment had ever been rendered. Counsel for appellants cite no authority which holds that the acts here considered amount to a payment of the notes. Upon the other hand, there is both authority and principle looking to the contrary. 2 Freem. Judgm. § 482.

The property which may be designated as the Chevalier wine was not included in the judgment of foreclosure. Hence, in view of the law as declared in this cause upon appeal from the judgment, no error was committed by the trial court in rejecting the evidence bearing upon that transaction; for this evidence of Chevalier and others was not material upon the question of estoppel, other than as to the Chevalier wine. Neither did it tend to establish a novation. For the foregoing reasons, the order appealed from is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

Action by Thomas L. Tally against H. Parsons and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

J. C. Brown, for appellants. Clarence A. Miller, for respondent.

COOPER, C. This action was tried before the court, findings filed, and judgment entered for plaintiff. Appellant Ganahl has appealed from the judgment on the judgment roll. The only question necessary to be determined is as to whether the findings entitled the plaintiff to judgment against appellant. It appears from the findings that plaintiff's assignor entered into a written contract with defendant Parsons, under the terms of which Parsons agreed to build a dwelling house for said assignor upon the premises described in the complaint for the sum of \$2,344, to be paid in certain installments. The contract provided that, in case the said Parsons should fail to prosecute the work with diligence, or in the performance of his agreement in any respect, the owner (plaintiff's assignor) shall be at liberty to terminate the employment, enter upon the premises, and complete the building. It further provided that, in case of the failure of Parsons to complete the building according to the contract, the owner should have the right to employ any other person or persons to finish the work and provide the materials therefor, and contained the following clause: "The expense incurred by the owner as hereinbefore provided, either for furnishing materials or finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive between the parties." At the time of the execution of the contract the contractor executed and delivered to the owner his bond in the sum of \$800, with appellant as one of the sureties thereon, conditioned that the contractor should faithfully perform all the terms and conditions of the contract, and complete the building according to the plans and specifications, and, when completed, deliver the same up to the owner free from all liens. After the commencement of said building and the payment of various amounts, the contractor, without any just cause, refused to complete the building, and abandoned the contract. The owner thereupon took possession, employed men, purchased materials, completed the building, and necessarily expended in its completion according to the plans and specifications the sum of \$513.33 over and above the contract price, for which sum plaintiff recovered judgment. The court found that the architects "never did audit and certify to the costs and expenses for materials and labor for the completion of said building by said Mary A. Tally, and that said architects never did audit or certify to any or all of the expenses for the completion of said building; * * * that said architects were never called upon or asked by said Mary A. Tally, or by any other

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TALLY v. PARSONS et al. (L. A. 984.)

(Supreme Court of California. Feb. 11, 1901.)

BUILDING CONTRACT — DEFAULT OF CONTRACTOR — COMPLETION BY OWNER — EXPENSE — RECOVERY — CERTIFICATE OF ARCHITECTS — NECESSITY — LIABILITY OF SURETY.

A contract for the erection of a house provided that on default of the contractor the owner could terminate the contract, and complete the building, the expense thereof to be audited and certified by the architects, whose certificate should be conclusive between the parties, and the contractor gave a bond conditioned for his faithful performance of the contract. The contractor abandoned the contract, and the owner completed the building, but did not have the expense thereof audited and certified by the architects, who had been discharged as incompetent. *Held*, that the expenses incurred by the owner could not be recovered from the sureties on the bond without the architect's certificate, they not having been shown to have been incompetent or dishonest, as charged, or to have refused to certify the expenses.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. C. B. Hebbard, Judge.

person, to audit and certify, or audit or certify, to the expenses for material and labor for the completion of said building." The court further found that, immediately after the abandonment of the contract by Parsons, the owner discharged the architects on the ground that they were careless, dishonest, and incompetent, and never afterwards employed them.

Appellant was surety for the faithful performance of the contract by Parsons. He was bound only by the express terms of his contract, and to the extent, and in the manner, and under the circumstances pointed out in his bond and the building contract, to which it referred, and no further. He was entitled to stand on its precise terms. *Pierce v. Whiting*, 63 Cal. 543; *Carter v. Mulrein*, 82 Cal. 169, 22 Pac. 1086, 16 Am. St. Rep. 99. It was a part of the terms and conditions of his contract that if the owner, by default of the contractor, should be compelled to furnish labor and materials and finish the building, any damage incurred through such default should be audited and certified by the architects. This was a condition precedent, and was inserted for the protection of the contractor and the sureties. The architects were named in the contract, and were the agents of both parties. The sureties agreed to the contract and as to the selection of the architects therein named. It was competent for the parties to agree that, in case of loss, expense, or damage to the owner, such loss should be audited by a tribunal of their own selection. They did make such agreement, and selected such tribunal, and, unless some valid reason is shown, the auditing by such tribunal is a condition precedent to plaintiff's recovery. In *Smith v. Briggs*, 3 Denio, 73, the defendant had covenanted with the plaintiff for doing the carpenter work of certain houses, and to pay him when he should receive from the architect his certificate that the work was fully and completely finished according to the specification annexed to the contract. It was held that giving the certificate by the architect was a condition precedent, the performance of which must be averred in an action brought to recover payment for such work. In *Smith v. Brady*, 17 N. Y. 174, the contractor was to be paid the balance "when all the work should be completed and certified by the architects to that effect." It was held that the certificate was a condition precedent, and in the opinion it is said: "The parties have seen fit to make the production of such a certificate a condition precedent to the payment. The plaintiff is as much bound by this part of his contract as any other. It is not enough for him to bring his action, and say that he has completed the work which he undertook to do. He has agreed that the architects named should decide whether the work is completed or not." See, also, *President, etc., of Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 263; *U. S. v. Robeson*, 9 Pet.

328, 9 L. Ed. 142; *Wolf v. Michaelis*, 27 Ill. App. 337; *De Mattos v. Jordan* (Wash.) 46 Pac. 403. In the latter case the action was upon the bond of a contractor, and is in many respects similar to the case at bar. The clause in the contract was: "The expense incurred by the owner as herein provided either for furnishing materials or finishing the work shall be audited and certified by the architect, and his certificate thereof shall be conclusive upon the parties." In the opinion it is said: "We deem it proper to observe that appellant can, under the terms of the contract, only recover such of the expenses incurred by him for furnishing materials or finishing the work as shall have been audited and certified by the architect. * * * The purpose of this provision was to protect the sureties against excessive and unjust charges for work and material, and it was agreed that the certificate of the architect should be conclusive as to the amount of expenses incurred by the owner." This court has held that, where a contract provides for the payment of such sum as may be determined by arbitrators, the submission to arbitrators and procuring an award is a condition precedent to recovery. *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Scammon v. Denio*, 72 Cal. 395, 14 Pac. 98. It is said by respondent that the rule does not apply to the present case, for the reason that the contractor repudiated the contract by abandoning it, and giving notice to the owner, and for the reason that the owner of the premises discharged the architects. The abandonment of the contract by the builder and contractor would not impair the clause as to procuring a certificate from the architects. If the contractor had not failed to perform his duty, and abandoned the contract, there would never have been any expense incurred by the owner, and no necessity for procuring the certificate. The sureties never repudiated the contract, nor waived any condition therein. The condition was inserted in order to provide a method of arriving at the damage to the owner in case the contractor abandoned or failed to perform his contract. When the contractor abandoned the contract, and the owner completed the building, the very contingency arose for which provision was made as to procuring the certificate. The contractor could not repudiate this provision of the contract as to the sureties, no matter what effect his repudiation might have upon himself. Neither does the finding of the court that the owner discharged the architects relieve plaintiff of the condition in the contract. The finding states that the owner discharged the architects on the ground that they were careless, incompetent, and dishonest; but there is no finding that such grounds were true. Even if they were true, there would have to be some allegation or finding showing a good and sufficient excuse for not having the amount audited and certified by the architects. If the architects had refused to

act in the matter, or if they had acted, but acted fraudulently, or corruptly, or through mistake, the plaintiff could have alleged and proven such excuse, and thus relieved himself of the condition. It follows that the judgment should be reversed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

131 Cal. 521

HORGAN v. JONES et al. (S. F. 1,748.)

(Supreme Court of California. Feb. 11, 1901.)
STREET RAILROADS—COLLISION WITH VEHICLE—EVIDENCE—SUFFICIENCY.

Defendant's electric car collided with the rear end of a heavy truck drawn by a four-horse team, causing the leaders of the team to run away against the plaintiff. The conductor, who was called as plaintiff's witness, testified that the track was dry, and that a reversed current could have stopped the car in 30 feet. The result of the collision, which occurred while the car was coming down grade at a speed of more than six miles per hour, demonstrated that the motorman, who was inexperienced, did not slacken the speed, and that the cars were pushed more than 60 feet, half of that distance being on level ground. The driver of the wagon testified that no signal was given of the approach of the car, as stated by the conductor and motorman. *Held* sufficient to sustain a verdict that the motorman's negligence contributed directly to plaintiff's injury.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by John Horgan against Hugh P. Jones and another, as partners, and the Market Street Railway Company and others. From a judgment for plaintiff, the defendant company appeals. Affirmed.

W. H. L. Barnes, for appellant. Peri E. Allen and M. B. Kellogg, for defendants Jones and others. Sullivan & Sullivan, for respondent.

TEMPLE, J. On the 11th of January, A. D. 1897, the corporate defendant the railway company owned and was operating a street railway on Page street, in San Francisco, between Broderick and Devisadero streets. On this block the street is 68 feet 9 inches wide, and the sidewalks 12 feet each. From the curb on the southerly side to the nearest rail is 11 feet and 4 inches. The grade from Broderick street to Devisadero street is 12.12 per cent. descending. At about 3 o'clock p. m. of that day an electric car was descending from Broderick on the southerly track easterly towards Devisadero street. A four-horse team, hauling a heavy, but unloaded, truck, was descending on the southerly side of the street, having its northerly wheels very near, but not on, the track. It was in advance of the car, but how far when the car left Broderick street the evidence does

not show. When the car was about half way to Devisadero, the conductor of the car thought the truck was about 50 feet ahead. From street to street the block is 412½ feet. The truck was so situated that it must have been obvious to the motorman that the car could not pass without a collision. A collision did occur, which resulted in a serious injury to plaintiff. The suit is against the owner of the street railway; Lidstrom, the motorman; and against Jones and King, owners of the truck, and Norman, the driver of the truck. The action is so brought upon the theory that the negligence of all contributed to the injury. The leaders of the team ran down the street and against plaintiff. At the trial the appellants admitted all the facts necessary to establish the case for the plaintiff, except negligence on the part of such defendants. Of course, it does not matter how negligent the driver of the truck may have been, if there was proof to sustain the verdict to the effect that the motorman was also guilty of negligence which contributed directly to the injury. In other words, there is no purpose in the inquiry as to whether the driver of the truck was guilty of mere contributory negligence, such as would have prevented him from recovering damages for personal injuries against the railway company. The real contention of the appellants is that the injury resulted solely from the negligence of the driver of the truck, and that the motorman was not negligent.

The plaintiff, to make out his case, called the defendant Norman, who drove the truck, and the conductor, McCormick. Each of these, in some important respects, made confused or contradictory statements. Mr. McCormick, the conductor, stated that about one-half way down the block he went forward to turn the switch into Devisadero street, and discovered the truck on the right-hand side, so close that the car could not pass. The motorman rang his bell, and put on the brakes, and when within about 25 feet reversed the current. Still the collision occurred, and the leaders on the team broke loose, and ran down Page street. "After the car struck the wheel, it went forward about twenty feet before coming to an actual standstill,—right down to the level there. * * * A car traveling at the usual rate of speed on the grade could be brought to a standstill by applying the brakes and reversing the current in about fifty feet or so, I should judge. * * * When I first observed the wagon, I should judge it was probably twenty or thirty feet from the car,—about twenty feet ahead of the car when I first observed it. The car was then about the middle of the block. When I first observed the lumber wagon, it was about twenty feet ahead of the car. I cannot say at what rate of speed the car was coming down the grade, but it was a slow rate of speed. It was coming down at the usual rate for that grade. * * * I noticed the motorman apply the brake and re-

verse the current when the car was about twenty-five or thirty feet from the lumber wagon. After the car struck the wheel, the car went about twenty feet down to the level there. He stopped the car at Devisadero street. The collision occurred on Page street, about twenty-five feet from the corner. The car stopped on Devisadero street. After striking the wheel, the front of the car went about twenty feet before it came to a full stop. It came to a standstill about the middle of Devisadero street. My best recollection is we stopped right on Devisadero street, and the front of the car was about in the middle of Devisadero street." On cross-examination the witness testified that the car went slowly down the hill, under the brakes, all the way, and he knew the bell was rung. He said: "I judge the rear end of the truck was about fifty feet or more from the front of the car when he rang the bell for the wagon. He rang quite a while. I cannot say how many times he rang the bell. And he applied the brakes and the current also, and he had to stop ringing the bell first. I was looking at the man driving the team, and at no time, as near as I could judge, did the driver pay any attention to him whatever. I did not see him turn. He kept on going on the right-hand side of the car. He did not seem to pay any attention to the bell, if he heard it. That I don't know. I know the bell was rung. * * * I should judge the car was going down the grade about two miles an hour, probably more. * * * There are no other means provided for checking the speed of the car except the brake and reversing the current. I saw him use both of these." Here the witness repeats three times over that the wagon was about 50 feet ahead of the car when he first saw it, about half way down the grade, and the bell was then ringing. Also that he saw the motorman reverse the current, and release the brakes, when about 25 feet from the wagon. The track was dry on that day, and a reversed current might have stopped the car in 30 feet. Again, he said the driver did not seem to hear the bell; acted as though he did not hear it. The witness did not hear the noise of the wagon. The car made no particular noise. The motorman did all he could to stop the car. The motorman had never been on a car with him before. Did not know he was a green hand. Knew that he had been longer than a week in the employ of the company. Upon being recalled he stated, among other matters: "When I first went to the front the car was, maybe, one hundred feet from the wagon, and he was ringing the bell then. I should judge he rang it all of the way down to within thirty feet of the wagon. He rang the bell a distance probably of seventy feet." The witness was preparing to step out to turn the switch when the collision occurred. The switch is about 20 feet from Devisadero street, and the grade is as heavy there as upon any part of

the hill. The car generally stops without reversing the current, so that, had there been no danger of a collision, the motorman should have been prepared for a stop. The result demonstrated that there was no unusual slackening of the car, but the contrary. Instead of making the usual stop, it carried the heavy truck, overcoming the resistance of the horses as well, more than 30 feet over the level ground on Devisadero street. Instead of carrying the wagon 20 feet, as stated by McCormick, it must have gone more than 60 feet, and was only stopped after leaving the grade. The jury were justified in believing—as I certainly do—from the evidence that the car was not slackened at all by the attempt to reverse the current, but, to the contrary, that the motorman lost control of the car, and it was precipitated, unchecked by any brakes, upon the truck. In other words, there was gross negligence, or utter incapacity,—probably the latter,—on the part of the motorman. Norman, the truck driver, testified that his horses were walking at the rate of from three to four miles per hour. The conductor saw the wagon when the car was about one-half way down the hill, at which time he says the wagon was about fifty feet ahead, and the collision occurred about 25 feet above Devisadero. The speed must have been sufficient to overtake the wagon while the latter was going 130 feet, more than 6 miles per hour. Norman and Zoberbier, the only other witness, agree that the collision occurred when the wagon was about two-thirds of the way down the hill. If this be true, the wagon must have been pushed more than 100 feet, and the speed must have been much greater than 6 miles per hour. Norman also testified most positively that the bell was not rung at all; that he would surely have heard it if it had been rung, and could easily have avoided the collision had he been notified of the approach of the car in the usual mode. The preponderance of evidence is decidedly in favor of the proposition that the bell was rung, but surely there was evidence before the jury which they were at liberty to adopt to the effect that it was not. On the whole, it seems clear that the verdict and judgment against the appellants are fully sustained by the evidence.

The owners of the truck and the driver have not appealed, and, if it be admitted that Norman was also guilty of negligence, such admission would not affect the case of the appellants. We need not discuss, therefore, the question as to how the failure of the truck driver to look back or to listen would affect his rights as against the railway company. That the position of the truck and the conduct of the driver could affect the liability of the appellants is urged upon the proposition that the motorman had a right to assume that the driver would get out of the way, and not obstruct the track. It is evident from the testimony of the conductor

that before the motorman attempted to reverse the current the driver was not heeding the signals, if made, and, as already stated, the jury were warranted in finding that when the motorman attempted to reverse the current, through his incompetence he failed to do so, but merely loosened the brakes, and let the unchecked car loose upon the wagon.

Appellants complain of the modification of an instruction asked by them. The modification did not, in a respect material in this case, change the meaning of the instruction. The instruction as given was fully as favorable to appellants as they were entitled to have given. The judgment and order are affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

6 Cal. Unrep. 634

PEOPLE v. YOUNG. (Cr. 631.)

(Supreme Court of California. Feb. 9, 1901.)

HOMICIDE—INSTRUCTIONS—CHARACTER OF DECEASED.

A charge on a murder trial that evidence of the character of deceased, tending to show that he was a violent, quarrelsome, and dangerous man, was not admitted as tending "in any way" to justify his slaying by accused, was not improper when qualified by the rest of the instruction, to the effect that the evidence of bad character was to be considered only as a circumstance illustrating the facts of the homicide, and indicating the aggressor and the nature of the aggression.

In bank. Appeal from superior court, Mendocino county; J. M. Mannon, Judge.

G. G. Young was convicted of manslaughter, and he appeals. Affirmed.

Arthur J. Thatcher and L. J. Maddux, for appellant. Tirey L. Ford, Atty. Gen., for the People.

PER CURIAM. The defendant was charged with murder, and appeals from a judgment convicting him of manslaughter and from an order denying him a new trial.

It appears that on the 20th day of July, 1899, at 4 or 5 o'clock in the afternoon, the defendant and Caleb Greenwood, with several other persons, were in the saloon of Charles Lockhart, near Monroe post office, in Mendocino county. Greenwood and defendant being both under the influence of liquor, they were soon engaged in a war of words, which concluded with Greenwood committing a violent, brutal, and unjustifiable assault on Young, in which Young was thrown down on the floor at least twice. He was kicked and badly wounded in the face, the clothes were torn from his body, and he was otherwise maltreated by Greenwood. This brutality finally ended, without any interference on the part of the bystanders, and Young retired to a rear room, reclothed himself, returned, treated all hands, including Greenwood, and left the saloon. About two hours later Young reappeared

at the saloon with a Winchester rifle in his hands, and inquired for Greenwood. He remained on and about the premises for about half an hour, and during that time he took a drink with a friend, and asserted that he was a bad man, and would not be walked on, talked about shooting the bottles off the bar, wanted to find Greenwood, and said, "I'll fix him; I'll allow no man to stamp me in the floor." Soon after all this, and about 2½ hours after the assault on him by Greenwood, the defendant went out at the front door of the saloon, with his gun still in his hands, intending, as he testified, to go to the pump at the rear of the saloon to wash the blood off his face. When the defendant was near the rear end of the saloon, he saw Greenwood at the rear door thereof, and shot him twice, from the effects of which Greenwood died on the following day. The defendant testified that immediately before the shooting Greenwood straightened up, and slapped his left hand on his hip pocket, and said, "I am heeled, you son of a bitch." Defendant also testified that before the trouble with Greenwood, and on that same day, he saw the handle of a pistol in Greenwood's pocket. An apparently disinterested eyewitness testified that at the time of the shooting Greenwood was standing with one foot on the step, with his hand on the door, and the right hand by his side, and made no hostile movement, and, when Young came around, Greenwood said, "Don't shoot me, Gib." Another witness, who heard the shooting, and went to Greenwood where he fell, and stayed with him till he was removed, testified that he searched Greenwood, and found no weapon on him. There was no evidence except defendant's testimony tending to show that Greenwood was armed at the time of the shooting. It was shown without conflict in the evidence that Greenwood's reputation in the neighborhood for peace and quietude was bad, and that defendant was well acquainted with that fact.

The only reasons urged for a reversal on this appeal are that the court erred in refusing defendant's offered instruction No. 7, and in giving the instruction No. 12 requested by the prosecution. Said refused instruction reads as follows: "Evidence has been offered as to the character of deceased, Greenwood, for peace and quiet. I charge you that, in case of doubt as to who was the aggressor, the previous character of the deceased for peace and quiet is an important element to be considered by the jury. If you believe from the evidence that the deceased was a quarrelsome and dangerous man, and had the reputation of being a dangerous and quarrelsome man in the community in which he lived, you have the right to take these things into consideration in determining as to the danger the defendant, Young, was in when he fired the fatal shot." The instruction given is as follows: "Evi-

dence has been introduced before you of the character of the deceased, and tending to show that he was a violent, quarrelsome, and dangerous man. This was not admitted as tending in any way to justify his slaying by the defendant. A party has no more right to slay a bad man than a good one. Both are equally protected under the law. The unwarranted slaying of either is equally a crime. The evidence of bad character is to be considered by the jury only as a circumstance illustrating the facts of the homicide, and indicating the aggressor and the nature of the aggression; it being more probable that a man of violent and dangerous character would make an unprovoked and deadly assault than that a quiet and peaceable man would do so." There is no valid objection to the instruction given. The words, "This was not admitted as tending in any way to justify his slaying by the defendant," when read with and qualified by the rest of the instruction, are not improper; and the instruction, thus read, correctly enunciates a principle of the law of evidence applicable to the case in hand. The instruction given substantially covers every proposition contained in the refused instruction, and is as favorable to the defendant as he could reasonably ask. In addition to this, the court also instructed the jury fully as to the law of self-defense as it applied to the case. For the reasons given, there was not any error in refusing the one or in giving the other of the instructions quoted. The judgment and order are affirmed.

131 Cal. 415

In re ADAMS' ESTATE. (Sac. 715.)

(Supreme Court of California. Jan. 22, 1901.)

EXECUTORS—ACCOUNTING—ANNUAL SETTLEMENTS—FINAL ACCOUNT—CREDITS—INDIVIDUAL TRANSACTIONS—FINDINGS—APPEAL.

1. Code Civ. Proc. §§ 1622, 1636, require an executor to render accounts showing amounts received and expended and the amount of claims presented, and that notice be given of final accounting, and that all claims not passed in former accounts may be contested by heirs for cause shown. *Held*, that an executrix who filed and had settled annual accounts from 1890 to 1897 on final accounting might present, and have allowed, a claim for machinery rented to the estate for the years 1890 to 1893; such claim not having been passed on, and an opportunity being given to contest its allowance.

2. A finding by the court that a claim by an executrix for attorney's fees was reasonable will not be interfered with on appeal except for a plain abuse of discretion.

3. Where an executrix sold property of the estate and also property of her own, taking the purchaser's notes and afterwards crediting a partial payment on her own note, on the purchaser becoming insolvent and returning the property the executrix was not entitled to transfer all the property to the estate, crediting her note with what she deemed the value of her property, and to charge the estate with the balance due her, though the purchaser was the lessee of the realty of the estate, and used the property thereon, and after its return it was sold, and the estate received the proceeds.

4. Findings filed in contesting an accounting by an executrix may be considered on appeal,

though it is not necessary to have findings made in such case.

5. A decree allowing an account by an executrix, erroneous as to some of the items, may be corrected on appeal, and so affirmed.

Department 2. Appeal from superior court, Yolo county; E. E. Gadis, Judge.

Accounting by Elizabeth Adams, as executrix of D. Q. Adams, deceased. From a decree allowing the account, the Bank of Woodland, a creditor, appeals. Corrected and affirmed.

Mr. Craig, Mr. Hawkins, and Thos. B. Bond, for appellant. R. L. Simpson and Hurst & Hurst, for respondent.

PER CURIAM. Elizabeth Adams, the executrix of the will of deceased, filed her final account, asking for its settlement and allowance. The Bank of Woodland, a creditor of said estate, filed a written contest as to certain items of the account. Findings were filed, and a decree entered allowing the account and the contested items. This appeal is from the decree and an order denying a new trial.

It is claimed that the court erred in allowing the executrix the item of \$4,295 for the use of her steam engine and harvester for the years 1890 to 1893. The main argument urged in support of this contention is that the executrix filed and had settled her annual accounts from 1890 to 1897, and during this time rendered four such accounts; and, for the reason that in those accounts no charge is made for the use of the steam engine and harvester, she should now be estopped and precluded by the decrees settling said accounts. The accounts, as so settled, made no mention of the items in dispute, and the question is as to whether in such case the executrix can charge such item in her final account. We think the settlement of the annual accounts were conclusive only as to such matters as were actually included therein, and directly passed upon by the court. It is provided in Code Civ. Proc. § 1622 et seq., that six months after his appointment, and at any time when required by the court of its own motion, or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit, under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs. Any person interested may appear, and by objections in writing contest any account or statement therein. Within 30 days after the expiration of the time mentioned in the notice to creditors the executor or administrator must render a "full account and report of his administration." This account must exhibit all debts which have been presented and allowed during the period embraced in the account. If the account be for a final settle-

ment, the notice of settlement must state such fact. On the day appointed for settlement any person interested in the estate may appear and file his exceptions, in writing, to the account, and contest the same. It is then provided by section 1636: "All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs for cause shown." This item was a matter not passed upon on the settlement of any former account, and the contestant had its day in court, and was allowed to and did contest the charge. It could not have contested the item in any former account, because no former account contained it. No matter what was contained in former accounts, the item in dispute here has been only once in any account, and, when so in, the contestant filed his objection in writing, produced its witnesses, and was given a hearing. Section 235 of the probate act of 1861 contained the same language herein quoted from Code Civ. Proc. § 1636. In *Walls v. Walker*, 37 Cal. 424, it was held that an annual account of an executor or administrator is not conclusive, except as to such items as are included in it, and actually passed upon by the probate court. In the opinion it is said: "The fact that the heirs, legatees, and creditors are thus expressly permitted to contest matters not included and passed upon in any former account necessarily implies that the administrator is not precluded from going behind a former account, and bringing forward charges which, through inadvertence or oversight, may have been omitted." Mr. Woerner, in the second edition of his work on the American Law of Administration (page 1126, § 504), says: "But, even where the accounting or settlement is conclusive as to the matters adjudicated, it cannot be conclusive as to matters omitted from the account, which may, therefore, be surcharged in subsequent settlements." The text refers to and is supported by *McLellan's Appeal*, 76 Pa. St. 235; *Saxton v. Chamberlain*, 6 Pick. 422, 425; *Blake v. Pegram*, 109 Mass. 541, 551.

It is further claimed that the item should not be allowed for the reason that the executrix agreed at the time of the settlement of her third annual account that, if contestant would consent to the allowance of said account as rendered, she would make no charge for the engine and harvester. It is sufficient to say that there was a conflict of evidence as to whether or not any such agreement was made, and the finding of the court is in favor of the executrix upon the proposition. The executrix testified that she made no such agreement. As to the suggestion that the executrix incurred loss to the estate by the farming operations for which the charge is made, there appears to be no evidence or finding upon the point. If it had been alleged, and found upon evidence, that the item was incurred in carrying on farm-

ing operations by the executrix of her own volition, and that such farming resulted in loss to the estate equal to the amount of the charge, the court no doubt would not have allowed it.

The account contained a charge of \$800 paid as attorney's fees to one Hopkins for services in behalf of the estate as assistant counsel. The court found "that the services for which the sum of \$800 were paid were properly rendered for and on behalf of said estate, and said sum is the reasonable value of said services, and that the same is a proper charge against said estate." There is evidence sufficient to support this finding. The court below had the right to determine what services were rendered, and the reasonable value thereof. The order of the lower court as to attorney's fees will not be interfered with, except in case of a plain abuse of discretion. *Freese v. Pennie*, 110 Cal. 470, 42 Pac. 978.

The account charged the estate with the following: "Balance on note of \$7,111.11 due Elizabeth Adams from J. R. Williams, Sept. 1st, 1892, for which she received from Williams property of the value of \$5,000 (steam engine and harvester), and estate received from Williams property of the value of \$2,111.11, the same being still due from the estate and unpaid, \$2,111.11." The court erred in allowing this item. The evidence shows that in the year 1890 the executrix leased the lands of the estate to one Williams for the term of five years. Williams bought of the executrix a large amount of personal property of the estate, for which he gave two notes, one for \$9,700, and another for \$1,826. He also bought the steam engine and harvester, giving the executrix his note for the purchase price, \$6,500. On September 1, 1892, Williams owed the estate on the two notes, with interest, \$13,434.73, and the executrix on the note and interest for the engine and harvester \$7,111.11. Williams had paid the executrix \$690.20 prior to September 1st, which she had applied on her own \$6,500 note. Williams, at the last-named date, was insolvent, and transferred all the property he had bought of the estate, with some other property, to the executrix for the estate. He also transferred the engine and harvester to the executrix in her own right. In other words, the estate took back from Williams its property, and the executrix, in her own right, took back the engine and harvester. The executrix received on her note of \$6,500 the \$690.20, credited the note with \$5,000, the amount she deemed to be the value of the engine and harvester when returned to her, and seeks to charge the estate with the balance due on the note, \$2,111.11. There is nothing in this record to justify any theory upon which the estate could be held for the balance of Williams' debt to the executrix. The estate claimed no interest in the transaction. It was not the guarantor of the debt of Williams to the executrix. The property returned to the estate was for the benefit of

the estate. If the entire amount of property returned was sold for sufficient to pay the notes in full due by Williams to the estate, and the note due the executrix in her own right, and the account clearly showed this, a different question would be presented. But what right had the executrix to take back her own property, fix her own appraisal upon it, credit her note with the amount so fixed, and charge the estate with the balance? She has charged the estate with \$4,295 for the use of this property so returned to her, she received the \$690.20 from Williams, and she now seeks to charge the amount of the face of the note, less her own value placed upon the engine and harvester. In selling the property of the estate to Williams and in taking it back the executrix acted without any order of court. Williams, it is claimed, was insolvent as to the estate, but it is sought to have the estate make him solvent as to the executrix. There was not any separate account kept of the property so returned to the estate, and it cannot be said that the estate ever received even the face value of its notes given by Williams. The executrix testified: "The property received from Williams on this settlement has all been received by the estate. Most of it has been sold, the funds derived from the sales paid into the estate, and the accounts show it. Of course, a large amount of this property was used for the estate, and some of it worn out on the lands of the estate." When findings are filed in a contest of this kind, they may be considered for the purpose of determining the issues upon which such findings are made. *Miller v. Lux*, 100 Cal. 613, 35 Pac. 345, 639. But it is not necessary to have findings in such case. In *re Levinson's Estate*, 108 Cal. 455, 41 Pac. 483, 42 Pac. 479. When the decree allowing a final account is found to be erroneous as to an item or items, this court may direct the decree to be corrected, and, as corrected, affirm it. In *re Parsons' Estate*, 65 Cal. 240, 3 Pac. 817. The court below is directed to correct the decree as to the item of \$2,111.11 in accordance with this opinion, and, as so modified and corrected, it is affirmed, with costs to appellant.

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JOOST v. CRAIG et al. (S. F. 1,592.)

(Supreme Court of California. Feb. 7, 1901.)

NOTARIES PUBLIC—ACKNOWLEDGMENT—NEG-
LIGENCE—IDENTITY OF AFFIANT—CON-
TRIBUTORY NEGLIGENCE.

1. Under Pol. Code, § 801, providing that a notary public and the sureties on his bond are liable to a party injured for all damages sustained by the misconduct or neglect of the notary, a notary does not act judicially in taking an acknowledgment, and is liable for negligence.

2. In an action against a notary for negligence in taking an acknowledgment, in certifying that the person appearing before him was the person described in the deed, a nonsuit, on the ground that the plaintiff was guilty of contributory negligence, implied that plaintiff's case

as to the negligence of the notary was made out.

3. Where a notary, in acknowledging a deed, certified that the person appearing before him was known to him to be the person described in the deed, there was no negligence in the grantee in relying on such certificate.

4. Under Civ. Code, §§ 1185, 1189, providing that an acknowledgment of an instrument should not be taken unless the officer taking it knows, or has the oath of a credible witness, whose name must be stated, that the person making the acknowledgment is the person described in the instrument, a notary public not obeying the statute is liable for damages to any one injured by relying on the certificate of acknowledgment.

5. Where a notary, in acknowledging a deed, certified that he knew the person to be A., "and the person described in the deed," and in an action against the notary by the grantee it was shown that the person described in the deed did not execute it, the notary was not entitled to have a motion for nonsuit granted on the ground that it did not appear that some person known to the notary by the name of A. did not appear and make the acknowledgment.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by Behrend Joost against Lee D. Craig and others. From a judgment in defendants' favor, plaintiff appeals. Reversed.

Mullany, Grant & Cushing, for appellant. Denson, Oatman & Denson and W. T. Baggett, for respondents.

TEMPLE, J. This is an action against a notary public and his sureties for damages charged to have resulted from the negligence of the notary. As appears from the record, in April, 1891, one Fisher, who was a real-estate broker in San Francisco, as such broker offered to sell to plaintiff 10 lots of land situate in San Mateo county, then standing in the name of Charles A. Anderson. The lots were part of the Abbey Homestead Association's lands. Plaintiff was familiar with these lands, and had bought a portion of them. He contracted with Fisher at once for the property, agreeing to pay \$1,000 for it, conditioned, as usual, upon the title. He had an abstract made, and, finding that the title of Anderson was good, informed the broker that he would pay whenever he received a deed from Anderson properly executed. A deed was produced, apparently executed by Charles A. Anderson, and acknowledged before the defendant notary, and certified by him as follows: "On this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one, before me, Lee D. Craig, a notary public in and for said city and county, duly commissioned and sworn, personally appeared Charles A. Anderson, known to me to be the person described in, whose name is subscribed to, who executed, the within and annexed instrument, and he duly acknowledged to me that he executed the same," etc. In the body of the deed the grantor is described as "Charles A. Anderson, of Redwood City, county of San Mateo, state of California." It turned out that the

deed was a forgery, and was not executed or acknowledged by Charles A. Anderson, of Redwood City, or by any person known by that name, but the name of Charles A. Anderson was written by one Frank C. Koen. Plaintiff accepted the deed and paid his money, relying solely upon the certificate of the notary. The lots were of the market value of \$1,000. The plaintiff, through his reliance upon the certificate, paid the said sum of \$1,000, which was thereby lost.

It is provided in section 801 of the Political Code that, "for the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained." This statute sets at rest one of the contentions of respondent that in making an acknowledgment a notary acts judicially, and is therefore not liable in damages for mere negligence.

At the trial the court, on motion of defendants, granted a nonsuit, on the ground "that it appears from the evidence that plaintiff was guilty of such negligence as to put it beyond his power to recover anything from defendants." This ground implies that in other respects the case for plaintiff was made out. There could not be contributory negligence unless there was first negligence to which it contributed. There was no evidence which tended to show negligence on the part of the plaintiff, except that when the deed, apparently executed by Anderson, acknowledged before the defendant notary, and certified as above set out, was delivered to him by Fisher, he paid over the money to Fisher without further inquiry as to the identity of the grantor. This was not negligence on the part of plaintiff. He had a right to rely upon the certificate of the notary, and to presume without question that such officer had done his duty. No circumstance was brought to his attention which could raise a suspicion to the contrary. There was nothing which could have put the most prudent man upon inquiry. And the notary cannot excuse his negligence, under such circumstances, by the claim that the party who has been injured has trusted to his faithful performance of duty. The whole theory that the record of such instruments gives constructive notice of the contents of recorded instruments is founded upon the proposition that upon proper investigation the genuineness of such instruments has been determined. The certificate is also received as evidence in a trial in a court of law that the deed is genuine. If the deed is not genuine, but is forged, the notary and his sureties ought to be held for all damages, unless they have taken the precautions expressly required by the statute. The legislature has taken great care, though, considering the importance of the matter, not too great, to make this certificate reliable. Section 1185 of the Civil Code provides as follows: "The acknowledgment of an instrument must not be taken unless the officer tak-

ing it knows, or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation." The notary is expressly forbidden to take the acknowledgment unless he knows that the person making the acknowledgment is the person described in the instrument. Here such person was described as Charles A. Anderson, of Redwood City. If he did not know this, it should have been proven by the oath of a credible witness, whose name must be stated. Section 1189, Id. It is not enough that the person be introduced to the notary by a responsible person. If that were enough, there would be no purpose in requiring the oath; for such person could always furnish the introduction. This point has been often decided, although sufficiently obvious from the statute. To take an acknowledgment upon such introduction, without the oath, is negligence sufficient to render the notary liable in case the certificate turns out to be untrue.

The matter was considered in *Jones v. Bach*, 48 Barb. 568. It is there said: "The object of all these well-considered provisions, relative to the proof and recording of conveyances of real estate, was to protect owners of property and their creditors against forgery, as well as to secure the rights of grantees and mortgagees against spurious and fraudulent conveyances. Would this object be effected by the manner in which the acknowledgment in this case was made? Any one could be falsely personated without check or liability to punishment for crime, if a mere introduction at the moment shall authorize the officer to take the acknowledgment. The person who introduces, if the statement be false, only commits a falsehood; but, if he is sworn as to the truth of his statement, should it be knowingly false, he is guilty of perjury, and liable to a prosecution for a felony." The statute of New York there considered was not as clear on this proposition as ours. It did not expressly require the oath, but only "satisfactory evidence." But, even under that language, it was held that a mere introduction is not enough. The certificate here gave assurance that the notary knew of his own knowledge, and not upon mere hearsay, that the grantor was Charles A. Anderson, of Redwood City. If this certificate was not true, the notary should be held. The same matter was discussed in *State v. Meyer*, 2 Mo. App. 413. The court makes some suggestions as to what degree of acquaintance will authorize the notary to certify that he has personal knowledge, and also upon the proposition that an introduction, even by a responsible person, could not be relied upon, and says: "It is obvious that, when an officer taking an acknowledgment

and making a certificate assumes any such fact, he does it at his own risk. The law warns him, when he has not 'personal knowledge' of his own, to resort to certain observances which the law supposes to be sufficient in practice to prevent imposition. * * * But such a certificate is infinitely less liable to deceive or mislead than a declaration that the party making the acknowledgment is well known to the officer making the certificate. It puts all persons upon inquiry, and furnishes a clue for conducting it, and it complies with the law." This makes the certificate upon personal knowledge a guaranty of the genuineness of the instrument, and the court adds: "It is perfectly idle for him to protest that he did not know or suspect that his certificate was false. That may be taken for granted, but it is nothing to the purpose. His business was to know that it was true." A notary may take all due precautions, and fully comply with the statute, and still be deceived. In such case he would not be held liable, but, if he has not fully complied with the statute, the rule announced above is not a whit too stringent. This case was followed and commented upon in *State v. Balmer*, 77 Mo. App. 463.

It may be here remarked that the witness by whose oath the execution of an instrument is proven, when the person executing the instrument was not previously known to the officer, must himself be known to the notary. This is implied by the requirement that the officer shall certify that such person is a credible witness. When these necessary facts do not exist, the notary is expressly prohibited from taking the acknowledgment at all. When the notary does not obey this statute, he should expect to be held liable; and, I wish to repeat, these requirements are of great importance to the business world, and not at all too exacting. *Bank v. Murfey*, 68 Cal. 455, 9 Pac. 843, is not in conflict with these views. Murfey took the acknowledgment to a deed of one who personated the true owner, and signed his name to the instrument. The deed did not run to the impostor by his true name, but was taken by him to the president of the bank, and an application was made for a loan. The impostor then assumed the name of the fictitious grantee named in the forged deed. The president of the bank, after getting an abstract of the title, caused a note and mortgage to be prepared, and they were signed by the impostor in the bank, and were there acknowledged before a bank clerk, who was a notary. This acknowledgment was taken and certified by the employé of the bank, by the express direction of the bank president, who made the loan for the bank. The present case would have resembled that had Joost taken the impostor to the notary, and requested him to acknowledge and certify to the execution of the deed, upon the mere introduction to him by Joost. Such introduction would not have justified the officer, or

have constituted a defense to a suit by a grantee of Joost; but, by the rule announced in that case, Joost would, under the circumstances supposed, have been guilty of contributory negligence. There is no ground for such a contention here. Fisher, a real-estate broker, knowing that Joost was desirous of purchasing land in the "Homestead Tract," informed him of the opportunity, and upon being furnished the deed certified by Craig, as notary, he paid his money. Even had Fisher been the agent of Joost, there is nothing to show that he had any reason to doubt the truthfulness of the certificate. It does not appear, as it did in the *Oakland Case*, that Fisher knew that the certificate falsely stated that the officer knew that the person making the acknowledgment was the person described in the instrument. Had this statement in the certificate been true, there could have been no imposition.

It is argued that the judgment of nonsuit should be affirmed, because it was not proven that some person known to the notary as Charles A. Anderson did not appear before the notary and make the acknowledgment. Had such been the fact, it would not have been enough. The person might be known to him as Charles A. Anderson, though introduced to him. The certificate states, in effect, that the notary knew him to be Charles A. Anderson, and the person described in the instrument, to wit, Charles A. Anderson, of Redwood City.

The nonsuit was expressly granted because of supposed negligence on the part of Joost. As already stated, this implies that the court was satisfied that the certificate was false, and there was some evidence tending to establish such fact. It was shown that Charles A. Anderson, of Redwood City, did not execute the deed, and did not appear before the notary, and the signature was forged by Keon, who had and exhibited the deed before the acknowledgment was made. Keon furnished the deed to Fisher, and received the money. This was a fact peculiarly within the knowledge of the defendant notary, and which, in the nature of things, it would be difficult for plaintiff to prove. Under such circumstances, slight evidence is sufficient to shift the burden of proof. *People v. Lundin*, 120 Cal. 308, 52 Pac. 807. The judgment is reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

PEOPLE v. JOHNSON. (Cr. 626.)

(Supreme Court of California. Feb. 9, 1901.)
CRIMINAL LAW—INTENT TO COMMIT RAPE—
EVIDENCE—INSTRUCTIONS—WIT-
NESSES—IMPEACHMENT.

1. Defendant enticed a girl aged 12 years into his room, unbuttoned her clothes, put her on the bed, unbuttoned his own clothes, exposing his private parts, and touched and fondled the private parts of the girl. He tried to have in-

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tercourse with her, but did not, because of her refusal. *Held*, that a verdict of guilty of assault with intent to commit rape was justified, since, she being under 16 years of age and incapable of consenting, if he had in fact had sexual intercourse with her it would have been rape, and the intent with which he committed the assault must be supposed to be such as would ordinarily accompany such acts.

2. The court refused defendant's request to charge that, in order to find him guilty of an assault with intent to commit rape, the assault must have been made with the intent to perpetrate the crime of rape at all events, and if he voluntarily abandoned the attempt, if any there was, they must find him not guilty. *Held*, that the request was correctly refused, as the crime was complete when the assault was made with the intent to rape, and defendant could not purge himself of the crime he had committed by ceasing to continue the attempt.

3. On trial of defendant for assault with intent to commit rape, the fact that the district attorney was permitted to read certain questions and answers to two little girls, while on the witness stand, from their testimony given on the preliminary examination of the defendant before the magistrate, over defendant's objection that the prosecution was trying to impeach their own witnesses, was not prejudicial error, since the girls were the only material witnesses against him, and he would have been benefited by any weakening of their testimony.

Temple, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; Frank H. Dunne, Judge.

Charles Nells Johnson was convicted of assault with intent to commit rape, and appeals. Affirmed.

John S. Partridge, for appellant. Tiley L. Ford, Atty. Gen., for the People.

COOPER, C. The defendant was charged in the information of the crime of an assault with intent to commit rape, and upon trial was convicted. He appeals from the judgment and order denying his motion for a new trial.

1. It is contended that the evidence fails to show that defendant made the assault with the intent to commit rape, but that his intention was to gratify an unnatural desire, which is not a crime under the statute. The evidence shows that the defendant enticed two little girls (one aged 12 years, the age of the other not appearing in the record) into his room, unbuttoned the clothes of the 12 year old girl, put her on the bed, unbuttoned his own clothes, and exposed his private parts, and touched and fondled the private parts of the little girl in a manner too shocking and disgusting to be repeated in an opinion of this court. The child upon whom the defendant performed in the unnatural and disgusting manner before stated testified that defendant did not try to enter or touch her person with his private parts, but could have done so; that he wanted to have intercourse with her, but did not. The other little girl testified to substantially the same thing, and in addition stated that defendant wanted to and tried to have sexual intercourse with the 12 year

old girl who had submitted to his unnatural and disgusting desires, but that she would not let him. This is the substance of the testimony, and we think the jury were justified in finding the intention of the defendant to be as alleged in the information. The defendant assaulted the child. Being under 16 years of age, she was incapable of consenting, and therefore the assault was in law without her consent. If he had in fact had sexual intercourse with her, he would have been guilty of rape. As he did not have sexual intercourse with her, but did assault her, the question as to his intent was to be determined by all the circumstances and by the acts of defendant. The facts that defendant unbuttoned his trousers, that he took out his private parts, that he wanted to have sexual intercourse, but the child refused, were sufficient to justify the jury in drawing the logical, rational conclusion that defendant's object was to have sexual intercourse with the child. Whether he desisted because he had satisfied his morbid, depraved passions in the manner described in the evidence, or because he was afraid of an outcry from the child, or because of his impotence, are all matters of conjecture. We do not think the crime charged against this defendant, and of which he was convicted, is of such a nature that we should attempt to shield him upon imaginary reasons, or upon a theory that might possibly account for his acts as being done with the intent only to gratify an unnatural desire. We must suppose that his acts were done with the purpose and desire that would ordinarily characterize the acts of an individual of the male sex when such acts were done with one of the female sex. That a man would entice a little girl into his room, lock the door, put her on the bed, undress her, and fondle her for the purpose of gratifying an unnatural desire, and not for the purpose of having sexual intercourse, is possible, but not at all probable. The intent of a person cannot be proven by direct and positive evidence. It is a question of fact, to be proven, like any other fact, by acts, conduct, and circumstances. *People v. Landman*, 103 Cal. 581, 37 Pac. 518. It was the peculiar province of the jury to find the intent. *People v. Swalm*, 80 Cal. 49, 22 Pac. 67. If the facts proven were such that the jury might reasonably infer the intent to be as found by them, we would not be justified in disturbing the finding. We cannot say, as a matter of law, that the jury was not justified in finding the intent as alleged from the acts of defendant, and the circumstances under which they were committed.

2. It is claimed that the court erred in refusing to give the following instruction requested by defendant: "In order to find a defendant guilty of an assault with intent to commit rape, the assault must have been made with intent to perpetrate the crime of

rape at all events. If you find that defendant voluntarily abandoned the attempt, if any there was, you must find him not guilty." We are not given the benefit of counsel's views as to why the refusal was error, and we think the court correctly refused the instruction. The instruction, with the exception of the latter sentence, is substantially given in other parts of the charge. We do not think the latter sentence states a correct proposition of law. If the defendant made an assault as charged in the information, with the intent to commit rape, the offense was complete. He could not afterwards purge himself of the crime he had committed by ceasing to continue the attempt. If he had not ceased from some cause or other, the crime of rape would have been committed. The statute has made the attempt a crime. If defendant made the attempt he is guilty of the crime as charged. We agree with the following portion of the opinion of the supreme court of Michigan, in *People v. Courier*, 70 Mich. 368, 44 N. W. 572: "In cases of this kind it is not necessary that it should be shown, as in rape, that the accused intended to gratify his passion at all events. If he intended to have sexual intercourse with the child, and took steps looking towards such intercourse, and laid hands upon her for that purpose, although he did not mean to use any force, or to complete his intent if it caused the child pain, and desisted from his attempt as soon as it hurt, he yet would be guilty of an assault with intent to commit the crime charged in the information." The contention of counsel for appellant is that, although defendant made the assault and attempted to commit rape upon the child, he is not guilty of assault with attempt because he of his own volition ceased the attempt. If the father of the child had approached defendant while engaged in the attempt, and defendant of his own volition ceased the attempt, he would not be guilty, if the requested instruction is law.

3. The district attorney was permitted, under defendant's objection, to read certain questions and answers to the little girls while on the witness stand, from their written testimony given on the preliminary examination of defendant before the magistrate. Defendant objected upon the sole ground that the prosecution was trying to impeach their own witnesses. The mere fact that the prosecution tried to impeach these witnesses could not have injured appellant, for they were the only material witnesses against him, and he would have been benefited by any weakening of their testimony. And it is not true that, as an absolute proposition of law, parties may not impeach their own witnesses. They may sometimes do so, and especially when they are honestly surprised at adverse testimony given by witnesses whom they themselves have called. The usual objection to a party asking his own witness if he had not made statements contrary to his testimony is that thereby hearsay evidence is pre-

sented to the jury. No such objection was made in the case at bar; but, if it had been, it would not have presented prejudicial error, even if error be conceded, for the former statements about which the girls were asked were substantially the same as their testimony at the trial. This disposes of all assignments of error argued by counsel. The judgment and order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

I dissent: TEMPLE, J.

(131 Cal. 552)

CADY v. PURSER et al. (Sac. 735.)¹

(Supreme Court of California. Feb. 12, 1901.)

MORTGAGES—REGISTRATION—CONSTRUCTIVE NOTICE—FORECLOSURE—ADVERSE TITLE—JUDGMENT—CONCLUSIVENESS.

1. Subsequent purchasers are not chargeable with constructive notice of the contents of a recorded mortgage, under Civ. Code, § 1213, where it has not been transcribed into the proper book, though the mortgagor's title exists only by virtue of prescription.

2. The adverse title referred to in the principle that paramount and adverse titles are not proper subjects for adjudication in a suit to foreclose a mortgage is not limited to one which is adverse to the mortgagor's title, but includes a title that is adverse to that which the mortgagee brings before the court.

3. A purchaser at execution sale after the date of a mortgage which is void as to subsequent purchasers because improperly recorded acquires a title which is adverse to that of the mortgagee, and is not a necessary party to a foreclosure suit, but, if made a party, the judgment against him is not a bar to his assertion of superior title, where the court made no finding on the issue whether his or the mortgagee's title is superior, and merely decreed that "said foreclosure sale shall be without prejudice to any and all prior and paramount rights of defendants except the defendant mortgagor."

Department 1. Appeal from superior court, Lassen county; C. E. McLaughlin, Judge.

Action by Frank P. Cady against Edward T. Purser and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Reversed.

Goodwin & Goodwin, for appellant. A. L. Shinn, for respondents.

HARRISON, J. Suit to quiet title. Each party to the action claims title to the land in controversy under the Eagle Lake Land & Irrigation Company, a corporation; the plaintiff by virtue of a sheriff's deed under two judgments rendered against the corporation, and the defendant by virtue of a sheriff's sale under a judgment foreclosing a mortgage executed by the corporation. Judgment was rendered in favor of the defendants, and plaintiff has appealed.

The plaintiff obtained a judgment against the corporation upon a money demand June 13, 1893, and at the sheriff's sale under an

¹ Rehearing denied March 15, 1901.

execution issued thereon purchased the lands described in the complaint herein on February 23, 1894, and the sheriff's certificate therefor was delivered to him and recorded March 5, 1894, and the deed thereon August 24, 1894. Charles Hartson obtained a judgment against the corporation July 14, 1893, and at the sheriff's sale under an execution issued thereon purchased the same lands, and received the sheriff's certificate therefor, which was recorded February 19, 1894. The sheriff's deed upon this certificate was executed to the plaintiff December 21, 1894, by virtue of an assignment of the certificate to him made by Hartson, March 29th. May 24, 1892, the corporation executed a mortgage upon the lands to the defendant Purser. This mortgage was filed for record in the office of the county recorder on November 22, 1892, and was recorded in Book A of Bills of Sale and Agreements. March 26, 1894, Purser commenced an action to foreclose this mortgage, making Cady and Hartson defendants therein. Judgment was thereafter rendered in this action for a sale of the mortgaged premises in satisfaction of Purser's claim, but declaring that "said foreclosure sale shall be without prejudice to any and all prior and paramount rights of the said defendants, except the defendant Eagle Lake Land & Irrigation Company." At the sale under this judgment Purser purchased the lands, and afterwards received a sheriff's deed therefor.

1. Under the foregoing facts it must be held that at the time the plaintiff and Hartson purchased the lands at the sheriff's sale they did not either of them have any notice of the mortgage from the corporation to Purser. Whether subsequent purchasers or mortgagees are charged with constructive notice of the contents of an instrument that has been filed for record in the recorder's office, notwithstanding such instrument is afterwards incorrectly or improperly copied into the books kept therefor, has been decided differently in different states; but it was held at an early day in this state, and must be regarded as a settled rule, that they have constructive notice of only such matters as appear from the instruments as copied into the proper books. In *Chamberlain v. Bell*, 7 Cal. 292, it was held that an instrument which was incorrectly transcribed by the recorder did not give constructive notice of its contents to a subsequent purchaser, but that such purchaser had the right to rely upon the instrument as it appeared upon the face of the record. In *Donald v. Beals*, 57 Cal. 399, the court said that, where there is a conflict between the actual record as it appears in the record book and the constructive record by the indorsement made upon the instrument at the time it was deposited for record, the latter must give way to the former. In *Watkins v. Wilhoit*, 104 Cal. 395, 38 Pac. 53, it was held that an assignment for the benefit of creditors was sufficiently recorded, so far as creditors are concerned, by a compliance

with section 1170, Civ. Code; but to be effective against subsequent purchasers or mortgagees, and so as to give them constructive notice, it must be recorded in accordance with the provisions of section 1213, Id. *Meherin v. Oaks*, 67 Cal. 57, 7 Pac. 47, cited by the respondent, was an action against the sheriff for an unlawful seizure and sale of mortgaged property, contrary to section 2969, Civ. Code, and did not involve any question of the rights of a subsequent purchaser. It appeared that before the sale by the sheriff the mortgagee gave him actual notice of the existence of the mortgage, and the decision went upon the ground that he was thereby put upon inquiry. Having received actual notice of the mortgage, there was no place for the doctrine of constructive notice, and what the court said with reference to section 1170 was irrelevant. The principle upon which the rule rests is that as, under the provisions of the recording act, if the grantee of an interest in lands would protect himself against subsequent purchasers or incumbrancers, he must give notice of his interest, and as the statute provides for constructive notice in the place of actual notice, it is incumbent upon him to comply with all the requirements prescribed for such constructive notice, one of which is the correct transcription of the instrument into the appropriate book. *Neslin v. Wells*, 104 U. S. 428, 26 L. Ed. 802; *Terrell v. Andrew Co.*, 44 Mo. 309. For this purpose the recorder is the agent of such grantee, and the errors or omissions of the recorder in making such transcription are his errors or omissions in the same manner as are the errors of a sheriff in executing a writ, or of a clerk in recording an order or a judgment.

The provision in section 1170, Civ. Code, that "an instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record," must be read in connection with the provisions of section 1213, that "every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees," and each must be construed with reference to the purposes for which it was enacted. Section 1170 is a part of article 2 of the chapter on recording transfers, which treats of the mode of recording, and designates the time at which the instrument shall be deemed to be recorded; while section 1213 is in article 4, which treats of the effect of recording, or the want thereof, and specifies the conditions under which such effect will be given to the instrument. For the purpose of complying with a statutory requirement, as in the case of official bonds or certificates of marriage, where the evident purpose of the statute is to make the instrument a matter of public record, or when the recording of

an instrument is an essential step in perfecting some right or completing some act of the party, as in the case of a declaration of homestead, or an assignment for the benefit of creditors, the depositing of the instrument in the recorder's office is sufficient; but, when merely making a record of the instrument is not the ultimate purpose of the party, but the recording of the instrument is the means by which his ultimate purpose is to be carried into effect,—as when his purpose is to give notice of his interest in real estate,—section 1213 requires not only that the instrument shall be filed with the recorder for record, but that it shall also be “recorded as prescribed by law.” By this requirement, in order that constructive notice of the contents shall be given to subsequent purchasers and mortgagees, the legislature must have intended something in addition to depositing the instrument in the recorder's office for record, since that had already been provided for in section 1170. The word “recorded,” in ordinary usage, signifies copied or transcribed into some permanent book. In Anderson's Law Dictionary the term “recording” is defined “copying an instrument into the public records in a book kept for that purpose by or under the superintendence of the officer appointed therefor.” By section 124 of the county government act as it stood at the time of these transactions (St. 1891, p. 324), the recorder was required to “record separately in large and well-bound separate books” the several instruments there named; and section 130 provided that, when any instrument was deposited in his office for record, he “must record the same without delay.” By section 125 the recorder is required to keep indexes to the several instruments, among which are two indexes labeled respectively “Mortgagors of Real Property” and “Mortgagees of Real Property,” with the pages divided and so headed as to show the parties and date and place of record of each mortgage. In addition to this, section 1171, Civ. Code, provides: “Grants absolute in terms are to be recorded in one set of books, and mortgages in another.” These provisions of the statute fully indicate that an instrument is not “recorded as prescribed by law” until it has been transcribed into the proper book. The policy of the law in this respect is to afford facilities for intending purchasers or mortgagees of land in examining the records for the purpose of ascertaining whether there are any claims against it, and for this purpose it has prescribed the mode in which the recorder shall keep the records of the several instruments; and an instrument must be recorded as herein directed in order that it may be recorded as prescribed by law. If recorded in a different book from the one directed, it is to be regarded the same as if not recorded at all. In *Sawyer v. Adams*, 8 Vt. 172, where an instrument was copied into a book that had not been in use for recording purposes for many years, it was held that the book

was improper for that purpose, and that the instrument was not “duly recorded”; the court saying: “The act of the town clerk was as wholly inoperative as if he had written this deed on a slate, or copied it into his family record.” The same principle was declared in *Insurance Co. v. White*, 17 N. Y. 469. In *Gillig v. Maass*, 28 N. Y. 214, a mortgage recorded in a book of deeds was held not to be duly recorded, and therefore not to give constructive notice of its existence. There is no provision in the statutes of this state authorizing the recorder to transcribe any instrument in a book entitled “Bills of Sale and Agreements,” and the above provisions requiring him to record mortgages in separate books, and to keep indexes of such records, lead to the conclusion that the record of the mortgage to Purser was ineffective for giving constructive notice of its contents. It is immaterial that the title of the corporation did not appear of record in the recorder's office. The provisions of the recording act are not limited to titles which appear of record, but are applicable as well to those which exist by virtue of prescription. The possession of the land by the corporation at the time of the sheriff's sale was *prima facie* evidence of its title.

2. The rights acquired by the plaintiff under the sheriff's sale were not affected by the judgment in the action of Purser for the foreclosure of his mortgage, or by the sale under this judgment. By virtue of the provisions of section 1214, Civ. Code, the omission of Purser to have his mortgage properly recorded rendered it void as against the plaintiff. The plaintiff, purchasing at a sale under his own judgment, was a bona fide purchaser for value, and the certificate of sale was a conveyance by which an interest in the property was created, and, as it was immediately recorded, it had priority over the mortgage to Purser. *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680. There was no record of the Purser mortgage prior to the action for its foreclosure. It has been stated in several cases that the effect of a sale under a judgment in foreclosure is to transfer to the purchaser the title of the mortgagor as it existed at the date of the mortgage, and that in an action for its foreclosure the rights of defendants which were acquired subsequent to its date are extinguished by such sale; and it is contended by the respondents that, as the rights of the plaintiff herein were acquired subsequent to the execution of the Purser mortgage, and as he was a defendant in the suit for its foreclosure, his rights so acquired were extinguished by the sale under the judgment in that action. These expressions in reference to the effect of a sale under foreclosure were, however, but the general statement of a principle in which only the ordinary facts and the usual conduct of parties were to be considered, but are inapplicable in the consideration of an unusual state of facts, or conduct, as where the mortgagee fails to

record his mortgage until after a third person has acquired an interest in the land. It would be a harsh rule of procedure to hold that the foreclosure of a mortgage which the statute had declared to be void would extinguish the interest of such third person. The principle is well settled that paramount and adverse titles are not proper subjects for adjudication in actions for the foreclosure of a mortgage. The adverse title here referred to is not limited to one which is adverse to the title which was in the mortgagor at the date of the mortgage, but includes a title that is adverse to that which the mortgagee brings before the court. A title may be paramount and superior to the title of the mortgagee, although acquired after the date of the mortgage, and if, after the execution of the mortgage, a purchaser from the mortgagor acquires a title which is superior to that of the mortgagee, that title is adverse to the mortgagee's title. The provision in section 1214, Civ. Code, by which the failure of the mortgagee to record his mortgage renders it "void" as against subsequent purchasers or mortgagees, deprives it of all consideration in reference to its date, and requires it to be treated as if it had been executed subsequent to the record of the subsequent purchaser. Being void as against him, neither its date nor its contents can be available to defeat his title. As against the plaintiff herein, the mortgage of Purser had no existence until the commencement of his action for its foreclosure. *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680; *Emeric v. Alvarado*, 90 Cal. 468, 27 Pac. 356; *Duff v. Randall*, 116 Cal. 231, 48 Pac. 66. The title of the plaintiff being, therefore, adverse and superior to that held by Purser, the plaintiff was not a necessary party to the foreclosure, and, although he was made a party, the facts presented upon the record were insufficient to render the judgment against him a bar to his assertion herein of his superior title. The complaint simply alleged that he had, or claimed to have, some interest in the lands, but that such claim was "subsequent, subject, and subordinate to the lien of the plaintiff." In his answer thereto the plaintiff herein denied this allegation, and affirmatively alleged that his claim was not subsequent, subject, or subordinate to the plaintiff's lien. The court made no finding upon this issue, but merely found that the defendants claimed some interest in the premises, and in its judgment expressly decreed "that said foreclosure sale shall be without prejudice to any and all prior and paramount rights of the defendants, except the defendant Eagle Land & Irrigation Company." There was, therefore, no adjudication upon the issue whether the title of the plaintiff herein was subordinate to the claim of the mortgagee, and the plaintiff is, therefore, not estopped thereby from asserting in this action his claim of title to the lands purchased by him at the sheriff's sale. *Beronio v. Lumber Co. (Cal.)* 61 Pac. 958. As we

have seen that his title thereby acquired is superior to that derived under the mortgage, the provision in the decree foreclosing all persons having liens subsequent to the lien of the plaintiff therein is inapplicable to the plaintiff herein, and the superior court erred in holding that the plaintiff herein has no title to the lands, and in rendering judgment in favor of the defendants. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(131 Cal. 527)

O'DONNELL v. MERGUIRE et al.
(S. F. 1,346.)

(Supreme Court of California. Feb. 11, 1901.)
EXECUTION—SIGNATURE BY FORMER CLERK—
VALIDITY.

Code Civ. Proc. § 682, provides that a writ of execution must be subscribed by the clerk of the court. *Held*, that an execution signed in print with the name of a former clerk of the court, and in writing by a deputy of the present clerk, was void, and sale thereunder conveyed no title.

Beatty, C. J., dissenting.

In bank. On rehearing. Opinion in department (60 Pac. 981) affirmed, and judgment of lower court reversed.

Reed & Nusbaumer, for appellant. Charles Wesley Reed, Roger Johnson, and King & Hornblower, for respondents.

PER CURIAM. Appeal from an order granting the defendant a new trial. The suit was brought to quiet title to lands described in the complaint. The defendant Reid claimed title in himself. Both parties deraigned title from one Thomas O'Donnell, the husband of plaintiff,—the plaintiff, by deed of conveyance of date July 14, 1891; the defendant Reid, by a sheriff's sale under an execution against Thomas O'Donnell. The defendants' case is based on the claim that the former conveyance was in fraud of creditors, and hence void as against the subsequent execution sale to him. The findings negatived the allegations of fraud, and found in favor of the plaintiff on the issue of title. The new trial was granted presumably upon the ground that the evidence was insufficient to justify the finding that the conveyance of O'Donnell to the plaintiff was not fraudulent as to creditors. But, as the conveyance is specifically found, the finding as to fraud can be material only upon the assumption of the validity of the subsequent sheriff's sale to the defendant. Otherwise, the plaintiff's ownership follows as a conclusion of law, from the conveyance to the plaintiff from O'Donnell, the common source of title, and the alleged fraud is immaterial.

The alleged writ of execution, under which defendants' title was deraigned, was regular in all respects, except that it was signed, "M. C. Haley, Clerk, by B. D. Dough-

erty, Deputy Clerk," and not by C. F. Curry, who was the clerk at the date of the alleged execution. Haley was a former clerk, and his signature, "M. C. Haley, Clerk," was in print, and it was admitted that Dougherty was the deputy of Curry, as he had been also of Haley. The question is thus presented whether the document in question was a valid execution, sufficient to confer power on the sheriff to sell and to convey the land. The power of courts to amend writs issuing from them, when defective or irregular, has long been exercised, and in modern times with increasing frequency; nor is it easy to prescribe definite limits to the power (1 Freem. Ex'ns, § 63); and it is also settled that, if the writ be amendable, it will be accorded the same effect, with reference to acts done in execution of it, as if it had been amended (Id. § 71b; *Hunt v. Loucks*, 38 Cal. 374). The question, therefore, is whether the omission of the subscription of the clerk to the writ of execution, as required by section 682, Code Civ. Proc., can be amended. If so, it cannot be regarded as void; otherwise, it must be so regarded.

The question, we think, admits of an obvious answer. The power of amendment, however extensive it may be, is limited to the amendment of the writs of the court, which can be authenticated only, under provisions of the law similar to ours, by the subscription of the clerk. Without this there is nothing "which the judge can affirm" is an execution "issued upon the judgment produced." *Hunt v. Loucks*, 38 Cal. 375. Under the ancient practice, where the seal of the court was in the custody of a particular officer and sedulously guarded, and when seals were habitually used for the purpose of authenticating instruments, a seal alone may have been sufficient to authenticate an execution, as in fact was the case in the king's bench, though in the more modern court of common pleas the signature of the prothonotary was required. *Tidd, Prac.* 999, 1027. But in modern times the seal has lost its significance, and cannot be regarded as a sufficient authentication without the signature of the officer affixing it. Whether both seal and subscription of the clerk, as required by the Code, be essential, is a question about which the authorities differ (1 Freem. Ex'ns, § 70), and which it is unnecessary in this case to determine. But we are of the opinion that the seal by itself is insufficient, and that the subscription of the clerk is an essential part of the writ, without which there is no execution to be amended. On this point also there is some conflict in the authorities, which are discussed by the author in the work cited (1 Freem. Ex'ns, § 45); but the preponderance seems to be in favor of the conclusion we have reached (*Huggins v. Ketchum*, 4 Dev. & B. 414; *Short v. State*, 79 Ga. 550, 4 S. E. 852; *Hernandez v. Drake*, 81 Ill. 34; *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80, 31

Am. St. Rep. 355; *Dearborn Laundry Co. v. Chicago & A. R. Co.*, 55 Ill. App. 438; *Dwight v. Merritt*, 18 Blatchf. 305, 4 Fed. 614). The order granting a new trial must therefore be reversed; and it is so ordered.

I dissent: BEATTY, C. J.

131 Cal. 566

GRAY v. LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE.

(S. F. 1,755.)

(Supreme Court of California. Feb. 12, 1901.)

BUILDING CONTRACT—CHANGE IN SPECIFICATION—EXTRA WORK—LIABILITY—WRITTEN AGREEMENT—NECESSITY—AUTHORITY OF ARCHITECT—ARBITRATION—ISSUES.

1. Specifications for a building contract provided that no extra work should be allowed except on a written order from the architect, approved by the building committee, and that, on any alterations or changes, the character and valuation of the extra work should be agreed on in a writing signed by the owner or architect and the contractor. The contractor, on verbal instructions from the architect, and without the knowledge of defendants or their building committee, continued the foundation wall 18 inches higher than specified. *Held*, that defendants were not liable therefor as extra work.

2. Where specifications for a building provided that in case of dispute as to the value of extra work the matter should be submitted to arbitration before suit therefor, arbitration was a condition precedent to such action.

3. Where plaintiff claimed that the work sued on was included in the original contract, and defendant alleged it was extra work, the valuation of which had not been submitted to arbitration, as required by the specifications, the contention that there was no issue as to the value of the work cannot be sustained.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by H. N. Gray against La Societe Francaise de Bienfaisance Mutuelle. From an order denying a new trial, and from a judgment in favor of defendant, plaintiff appeals. Affirmed.

Fisher Ames, for appellant. A. Comte and Boyd & Fifield, for respondent.

COOPER, C. This action was brought to foreclose a contractor's lien for work and labor done and materials furnished in supplying all of the concrete and artificial stone work for the building of the defendant known as the "French Hospital" in the city and county of San Francisco. The case was tried before the court, and findings filed upon which judgment was entered for defendants. Plaintiff made a motion for a new trial, which was denied, and this appeal is from the order denying the motion.

It is claimed that the evidence is insufficient to sustain the findings in two important particulars, which we will discuss in the order as set forth in the briefs. On the 7th day of October, 1893, the plaintiff's assignor, a corporation, entered into a contract in writing with defendant corporation, by the terms of

which the said assignor of plaintiff agreed to furnish labor, tools, materials, and appliances, and perform and complete all the excavating, concrete artificial stone work, cementing, and other work as shown and described in the plans and specifications made by the architects and signed by the parties at the time of making the said contract; all for the sum of \$25,885. The work was performed, and the contract price paid as agreed upon. The contention here is not as to the amount to be paid under the contract, and which was paid thereunder, but is as to an item of \$1,684.50, which is particularly stated in finding 4 as follows, to wit: "That immediately after the execution of said written contract the said Gray Brothers' Artificial Stone Paving Company entered upon the performance thereof under said articles of agreement and specifications, and while they were so engaged in the early part of December, 1893, Wm. Mooser, one of the said architects, requested said corporation orally to carry up the concrete walls eighteen inches higher than called for by the original plans and specifications, and that said corporation subsequently complied with said request, and did carry up said concrete walls eighteen inches higher than called for by said plans and specifications, and in so doing put in 6,738 cubic feet of concrete wall, of the value of \$1,684.50." The court found, in effect, that this item was for extra work, and was not agreed to in writing, nor requested by defendant nor its building committee, and that for this reason plaintiff could not recover therefor. The main contention of appellant is that the item was for services performed under the original contract, and was not for extras, and that the work was done at the request of the architect of defendant, and that for this reason the defendant is responsible. The contention is mainly based upon the following clause in the specifications, which were a part of the contract, to wit: "If, in the opinion of architects, any particular place should require more cement or more thickness of floor or concrete than is called for, the contractor will have to do the same, and the cost of said work to be determined by the architects." We think, without regard to the question as to whether or not the contested item is for extras or was incurred under the authority of the contract and said quoted clause in the specifications, the defendant is not liable. Immediately following the clause quoted from the specifications, and as a part of the same sentence, is the following: "But no extra work shall be allowed except where a written order from architects is procured, approved by the building committee." The court found "that the request of the architect therefor was never approved by the building committee, nor was the cost or value thereof ever fixed, or agreed upon, or prearranged." This finding is supported by the evidence. It follows that, even if the original contract and the specification quoted authorized the carrying up of the con-

crete walls 18 inches higher, it could only be a charge against defendant when done under a written order from the architect, approved by the building committee. The defendant cannot be bound outside the terms of its contract. The plaintiff agreed that no extra work should be allowed except upon a written order from the architect approved by the building committee. It did not procure such order, and therefore must be held to the terms of its contract. The above is the correct interpretation of the specification, and was the true intent of the parties as shown by the other parts of the contract. It is provided in the eighth clause that, "should the owner or the architect at any time during the progress of the work request any alterations to or omissions from this contract or the plans or specifications, either of them shall be at liberty to do so only by written agreement." It is provided in the ninth clause: "The rule of practice to be observed in the fulfillment of the last foregoing paragraph [eight] shall be that, upon the demand of either the contractor, owner, or architect, the character and valuation of any or all changes, omissions, or extra work shall be agreed upon and fixed in writing, signed by the owner or architect and the contractor prior to execution." And in the specifications after the clause hereinbefore quoted in specification 5 it is provided: "And in all cases where any alterations or additions (if any) shall involve any increase of expenditure not included or provided for in the drawings, specifications, or contract, then authority in writing shall be necessary, and cost prearranged, before such work shall be undertaken. Neither will the same be paid for, nor any allowance be made in any respect thereof, unless the work in question shall have been executed under the authority of such written order, and said order be produced at the first settlement of extra account subsequent to the date thereof. Said written order to be given by architects, and approved by building committee." It thus appears that the parties over and over again bound themselves that no extras or extra work should be charged for unless agreed to in writing, as provided in the contract and specifications. There is no evidence of any agreement in writing as to the item in contest. There is no evidence that it was for work done by virtue of any change of plans approved by the building committee. Not only this, but the court finds "that neither the defendant, nor any of its officers, nor its board of trustees, nor its building committee, nor any member thereof, ever knew of said oral request of the architect, or that said extra work was being done, or had been done, until a considerable time subsequent to the doing of said extra work." This finding is supported by the evidence, and is entirely inconsistent with the contention of appellant's counsel that the defendant waived the provisions of the contract requiring all increases in expenditure to be in writing.

In *J. M. Griffith Co. v. City of Los Angeles* (Cal.) 54 Pac. 383, the plaintiff had contracted with the defendant for a fixed price to construct a certain sewer leading from the city of Los Angeles to the Pacific Ocean. After completing the contract, the plaintiff claimed an amount for extras in furnishing, at the request of the city engineer, who had charge of the work, a large number of steel bands for the pipe, in addition to those required in the specifications. The amount claimed for such extras was \$4,012. The contract provided, "No extras are to be allowed except upon change of route or plan," and in regard to changes in the plans it provided, "But the changes so made, with the price to be added to or deducted from the contract price, shall be agreed upon between the parties hereto and indorsed upon the contract," and, if not so indorsed, "then the original price shall be neither increased nor diminished." This court held that the amount so claimed could not be recovered, and in the opinion said: "The contract, however, was plain that no extras should be allowed except on change of route or plans, and, in case the engineer should change the plans, still no extra payment was provided for unless the changes so made, with the price to be added to or deducted from the contract price, 'shall be agreed upon between the parties hereto,' viz. the city and the contractors. If they could not agree on the price, then the engineer should fix the same. These provisions evidently mean that no changes of plan should become a part of the contract to be paid for by the city, unless it should agree thereto." We have no doubt of the correctness of the above rule. The defendant had the right to the protection given it by its contract, and the right to determine, through its building committee, in a regular manner, as to whether or not it desired to change its plans or increase the cost of the work for which it had contracted. The architect possessed only the power given him by the contract. He is nowhere given the right to change the contract or plans. If the architect could change the plans and specifications in material respects, of his own volition, then the contract would afford the defendant no protection. If he could raise the foundation 18 inches, and increase the cost \$1,700, he could indefinitely expand, increase, and change the building, until the cost would be doubled or trebled, and when completed the defendant would have a different building from that called for in its contract, and probably be bankrupt by the expense. We do not think such is the law. The agreement provided that, in case a dispute should arise between the parties respecting the valuation of any extra work, the disputed matter should be submitted to two competent persons who are experts in the business of building, and, in case these two cannot agree, they shall select a third person, an umpire, and the decision of the two shall be binding on all parties. The plaintiff alleged that, being unable to agree with de-

fendant on the value of the alleged extra work, the plaintiff's assignor proposed to defendant to arbitrate the same in the manner provided in the contract, and to that end offered to select upon its part an arbitrator, and requested the defendant to likewise select an arbitrator; but that defendant refused, and still refuses, to arbitrate. This was denied by the answer, and upon the issue so raised the court found: "That the said Gray Brothers' Artificial Stone Paving Company never at any time proposed to the defendant to arbitrate the value of said extra work and materials in the manner provided in said articles, and never offered to select, upon its part, an arbitrator, and never requested defendant to select an arbitrator to represent it for the purpose of making such arbitration. And the defendant never did in any way refuse to enter into any arbitration as to the value of said extra work. And no arbitration was in fact ever made or attempted as to the value of said extra work and materials." The evidence sustains this finding. This finding precludes any recovery by plaintiff. Where parties have agreed to an arbitration as a condition precedent in a contract of this character, they must arbitrate, or in good faith endeavor to do so, or show some good and sufficient excuse for not having done so, before they will be allowed to maintain an action. *Holmes v. Richet*, 56 Cal. 307; *Scammon v. Denio*, 72 Cal. 393, 14 Pac. 98. We do not think it can be said, in view of the pleadings, that there was no issue as to the value of the extras. Conceding that the question as to whether or not the disputed work was included in the contract is a matter for the court, and not subject to arbitration under the contract, it does not follow that the value of the work is not the subject of arbitration. If the court had found the work to be in addition to that originally called for and extras, it would still have to find the value in order for plaintiff to recover. The court could not find the value unless the plaintiff endeavored to ascertain it in the method provided by the contract, or showed some valid reason for not having done so. We advise that the order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the above opinion, the order is affirmed.

(131 Cal. 530)

OWEN v. POMONA LAND & WATER CO.
(L. A. 637.)¹

(Supreme Court of California. Feb. 11, 1901.)

APPEAL — ASSIGNMENT OF ERRORS — SUFFICIENCY — VENDOR AND PURCHASER — RESCISSION OF CONTRACT — WAIVER — DEFECTIVE TITLE — WATER RATE — IMPROVEMENTS.

1. Under a statute which requires that the specification of errors on appeal shall contain a statement of the particulars in which the evidence is insufficient, a statement that there is no evidence to justify a certain finding, or to prove or tending to prove a certain fact, is sufficient.

¹ Rehearing denied March 14, 1901.

2. In an action to rescind a contract to purchase land, and recover the purchase money paid, and increased value of the land by reason of improvements thereto, a finding of the amount of such increased value is sustained by proof that the value of the improvements amounts to such sum, since, though it does not necessarily follow that land is enhanced in value to the same amount as the value of the improvements, the inference is one the court may fairly draw, in the absence of other evidence.

3. The finding that a vendee of land, going into possession and making valuable improvements under a contract to purchase, may recover the value of such improvements on a rescission of the contract, cannot be reviewed by the supreme court on an appeal from an order denying a new trial, since on such appeal the court can review only specification of insufficiency of evidence to support the findings and of errors of law occurring at the trial, while such finding is simply a conclusion of law.

4. Defendant contracted to convey to plaintiff certain land which it had purchased from a railway company which held a patent therefor from the United States. Plaintiff paid part of the price, went into possession, and improved the land. When balance of purchase price was due, plaintiff tendered the same, and demanded a conveyance. After the contract was made, the United States supreme court held patents similar to the one for this land invalid, and defendant promised that it would make the necessary proofs as soon as the land office was ready to receive them, and would procure a patent direct from the United States, under Act March 3, 1887 (24 Stat. 557, § 4), which provides that where lands erroneously patented to a railway company have been sold to citizens of the United States, purchasing in good faith, patents should issue direct to such purchasers on proof of such facts. Plaintiff relied on this promise, and continued in possession two years longer, when he renewed his tender, and commenced suit for rescission, and to recover purchase price paid and value of improvements. The land office had not been ready to receive proofs under section 4, and hence defendant had not been able to obtain title. *Held*, that while plaintiff was entitled to rescind on defendant's inability to procure and convey title at the time fixed by the contract, he having then accepted defendant's promise to acquire title and continued in possession, he could not thereafter rescind on that ground until defendant had had reasonable time and opportunity to comply with its promise.

5. Defendant contracted to convey to plaintiff certain land and shares in an irrigation company, which entitled him to a certain amount of water. Plaintiff paid part of the price, took possession, and improved the land. The irrigation ditches were fed by artesian wells, which at the time the contract was made, and for five years thereafter, furnished as much water as represented, but partially failed the following season. *Held*, that such failure of the wells did not authorize a rescission of the contract, since, if there was a failure of this part of the consideration, the failure was through no fault of the defendant.

6. Plaintiff contracted to purchase certain land and shares of stock in an irrigation company. The stock was sold with the land, under a rule apportioning 10 shares to each acre. By the terms of the contract, plaintiff, in consideration of the right to occupy the land pending the fulfillment of the contract, agreed to pay and discharge all water rates that might be levied on the premises. The artesian wells which supplied the water for the irrigating company failed, and an assessment was levied on the stock for means to increase the supply of water. *Held*, that the assessment was a water rate assessed on the premises, within the

meaning of the contract, for which plaintiff was liable.

In bank. Judgment in department (61 Pac. 472), affirming judgment of lower court, reversed.

BEATTY, C. J. This is an action by the vendee of certain land, and of certain shares of stock in an irrigation company, to cancel the contract, and to recover various sums paid to the vendor, and also the value of improvements placed upon the land. The suit is based upon an alleged rescission of the contract of sale, for failure of title, and failure of the irrigation company to furnish the quantity of water required for irrigation. The defendant by answer contested the right and the fact of rescission, and by cross bill sought a specific enforcement of the contract. The cause was tried by the court, and findings made, upon which judgment was entered in favor of the plaintiff. The defendant appealed from the judgment, and also from an order denying its motion for a new trial, but, the appeal from the judgment having been dismissed for failure to file the transcript in time, there is nothing left to be considered except such matters as can be reviewed upon an appeal from the order, i. e. specifications of insufficiency of evidence to support the findings and of errors of law occurring at the trial.

A preliminary statement of the principal facts of the case will be of assistance in the discussion of these questions: The land which the defendant covenanted to convey is part of a certain section, No. 15, in San Bernardino county, for which the officers of the land department of the United States had issued a patent to the Southern Pacific Railroad Company in 1879. That company sold it to Wicks, who assigned his contract to defendant, who, upon compliance with its terms, received a conveyance in due form from the railroad company. These conveyances and contracts, being duly recorded in San Bernardino county, showed an apparently perfect title in the defendant, but in fact its title was not perfect for the following reasons: This section 15 was a part of the lands included in the provisions of the act of congress of July 27, 1866, purporting to grant them to the Atlantic & Pacific Railroad Company in aid of the construction of its road. It was also within the description of lands granted to the Southern Pacific Railroad Company for similar purposes by the act of congress of March 3, 1871. The Southern Pacific Railroad Company completed its road according to the conditions of its grant, but the Atlantic & Pacific Railroad Company never built that part of its road west of the Colorado river, where the two lines intersected, and the officers of the land department, acting upon their construction of the law, issued patents to the Southern Pacific Railroad Company for lands within the common limits of the two grants. Subsequently,

in 1886, congress passed an act forfeiting the lands granted to the Atlantic & Pacific Railroad Company for breach of the conditions of the grant, and thereafter proceedings were instituted on the part of the United States to vacate the patents so issued, upon the ground that their issuance was unauthorized. Proceedings of this character were pending in January, 1891, when the contract between these parties was entered into. It does not clearly appear that the patent covering this particular section 15 had been assailed at that time, but actions had been commenced to cancel similar patents for lands similarly situated, and to one of those actions the defendant here was a party. In other words, it had actual knowledge that its title to one parcel of land was assailed upon grounds which equally affected the title to the land which is here involved. But the litigation, so far as it had progressed, had resulted in favor of the defendant's title; that is to say, the decision of the United States circuit court, where the suits were commenced, had sustained the action of the officers of the land department in the issuance of the patents, holding that the Southern Pacific Railroad Company had earned and become entitled to all the lands within the common limits of the two grants. *U. S. v. Southern Pac. R. Co.* (C. C.) 45 Fed. 596; *Id.*, 46 Fed. 683. Besides, congress had in 1887 passed a curative act saving the rights of citizens who had bona fide purchased from the patentees lands erroneously patented, as these were, and providing that, upon proof of their citizenship and bona fides, patents should be issued to them without further payment. The plaintiff had no actual knowledge of these matters affecting the title in January, 1891, when he contracted for this land. In an application to purchase, which preceded the contract, plaintiff had stipulated for a certificate of title, and the defendant furnished a certificate made by a reputable title and abstract company, showing that its title was perfect, as in fact it was, so far as appeared by the records of San Bernardino county, which contained no reference to any action by the United States to cancel the patent issued to the Southern Pacific Railroad Company. It is one of the grievances of the plaintiff that the pendency of that litigation, known to the defendant, but unknown to him, and undisclosed by the county records, was not brought to his attention prior to the making of the contract.

The terms of the contract were, in brief, that plaintiff was to pay \$1,000 cash, \$1,000 January 14, 1893, and \$1,000 January 14, 1894, with interest on the deferred payments, and to have immediate possession. Defendant was to convey by deed of grant, bargain, and sale certain described lots in said section 15, containing 20.32 acres of land, "together with two hundred and three and $\frac{2}{10}$ (203.2) shares of the stock of the Del Monte Irrigation Company, representing two and $\frac{32}{1000}$ (2.032) inches of water un-

der four (4) inch pressure, said stock to be delivered by the party of the first part and accepted by the party of the second part subject to the by-laws of the said Del Monte Irrigation Company." In pursuance of this contract the plaintiff made the cash payment of \$1,000, and entered into possession of the land, which he proceeded to improve by the erection of buildings and the planting of fruit trees. He made no further payments of purchase money under the contract, but paid a portion of the accruing interest, and paid all the taxes.

In December, 1892, the supreme court of the United States decided the cases entitled *U. S. v. Colton Marble & Lime Co.* and *U. S. v. Southern Pac. R. Co.*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, and also two other cases, entitled *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091. These were appeals from the circuit court in several cases involving different phases of the litigation concerning the patents which had been issued to the Southern Pacific Railroad Company for lands within the limits of the grant to the Atlantic & Pacific Railroad Company, and by the judgment of the supreme court the decrees of the circuit court were reversed, and the causes remanded, with directions to enter decrees in favor of the United States vacating and canceling the patents. These decisions were brought to the attention of the plaintiff in the early part of the year 1893, and he then learned for the first time that the title to the lands contracted for was not in the defendant. From that time forward, however, he had actual and full knowledge of all the facts and of the law affecting defendant's rights in said lands, and his own rights under the contract of purchase. He did not, during the year 1893, take any steps looking to a rescission of his contract. In fact, it appears that he was at that time satisfied, as a lawyer, that, although the title was not then in the defendant, it was, nevertheless, practically certain that under the provisions of the act of 1887, above referred to, a new patent for the land would be issued direct to the defendant upon proof of its purchase from the railroad company upon the faith of the invalid patent of 1879. There is uncontradicted evidence that he so advised a client who consulted him professionally as to the title of defendant to another subdivision of the same section of land prior to the month of April, 1893. In January, 1894, when the final payment under his contract fell due, plaintiff made a formal offer to complete the payment upon conveyance of a good title to the land and water stock. But he knew at the time he made this offer that its condition could not be complied with, and his only object seems to have been to demonstrate his readiness to perform when defendant was able to perform on its part. The result of this offer and the ensuing discussion of the defect in the title

to the land was a promise and assurance on the part of the defendant that it would make the necessary proofs as soon as the land office was ready to receive them, and would procure a patent direct from the United States under the act of 1887. Resting upon this promise, plaintiff remained in possession of the land, cultivating and caring for the fruit trees he had planted, until the summer of 1896.

During the whole period of his occupancy of the land, down to and including the irrigation season of 1895, the plaintiff received from the Del Monte Irrigation Company the full quantity of water mentioned in his contract; but in the year 1896, owing to the failure of the artesian wells which constituted its source of supply, the irrigation company was not able to furnish to its stockholders quite one-fourth of the quantity of water represented by its stock; that is to say, there were 21,000 shares of stock issued, and in order to supply 1 inch of water of every 100 shares it required a flow of 210 inches from its wells, which in August, 1896, were yielding only about 40 inches, to which something seems to have been added by pumping. In order to secure a better supply of water, the irrigation company levied an assessment of 8 cents a share on its stock, and the defendant notified the plaintiff that he must pay the assessment on the 203.2 shares which it had contracted to him or be deprived of water for irrigation. He refused to pay the assessment, and at this juncture, on August 5, and again on August 19, 1896, renewed his demand for a deed of conveyance of the land and his offer to perform on his part. This, however, like his first offer, was merely formal; for he knew that the defendant had not yet received a patent, and he had no intention of accepting its deed or parting with the money which he tendered. The defendant being unable to comply with the conditions of his offer, he gave notice that he rescinded the contract, and offered to reconvey everything he had received, and to restore the possession of the land, upon condition that the defendant would refund the moneys paid in pursuance of the contract, and compensate him for the value of his improvements, with interest. His offer being declined, plaintiff commenced this action in August, 1896, which resulted in a judgment in his favor for the amount of his payments under the contract, and the value of his improvements, fixed at the sum of \$6,250, together with interest and costs. The whole amount of the judgment was declared to be a lien upon the land and water stock, which were ordered sold, and the proceeds applied upon the judgment, with judgment over for any deficiency, etc.

On this appeal of the defendant from the order overruling its motion for a new trial, we have to consider only the assignments of error in the rulings of the superior court at the trial, and the specifications of insufficiency of the evidence to justify the findings.

With regard to these specifications the respondent makes the objection that they are not sufficient in substance or proper in form, and to this point cites the case of *De Molera v. Martin*, 120 Cal. 545, 52 Pac. 825. But the decision in that case has no application to the specifications here, which are as exact and detailed as they could be made in pointing out the particular findings and parts of findings which it is claimed the evidence does not justify. The language of many of these specifications is: "There is no evidence to justify;" "there is no evidence to prove or tending to prove," etc.; and it seems to be claimed that this is not a compliance with the statute, which requires a statement of the particulars in which the evidence is insufficient. This objection is too refined. If there is no evidence to support a finding, it is certainly proper to say so, and even where there is slight, but insufficient, evidence to support a particular finding, every purpose of the law is answered by a specification that there is no evidence.

It is first objected that there is no evidence to justify the finding to the effect that the defendant corporation, before the execution of the application and contract, as an inducement to plaintiff to purchase the land and water stock, represented that it had a perfect title to the land, and that the right to a perpetual flow of one inch of water to each ten acres of land was sold therewith. We think the evidence fully sustains this finding. The representations were made, but they were honestly made. The officers and agents of the corporation had every reason to believe at the date of the contract that its title to the land was perfect. It had been sustained by the decision of the circuit court, and even if that decision was erroneous, as was afterwards decided by the supreme court, the equitable claim of the defendant to the land was protected by the act of congress of 1887. As to the water, all that was represented was true, as the defendant could see for himself. There was then an ample supply of water, and continued to be for five years after the date of the contract, when for the first time the artesian wells which were the source of supply began to fail. If there was any assertion or prediction by the defendant's agents that the wells would always yield as abundantly as they were then yielding, this was but an expression of opinion upon a matter as to which plaintiff was as fully informed as they were. What effect this finding is to have will be further considered, but the finding itself cannot be set aside for lack of evidence to support it.

There is also evidence sufficient to justify that portion of the fifth finding wherein it is found that the plaintiff had no knowledge of the title to said lands or the amount of water represented by said stock, except as he was informed of the same by the defendant, and that the purchase was induced by the representations. The plaintiff testifies to these facts, and his evidence is

sufficient to sustain the findings. Indeed, the argument of appellant in support of his specification against this finding is not that the plaintiff had actual knowledge as to the title and water when he entered into the contract, but that his ignorance was inexcusable. It is true, as contended by appellant, that all the information it had as to its title was contained in acts of congress and public records of the courts and land department, and that the plaintiff, by exploring these sources of information, might have learned all that it knew; but this is quite consistent with the fact found that he was actually ignorant of the state of the title, and relied upon the representations of the defendant. As to the water, his ignorance of the facts is of no consequence, since, as has been seen, no representations were made that were not true.

The seventh finding, as to the fact that plaintiff made all his improvements on the land before he had any actual knowledge of the defect in the title, is also supported by the evidence, and there is sufficient evidence to sustain the finding that the land was enhanced in value by plaintiff's improvements to the extent of \$6,250. The evidence was that the improvements, consisting of dwelling, outhouses, flume, and fruit trees, all suitable to the character of the premises, had been appraised at that sum by appraisers agreed upon by the parties, and, while it is true that it does not necessarily follow that the value of the land was enhanced in the same amount as the value of the improvements, the inference was one which, in the absence of other evidence, the court might fairly draw. The evidence, in other words, was sufficient *prima facie* to sustain the conclusion. A further objection made by appellant to this finding is that the evidence which supports it was absolutely inadmissible, not only because it was irrelevant, but because the plaintiff was not entitled to recover the value of the improvements. It has been said by this court in one or two cases that the vendee of land going into possession under his contract of purchase, and upon representations of the vendor that he has the title, may, upon failure of the title, recover the value of improvements made *bona fide* while in possession. *Gates v. McLean*, 70 Cal. 50, 11 Pac. 489; *Worley v. Nethercott*, 91 Cal. 517, 27 Pac. 767. It is contended that the expressions upon this point in those cases were mere dicta, and it may be doubted whether the doctrine is authoritatively settled in this state; but in this case we cannot decide the question, and it would be a waste of time to consider it. It was purely and simply a conclusion of law that the plaintiff was entitled to recover the value of his improvements, and upon this appeal the conclusions of law are not reviewable.

The ninth finding is to the effect that the plaintiff has regularly paid all taxes, as-

sessments, and water rates that have been levied or assessed upon said land and improvements for the period of five years from the execution of the contract, etc. This finding, according to its literal terms, is fully supported by the evidence; but more than five years elapsed after the execution of the contract before the levying of the assessment on the water stock sold to plaintiff along with the land, and defendant claims that the refusal of plaintiff to pay that assessment was a breach of his contract. This contention the superior court disposed of in its conclusions of law, where it was held that plaintiff was not liable under his contract for that assessment. Whether this conclusion was correct may call for further consideration, but the finding here in question has no reference to that assessment, and as to other taxes, etc., it is correct.

The tenth and eleventh findings of fact set forth the chain of defendant's title to the land, and the latter concludes as follows: "That defendant's (Pomona Land and Water Company's) only right or title to said lands is that derived under the chain of title above set forth, considered in connection with such remedial legislation as may be found in any act of congress applicable to the said chain of title; that by reason of the facts last hereinbefore set forth, as to the defective character of the title attempted to be conveyed to plaintiff, plaintiff has been greatly damaged." No part of these findings is called in question, except the last sentence above quoted, which embodies the conclusion that, by reason of the facts recited, the plaintiff has been greatly damaged. As to this the respondent contends that it is a misplaced conclusion of law, and cannot be reviewed on this appeal; but we agree with the appellant that it embraces a finding upon a vital issue of fact, viz. whether there was such a defect in the title as justified the plaintiff in rescinding the contract of sale at the time and under the circumstances of the alleged rescission. The finding was material in no other aspect, and in that aspect it was material; for it could not be established either as a conclusion of fact or of law that the contract had been rescinded for failure of title to the land without a finding that the title was so defective that the plaintiff could not be required to accept it. As to this matter, it may be conceded that the title which the defendant had on the 14th of January, 1894,—the date at which its conveyance was due,—was not such a title as the plaintiff was bound to accept. The defect, it is true, was curable under the act of 1887; but it had not been cured, and the defendant never, down to the trial of the action, had been able to cure it under that act, for the reason, apparently, that the land office would not receive its proofs of citizenship and *bona fide* purchase until the patent to the railroad

company had been vacated, and the suit to vacate the patent was still undecided. If, therefore, the plaintiff had elected to rescind at that time, his right so to do would probably have been clear. But he did not elect to rescind at that time. Instead of rescinding, he accepted the promise of the defendant to cure the defect in its title, and rested upon it for two years and a half before taking any further action. For this, of course, he was in no wise to blame. He had a right to accept and rely upon the promise of defendant to perfect its title, and in the meantime to hold his right of rescission in reserve, to be exercised when, after a reasonable opportunity so to do, the defendant had failed or refused to redeem its promise; for while it is true that the right to rescind must be exercised promptly and is lost by delay, it is equally true that it does not lie in the mouth of a delinquent party to object to a delay which has been granted at his instance in order to enable him to perform an agreement which he is unable to perform at the time stipulated. On the other hand, it seems to follow that when, in consequence of some promise of the delinquent party, rescission has been delayed beyond the proper time, the right to rescind will not be revived until a reasonable opportunity has been afforded for compliance with such promise, unless it is by its terms to be performed within a certain time. And so the real question to be decided in this connection, and the main question in the case, is whether the defendant did unreasonably delay the proceedings to perfect its title.

The actual delay was no doubt unusual in the matter of perfecting a title, but whether it was unreasonable or injurious to the plaintiff depends upon the ability of the defendant to proceed, and the situation in which the plaintiff was left pending the delay. As to this it seems to be conceded that the defendant was prevented from making its proofs under the act of 1887 by a regulation of the land department that such proofs would not be received in any case until the patent to the railroad company had been canceled, and the patent embracing this particular land had not been canceled at the date of the alleged rescission. As to the terms of the regulation respecting the time of making these proofs, there is no direct evidence in the record, but, since the act of congress authorized the department to make rules on the subject, we must take judicial notice of such rules as were made, and, since the statement of counsel for appellant as to the substance of the regulation is not controverted by the respondent, we assume the fact to be as above stated. The defendant, therefore, not being a party to the suit involving the patent to this section, and having no power to expedite a decision,—if, indeed, any person could have brought the litigation to an earlier conclusion,—cannot be blamed for failing to procure

a patent under the act of 1887, prior to the attempted rescission. But another and a more liberal act of congress was passed in March, 1896, under which, as plaintiff contends, the defendant might have proceeded without delay to get its patent, and he justifies his determination to rescind in August, 1896, upon the ground that the defendant had taken no steps under the later act. It does not appear, however, that either of the parties was advised at that time that the obtaining of a patent in this case could be hastened by a proceeding under the new law, and there is no evidence of any request or suggestion from the plaintiff that the defendant should take any different course from that previously agreed upon, viz. that it should keep track of the proceeding in court, and make its proofs, under the act of 1887, as soon as notice should be given that the land office was ready to receive them. We think that, if plaintiff desired a different or more expeditious procedure, he should have notified defendant, and given it a reasonable opportunity to conform to his wishes, before declaring a rescission of the contract on this ground. As to any injury to plaintiff occasioned by the delay, the record is silent. There is no evidence that he was damaged in any way. He was living upon the land. He was practically certain of securing the title in due course of proceedings under the law, and secure against any disturbance of his possession meanwhile. It is true, as suggested, that he might not have been able to sell the property so readily as he would have been if the title had been perfected; but there is no evidence that he desired to sell, and in a case of this complexion, in which the incidents of rescission have been complicated by the taking of possession and the making of improvements, we think something more is required to justify the course taken by plaintiff than the mere speculative injury involved in the surmise that the state of the title might have prevented a sale if he had desired to sell. Our conclusion upon this point is that the defect in the title to the land was not such a damage to plaintiff as to justify a rescission at the time plaintiff undertook to exercise the right, and that the finding of such damage is not sustained by the evidence.

As this finding is the principal basis of the conclusions and decree of the superior court, it is perhaps not strictly necessary that we should notice other points discussed by counsel, but we will briefly state our conclusions upon one or two propositions affecting the rights of the parties.

We think there is no foundation for any charge of fraudulent representations inducing the execution of this contract. The representations as to the water were true, and that respecting the title was based upon a state of facts which at the time fully justified the claim of a perfect title. Besides, if the plaintiff intended to rely upon misrepresentation as to the title, he should have re-

scinded as soon as he discovered the fact, and, since he did not then rescind, he waived the right to do so to the same extent at least that he waived his right to rescind for the actual defect of title of which he complains. Whether or not, in the final adjustment of this controversy, it may be held that the plaintiff can claim or recoup damages for any actual failure of the supply of water which his stock purported to represent,—a point as to which we express no opinion,—it is certain that the failure which occurred was not a cause for rescission. If this part of the consideration for plaintiff's obligation failed in any degree, the failure was due to no fault of the defendant, and so was not a ground of rescission. Civ. Code, § 1689, subd. 2.

As to the assessment levied upon the stock of the Del Monte Irrigation Company in August, 1896, we think, by a fair construction of the contract, it was payable by the plaintiff. He agreed, in consideration of the right to occupy the land pending the fulfillment of the contract, to "pay and discharge all taxes, assessments, and water rates" that might be levied or assessed "on the premises." The stock was sold with the land under a rule apportioning 10 shares of stock to each acre of land, and they were so inseparably related under the contract that an assessment upon the stock to carry out the purposes of the irrigation company was, within the meaning of the contract, a water rate assessed upon the premises. The order denying a new trial is reversed.

We concur: MCFARLAND, J.; HENSHAW, J.; VAN DYKE, J.

131 Cal. 561

EATON v. NORRIS et al. (Sac. 699.)

(Supreme Court of California. Feb. 12, 1901.)
PUBLIC MINERAL LAND—LOCATION—MARKING
BOUNDARY ON GROUND.

Two adjoining mining claims were each marked at the corners by four stakes about a foot and a half long, flattened on two sides, and driven into the ground about four inches; two stakes being at the ends of the dividing line common to both claims; some stakes being in the brush, and others in the open ground. In the middle of the dividing line was a tree blazed on both sides, on one of which the notices of location were posted, describing the claims by courses and distances, running from the tree to a stake, and from stake to stake to point of beginning. The ledge on each claim had been sufficiently developed to show its existence and direction. *Held*, that the location sufficiently complied with Rev. St. U. S. tit. 32, c. 6, § 2324, requiring that a location must be distinctly marked on the ground, so that its boundaries can be readily traced.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by J. R. Eaton against T. R. Norris and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Warren & Taylor, for appellants. Gillis & Tapscott, for respondent.

SMITH, C. An appeal from a judgment against the defendants and from an order denying a new trial. The suit was to quiet title to two mining claims particularly described, and known as the Luella quartz-mining claim and the Extension of the same. The former claim was located January 1, 1896, by the plaintiff; the latter by his wife, who conveyed to him prior to the beginning of the suit, he conveying to her an undivided half of his original claim. The defendants claim under a later location, of date January 15, 1898; and their location, being subsequent to the act of March 27, 1897, "prescribing the manner of locating mining claims" (St. 1897, p. 214), must depend for its validity on compliance with the provisions of that act, with which the court found they failed to comply. As conclusions of law the court found that the defendants' location was void, and that the plaintiff, being in possession, was entitled to judgment against them as mere trespassers. It is now urged by the appellants that their location was valid, and the findings to the contrary unsupported by the evidence. But the first question to be determined is as to the validity of the plaintiff's location; for, if this was valid, the claims were not open to location by the defendants. The plaintiff's locations, being anterior to the act of March 27, 1897, and there being in this case no local usage or customs, must be governed, with regard to their validity, exclusively by the provisions of chapter 6 of title 32 of the Revised Statutes of the United States, and especially by those of section 2324 (Rev. St. p. 426); the sole requirement of which is that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." The court finds specifically how the locations were in fact marked on the ground, but does not find in words that the marks found were such that the boundaries could "be readily traced"; and it is objected that, in the absence of such a finding, the judgment cannot be sustained. It is, no doubt, true that the ultimate fact in determining the validity of a location is the placing of such marks on the ground as to identify the claim, or—to use the language of the statute—of such a character that the boundaries can be readily traced; and that it is for the jury, or court sitting as a jury, to determine whether this has been effected. 1 Lindl. Mines, p. 483, § 373; Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594; Anderson v. Black, 70 Cal. 230, 11 Pac. 700. But where specific facts are found, "from which the existence of the ultimate fact must be conclusively inferred, the finding is sufficient as the finding of the ultimate fact." Hence, if the marks of location as found by the court are of such a character that it is evident that the boundaries can be readily traced, the finding will be sufficient; and in such a case, if there be, in addition to the special findings, a general finding to the contrary, the findings will be set aside as conflicting,—as was

in fact done in a case involving the validity of mining locations, where it was found that "said locations were not distinctly marked on the ground, so that their boundaries could be readily traced." *Howeth v. Sullenger*, 113 Cal. 549, 45 Pac. 841. The question to be considered, therefore, is whether in this case the marking of the location as found was sufficient. And in considering this question it will be observed we are not confined to the monuments placed at the corners of the claim at the inception of the location for the purpose of marking it, but may consider also all other objects placed on the ground, either then or subsequently, prior to the defendants' location, either for the purpose of serving as monuments or otherwise; for all that the statute requires is that the claims be marked distinctly on the ground, without regard to the mode.

The two claims of the plaintiff, it appears from the findings, adjoin each other; the Extension being north of the Luella claim. They were each marked at the corners by four oak stakes, about a foot and a half in length, flattened on two sides, and driven into the ground four or five inches; two of the stakes being at the ends of the dividing line, and common to both claims. Some of the stakes were in the brush, others in the open ground. In the middle of the dividing line was an oak tree, blazed by the plaintiff on two sides, on which the notices of location were posted. In these the two claims were described respectively by courses and distances, running from the tree to a stake, and from stake to stake to the point of beginning. The quartz ledge had been previously discovered, and work had been done in developing it on both claims. The plaintiff also opened up and uncovered the ledge a considerable distance from the tree each way. Subsequently the ledge was further developed by three different cuts sunk deep in the rock, aggregating together over 80 feet in length. A house was built on the Luella claim, near the common boundary of the two claims, in which the plaintiff's men were living. This, I think, was sufficient, under the most stringent construction of the law (*Southern Cross Gold & Silver Min. Co. v. Europe Min. Co.*, 15 Nev. 383); and, indeed, the case seems to come directly within the authority of *Howeth v. Sullenger*, 113 Cal. 548, 45 Pac. 841, cited *supra*. Stakes driven in the ground are, in the absence of convenient natural objects, the most common means of marking a tract of land, and "the most certain means of identification." *Hammer v. Milling Co.*, 130 U. S. 299, 9 Sup. Ct. 551, 32 L. Ed. 967; 1 *Lindl. Mines*, p. 483, § 373. It may be that the marking of the claim by substantial stakes at four corners will not be of itself sufficient (*Taylor v. Middleton*, 67 Cal. 656, 8 Pac. 594), but here it is found that some of the stakes were in the open ground, and, as the ledge had been

sufficiently developed to show its existence and direction, the boundaries of the claim could be readily traced from these. Both claims were also marked by the blazed oak, and from that alone the boundaries as given in the notice could be readily traced. The posted notices, it is said, cannot be substituted for the marking, but they "may be an aid in determining the situs of the monuments." 1 *Lindl. Mines*, p. 483, § 373. They therefore constitute a part of the marking, as does every other object placed on the ground for the purpose of marking it or otherwise, if it in fact does help to mark it. It may, indeed, on account of its temporary nature, be, in general, of minor significance; but this is not so where the location is followed by the actual and continued working of the claim. *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 7 Sawy. 110, 11 Fed. 666. I think, therefore, that the plaintiff's location was good, and the findings sufficient.

This conclusion is also, in some degree, supported by other findings of the court, which are "that defendants were knowing to the above facts, and recognized the existence of said claims, but claimed that a sufficient amount of assessment work had not been performed by the plaintiff"; and that one of them "had been watching the plaintiff during the summer of 1897, to see if he did the required amount of assessment work on his claims." It appears, therefore, that the location was at least sufficient to satisfy the defendants, who alone are adversely interested, and that it thus effected the full purpose contemplated by the act. I advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER OURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

131 Cal. 547

KERN COUNTY v. FAY et al. (L. A. 795.)
(Supreme Court of California. Feb. 12, 1901.)

PLEADING—DEMURRER—STIPULATED FACTS—
DISTRICT ATTORNEY'S FEES—STATUTES.

1. Where a complaint alleges substantially the same facts as are later contained in a stipulation of facts of the parties on which judgment was rendered, a demurrer to the complaint was properly overruled.

2. Under St. 1893, p. 346, § 197, providing that the district attorney of K. county shall receive, as compensation for his services, a fixed annual salary; and section 216, prescribing that such salary shall be in full compensation for all services of every kind rendered by him as such officer,—such attorney, holding office from 1895 to 1899, was not entitled to the fee of \$10 for each suit of foreclosure against delinquent purchasers of school lands, authorized by Pol. Code, § 3533, passed in 1873, in addition to his salary, since the money was collected by him in his official capacity.

Department 1. Appeal from superior court, Kern county; J. W. Mahon, Judge.

Action by the county of Kern against Alvin Fay and others. From a judgment in favor of the plaintiff, defendants appeal. Affirmed.

Alvin Fay, for appellants. J. W. Ahern and S. C. Smith, for respondent.

VAN DYKE, J. The defendant Fay was the district attorney of Kern county from the first Monday of January, 1895, to the first Monday of January, 1899, and the other defendants were sureties on his official bond, as required by law. The action is to recover the sum of \$630, moneys alleged to have been collected by the defendant Fay as such district attorney, and to have been unlawfully retained by him. After a demurrer of the defendant Fay to the complaint had been overruled, he filed an answer containing a general denial of the allegations in plaintiff's complaint. For the purpose of the trial, the facts were stipulated and findings waived. The appeal is taken from the judgment entered in favor of the plaintiff on said stipulated facts. Two questions are presented by appellants on the appeal: First, it is contended that the court erred in overruling the demurrer to the complaint; second, that the evidence in said cause is insufficient to justify the decision rendered. As the complaint sets forth and alleges substantially the same facts as contained in the stipulation of the parties, the demurrer was properly overruled, if the stipulated facts are sufficient to sustain the judgment. Really, therefore, there is only one question presented, and that is whether the defendant Fay is entitled to retain the money collected by him in his official capacity as district attorney. The money in question was collected and received by defendant Fay as district attorney of Kern county, as costs taxed in suits to the number of 63 brought in the superior court of Kern county for the foreclosure of certificates of purchase of state school lands situate in said county. The register of the state land office furnished said Fay a statement embracing school lands in Kern county sold by the state upon which payments were then due and had not been paid. The said delinquents failing to make payment, said actions of foreclosure were commenced and prosecuted, and decrees rendered annulling the certificates of purchase of said lands and for costs. Said defendant thereupon presented a claim to the state board of examiners, which was allowed, in the sum of \$4,053.04, costs and expenses incurred in the prosecution of said suits. This sum included an allowance as attorney's fee of \$10 in each of said actions, amounting, as stated, to \$630, which said defendant failed and refused to turn over with the other costs and expenses so collected.

In retaining the money in question so collected, the appellant Fay relies upon section 3553 of the Political Code, which reads as fol-

lows: "The district attorney is entitled to receive ten dollars for each suit brought, to be taxed as costs." This section is found in the article of said Code entitled "Proceedings against Delinquent Purchasers." Sections 3546-3556. The Codes went into effect the 1st of January, 1873. Some of the sections in the article in question have been amended since, but such amendments do not affect the question under consideration. In the earlier history of the state, it seems to have been the policy of the law to compensate county officials mostly, and in many cases entirely, by fees collected for the work performed. Sheriffs collected and kept the mileage earned in civil cases, and the counties paid them mileage in criminal cases. County clerks collected and retained fees for each instrument filed, each notice given, and each record or copy made. The same was true of recorders, auditors, and to some extent district attorneys. By the constitution of 1879 it was intended to make an entire change in the mode of compensating such officers for their services, and to abolish the fee system. The legislature is required by general uniform laws to provide for the election and appointment in the several counties of boards of supervisors, sheriffs, county clerks, district attorneys, and such other officers as public convenience may require. "It shall regulate the compensation of all such officers, in proportion to duties, and for this purpose may classify the counties by population; and it shall provide for the strict accountability of county and township officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them, or officially come into their possession." Const. art. 11, § 5. To carry out this mandate of the constitution, the legislature, in 1883, passed a county government act. St. 1883, p. 299. This act revised the whole subject of the duties of county officers, and provides for classifying the different counties by population for the purpose of regulating compensation. Generally speaking, the manner of compensating officers is completely changed. Fees collected go to the treasury, and officers get flat salaries. It contains some 40-odd classes. The opening paragraph of each section, at the beginning of each class, reads something like this: "In counties of the ——— class the county officers shall receive as compensation for their services required by law, or by virtue of their office, the following salaries, to wit." Several county government acts have been passed since the first, in 1883. Defendant Fay was acting as district attorney under the act passed in 1893. St. 1893, p. 346. This contains a classification of counties, as did the former acts on the same subject, and the county of Kern belongs to the thirty-fifth class. "In counties of the thirty-fifth class, the county officers shall receive as compensation for the services required of them by law the following salaries, to wit." Section 197.

Then follows a list of the county officers of said class, with their respective salaries, and to the district attorneys a salary of \$2,000 per annum. Section 216 reads: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers, or ex officio officers; their deputies, and assistants, unless in this act otherwise provided."

As to the office of district attorney, it is nowhere otherwise provided in said act. On the other hand, in the section defining the duties of the district attorney, it is declared that he must "on the first Monday of each month file, with the auditor, an account, verified by his oath, of all moneys received by him in his official capacity during the preceding month, and at the same time pay them over to the county treasurer." County Government Act 1893, § 136 (St. 1893, p. 380). It would seem quite clear that under the provisions of the county government act of 1893 the district attorney is not permitted to retain for his own use any moneys collected by him in his official capacity; that the salary prescribed by said act is intended to compensate said officer in full for all services rendered by him. Changing the rule for compensating the district attorney so that he may not retain any fees collected to his own use does not necessarily repeal section 3553 of the Political Code in reference to the costs, including an attorney's fee, collectible in suits of the character that were prosecuted in this case. It would be immaterial, however, whether that section were repealed or not. The money in this case was collected by appellant Fay in his official capacity as district attorney, and he cannot now be heard to say that it was paid to him illegally, and that he therefore has a right to retain it. *People v. Hamilton*, 103 Cal. 488, 37 Pac. 627; *McKee v. Monterey Co.*, 51 Cal. 275; *People v. Bunker*, 70 Cal. 212, 11 Pac. 703. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

131 Cal. 610

HOLT v. HOLT et al. (L. A. 943.)

(Supreme Court of California. Feb. 19, 1901.)

PARTITION OF REAL PROPERTY—INTERLOCUTORY DECREE—FINAL ORDER—APPEAL AND ERROR.

1. Under Code Civ. Proc. § 963, providing that an appeal may be taken to the supreme court from an interlocutory judgment in an action for partition which determines the interests of the parties; and *Id.* § 956, declaring that on appeal from a judgment the court may review any intermediate decision which involves the merits or necessarily affects the judgment, except a decision from which an appeal might have been taken,—on an appeal from a final order in an action for partition, taken more than six months after the entry of an interlocutory decree therein, the court cannot consider the sufficiency of the complaint, or order overruling a demurrer thereto, since those matters were concluded by the interlocutory decree, and could have been considered on an appeal therefrom.

2. Where, on an appeal from a final order in an action for partition of real property, no objection is urged to the only matters determined by such order, the order should be affirmed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by William W. Holt against Frances M. Holt and others. From an order confirming the sale of the common property, and fixing the amount of the attorney's and referee's fees, the defendant Frances M. Holt appeals. Affirmed.

Hester & Ladd, for appellant. Chas. L. Batcheller and E. E. Bacon, for respondents.

GRAY, C. This is an action in partition in which the complaint alleges that the plaintiff, Holt, and the defendant Frances M. Holt, are tenants in common, each having an estate of inheritance to the extent of one undivided half of the whole of the fee in a certain described lot in the city of Los Angeles, and that defendant Frances Bacon has a mortgage lien on the said interest of Frances M. Holt to the extent of \$500, besides interest. The action was commenced January 6, 1899, a general demurrer to the complaint was overruled, an answer filed, and a trial had, followed by an interlocutory decree of partition made on May 25, 1899, and filed on the 27th of the same month. This decree adjudicated and determined the rights and interests of the

several parties to the suit in the lot in question, found that a partition could not be had without great prejudice to the owners, and ordered that a sale be made by the referees named in the decree, and the proceeds thereof be applied by said referees (1) to the payment of the general costs, including cost of abstract and attorney's fees; (2) to payment of costs of references and sale therein; (3) that the residue be paid to the several parties to the suit, the specific part that each should receive being fully stated in the decree. The court in this decree specially reserved its finding and order as to the amount of attorney's fees to be allowed until the making of its final decree. Subsequently a sale was made under this decree to the respondent Frank Jackson, and thereafter an order confirming said sale was duly made by the court, and filed on the 6th day of January, 1900. In this order the attorney's fees were fixed at \$100, and referee's fees at \$30. This appeal is from the last-mentioned order, which is referred to in the notice of appeal as "the final judgment and decree therein entered in the said superior court on the 6th day of January, 1900." The notice of appeal was filed and the appeal taken on April 20, 1900, more than 60 days after the entry of the order appealed from, and more than 6 months after the entry of the said interlocutory decree.

The only reasons urged for a reversal on this appeal are: (1) The complaint does not state sufficient facts, and the demurrer to it should have been sustained; (2) the court failed to find, upon the issue tendered in appellant's answer, as to her right to a homestead upon the said property. These questions cannot be considered upon this appeal.

The objection urged against the complaint is that it fails to set forth specifically and particularly the origin, nature, and extent of the interests of the several parties in the property described in the complaint. The nature and extent of the several interests were set forth in the complaint, and if the complaint was not sufficiently specific in the respects stated, and the court had improperly overruled the demurrer, such action could be reviewed only on appeal from the interlocutory decree of partition; for that decree is a final judgment, certainly, as to all questions determined in it (*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607); and whether the order here appealed from be treated as an order made after final judgment, or as itself a final judgment, it is plain that the decree of partition cannot be reviewed, because an appeal might have been taken from such decree (Code Civ. Proc. § 963), and any intermediate decision that might have been appealed from cannot be reviewed on this appeal (*Id.* § 956). For reasons apparent from the foregoing argument, we are also precluded from here reviewing or deciding anything as to the issue concerning the homestead.

This appeal cannot be treated as taken from the decree of partition, for the notice of appeal was filed after the time limited by stat-

ute for taking such an appeal. In the interlocutory decree of partition the question of attorney's fee was specially reserved for future consideration, and that matter was for the first time adjudicated in the order here appealed from. We may therefore treat such order as a final judgment as to the attorney's fee, at least, and in that view of the matter, as nothing is urged against said fee, we think the judgment appealed from should be affirmed, and so advise.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

131 Cal. 581

In re YOELL. (S. F. 1,683.)

(Supreme Court of California. Feb. 16, 1901.)

INSOLVENCY—DISCHARGE—JURISDICTION—GENERAL APPEARANCE.

Where a creditor has appeared generally in the insolvency proceedings, filed its claim, and voluntarily or in response to some notice appeared and opposed the application of the insolvent for her discharge, it should not be heard to object to the jurisdiction of the court on the ground that certain affidavits of publication of notices throughout the proceedings were insufficient to show that the court acquired jurisdiction.

Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Application of Emily C. Yoell, an insolvent, for a discharge. From an order granting her discharge, a creditor appeals. Affirmed.

Jackson Hatch, for appellant. D. W. Burchard, for respondent.

HENSHAW, J. Emily C. Yoell petitioned for and obtained her discharge in insolvency. Written opposition to her discharge was filed by certain creditors who had proved their debts, upon the sole ground that the insolvent had concealed a part of her estate. At the hearing no testimony was offered in support of this ground of opposition, but the attorney for one of the contesting creditors opposed the discharge upon the ground of lack of jurisdiction in the court, for that certain affidavits proving publication of notices throughout the proceedings were insufficient to show that the court had acquired jurisdiction. But this particular creditor here appealing appeared in the insolvency proceedings, filed its claim in due and proper form, and later, either voluntarily or in response to some notice, again appeared and filed its written opposition to the granting of the insolvent's petition for discharge. In all this no objection was taken or suggested as to any deficiency in the notices. Having thus made its general appearance and become an actor in the insolvency proceedings, we think it may not now be heard to urge this ground in opposition. *Pomeroy v. Gregory*, 66 Cal.

63 P.—58

CAL. REP. 63-65 P.—17

572, 6 Pac. 492; In re Clarke, 125 Cal. 392, 58 Pac. 22. In the latter case the insolvent in a proceeding in involuntary insolvency, having appeared, demurred to the petition, and filed an answer upon which issues of fact were raised and tried, was held to have submitted himself to the jurisdiction of the court, and could not thereafter be heard to complain that he was improperly brought before it by insufficient citation. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

131 Cal. 575

MARTIN v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 2,243.)¹

(Supreme Court of California. Feb. 15, 1901.)

APPEAL—LACHES—DISMISSAL.

The dismissal of an action on the ground of laches in the prosecution thereof will not be disturbed on appeal, where no abuse of discretion is shown.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Eleanor Martin, administratrix, etc., against the city and county of San Francisco. From a judgment for defendant dismissing the action, plaintiff appeals. Affirmed.

S. W. & E. B. Holladay and D. P. Belknap, for appellant. Franklin K. Lane, City Atty., for respondent.

PER CURIAM. The action involves the title to a tract of land in San Francisco held by the defendant for public purposes. The complaint was filed in 1872, and the answer thereto was filed in 1873. In December, 1875, upon the petition of the plaintiff, the cause was removed to the United States circuit court, and in October, 1887, was remanded to the superior court of the city and county of San Francisco. No further steps therein were taken by either party to the action until June 28, 1899, when a motion was made on behalf of the defendant to dismiss the same upon the ground of laches and want of prosecution on the part of the plaintiff. The motion came on for hearing August 18th, at which time certain affidavits and other documentary evidence in support thereof were read, and, after argument by counsel, the court made its order granting the motion, and thereupon entered judgment dismissing the action. From this judgment the plaintiff has taken the present appeal, and in support thereof urges that the dismissal of the action was without the authority of the court. The authority of the superior court to dismiss an action, on the ground of laches on the part of the plaintiff in prosecuting the same, has been frequently exercised, and, unless it is made to appear that there was a gross abuse of discretion

¹ Rehearing denied March 15, 1901.

In making such dismissal, its action will not be disturbed in this court. The matter was very fully considered in *People v. Jefferts*, 126 Cal. 296, 58 Pac. 704, and more recently in *Nicol v. City & County of San Francisco* (Cal.) 62 Pac. 513. Upon the authority of these cases, the judgment herein is affirmed.

131 Cal. 615

BAKER v. BORELLO et al. (Sac. 871.)
(Supreme Court of California. Feb. 19, 1901.)

PRACTICE AND PLEADING—MODIFYING INSTRUCTIONS—BILL OF EXCEPTIONS—AMENDMENT—JURISDICTION.

1. Where the court modified an instruction requested by the defendants before giving it to the jury, but did not import therein any error prejudicial to the defendants, the defendants could not object to it.

2. Code Civ. Proc. § 473, providing that the court, in its discretion, may allow an amendment to any pleading or proceeding, does not authorize the superior court to amend a bill of exceptions which had been settled and used on a motion for a new trial before an appeal had been taken from the order denying the motion, since after appeal the court was deprived of jurisdiction, and could not change the record on which it acted in denying the motion.

Department 2. Appeal from superior court, Merced county; E. R. Rector, Judge.

Action by Joshua Baker against F. M. Borello and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. W. Knox and P. F. Dunne, for appellants. J. F. McSwain, J. F. Peck, F. G. Ostrander, and F. W. Henderson, for respondent.

BEATTY, C. J. The defendants in this case appeal from an order denying a new trial. The respondent makes a preliminary motion to correct the record of the proceedings in the superior court. The facts are that the defendants, in support of their application for a new trial, served a draft of their proposed bill of exceptions, which showed that the trial judge of his own motion had given a certain instruction, numbered 18, to the giving of which they had duly excepted. The proposed bill also contained a special assignment of error upon the giving of instruction numbered 18. In this particular the bill of exceptions was settled and allowed by the trial judge, Hon. J. K. Law, in substance as proposed by defendants, and was filed April 27, 1900. The motion for a new trial was submitted to Judge Minor on June 28th and denied on July 2d. Defendants appealed July 14th, filed the transcript in this court August 22d, and on October 11th filed and served their brief, in which they presented their assignment of error upon the giving of said instruction. The attention of the respondent seems then to have been drawn for the first time to this feature of the bill of exceptions, and soon afterwards, and within six months from the settlement of the bill, he com-

menced proceedings to amend the record so as to make it appear that the instruction of which the appellants are complaining was really given at their request, and not volunteered by the court. After considerable delay, occasioned by a change of incumbents in the office of superior judge, an order was made by Judge Rector on January 15, 1901, correcting the bill substantially in accordance with the motion of the respondent; that is to say, it appears from the order of Judge Rector that the defendants presented the instruction to Judge Law—the trial judge—with a request that it be given, but it was not given in precisely the form in which it was requested. Before giving it, Judge Law struck out one or two words, and altered one sentence slightly, but without changing its meaning or effect. The only tendency of the alterations made by him was to make the instruction somewhat less open to the objection now urged against it than it was as originally requested by the defendants. Because of this modification of the instruction by the court before giving it, the appellants contend, in opposition to this motion,—that the statement contained in the bill of exceptions as proposed was true,—that the instruction given was not the instruction they asked, but an instruction volunteered by the court; and upon this point they cite *Morgan v. Peet*, 32 Ill. 281, where it was decided that the party asking an instruction may except to the giving of such instruction with an addition which is prejudicial to him, and is not law. I should not doubt the correctness of that decision, but it does not fit this case. This bill of exceptions, as corrected, shows that defendants asked a certain instruction, and that the court gave it in a slightly modified form. Their right to object to it therefore depends upon whether the changes made by the trial judge imported into it some new and distinct error prejudicial to them, as in the *Illinois* case. We cannot see that any such change was wrought in the instruction, but, if there was, they have their exception to the modification, and that matter could be considered when the appeal is heard upon its merits. In the meantime the action of the trial court in modifying, before giving, the instruction, is no obstacle to making the record speak the exact truth. We are brought, then, to the question whether it was competent for the superior court to correct this bill of exceptions after the entry of the order denying a new trial, and an appeal to this court, and the filing of the record here. This bill of exceptions being the basis of the motion for a new trial, and the record upon which the order overruling that motion rests, can it be changed without first setting aside that order, and can that order be set aside by the superior court after it has been appealed to this court? We have no doubt that a bill of exceptions or statement which has been settled after appeal

taken may be corrected by a proper proceeding under section 473, Code Civ. Proc., commenced, as this was, within six months after the settlement, for in such cases the superior court is empowered to settle the bill or statement—i. e. to complete the record—after, and for the purposes of, the appeal. *Flynn v. Cottle*, 47 Cal. 526; *Sprigg v. Barber*, 118 Cal. 592, 50 Pac. 682; *In re Lamb's Estate*, 95 Cal. 408, 30 Pac. 568. But a bill of exceptions, prepared and settled beforehand, to be used in support of a motion for a new trial, after the denial of the motion and an appeal therefrom presents a different question. We are of the opinion that in such case the record cannot be amended, and this for reasons which, though technical, are nevertheless conclusive. The appeal deprives the superior court of jurisdiction to set aside its order denying the new trial, and while that order is in force the record upon which it is based cannot be changed, and this court must review the order upon the same record upon which it was made. *Hayne*, New Trial & App. § 160, and cases cited. It has been held—and, we have no doubt, correctly held—that, where a new trial has been granted by an order improvidently or prematurely made before the record was properly settled and certified, this court, upon reversal of the order, may remand the cause for further and orderly proceedings upon the motion (*Morris v. De Celis*, 41 Cal. 331; *Thomas v. Sullivan*, 11 Nev. 280); but this rule of practice does not meet the exigencies of this case. What was said obiter in *Grand Grove U. A. O. D. v. Garibaldi Grove No. 71*, U. A. O. D. (Cal.) 62 Pac. 486, cannot be applied as a universal rule, but only to those cases in which the power of amendment has not been lost. The motion to amend is denied.

We concur: McFARLAND, J.; HENSHAW, J.

131 Cal. 582

MERRILL v. PACIFIC TRANSFER CO.

(S. F. 1,453.)

(Supreme Court of California. Feb. 16, 1901.)

CARRIERS—RECEIPT FOR GOODS—LIMITATION OF LIABILITY—KNOWLEDGE OF TERMS—STATUTES—INSTRUCTIONS—NEGLIGENCE—PROVINCE OF JURY—PLEADING—ALLEGATION OF DAMAGES.

1. Where the complaint in an action against a transportation company for the loss of a trunk alleged that defendant lost the trunk, and set forth its value, and that defendant had refused to pay the same, and defendant set up a special contract limiting its liability, and offered to submit to a judgment for a certain sum, an objection after verdict that the complaint was insufficient, in that it failed to allege damages, was without merit.

2. Civ. Code, § 2176, declares that a passenger or consignor, by accepting a contract for carriage, with knowledge of its terms, assents to any limitation of liability stated therein; and section 19 declares that every person who has notice of circumstances sufficient to put a prudent man upon inquiry has constructive no-

tice, where by prosecuting inquiry he might have learned them. Held that, in an action for the loss of a trunk, it was error to refuse to charge that if, when a receipt which limited the carrier's liability was delivered to plaintiff, the circumstances were such that a prudent man would have read the limitation as to liability, then he had notice thereof, and that it would not excuse him to say that he did not read the notice of limitation.

3. Where, in an action for the loss of a trunk, the court erroneously refused to charge that it was for the jury to say whether plaintiff had constructive knowledge of the limitation of liability contained in a receipt given him, such error was not harmless, on the ground that the evidence showed gross negligence on the part of the carrier, from which it cannot be exempted from liability under Civ. Code, § 2175; the question of gross negligence not having been submitted to the jury.

4. In an action against a transportation company for the loss of a trunk, it was error to admit testimony as to expenditures by plaintiff for wearing apparel, as leading the jury to consider such expenditures outside of the value of the contents of the trunk.

Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by Charles Merrill against the Pacific Transfer Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. P. Langhorne, for appellant. Samuel Knight, for respondent.

HENSHAW, J. This action is brought by plaintiff, assignee of his wife, to recover from the defendant, a common carrier, damages for its failure to deliver a trunk and its contents. In its answer defendant denied that the loss of the trunk was occasioned through its negligence, and further, as a special defense, pleaded a contract for the carriage of the trunk by which the limitation of liability for its loss was \$100, and offered to allow plaintiff to take judgment for \$100 in compensation for his injury. The case was tried before the court and a jury, and a verdict rendered in plaintiff's favor for \$950. Defendant's motion for a new trial was denied, and from the judgment and from the order so denying its motion it prosecutes this appeal.

The point was made in the lower court upon the motion for a new trial, and is pressed in this court, that the complaint was not sufficient to sustain the judgment, in that it fails to allege that plaintiff has sustained damages. But, however inartificially it may have been drawn in this respect, that pleading sufficiently charges the failure of defendant to deliver the trunk in accordance with its contract, and avers that by its gross negligence and that of its servants it lost the trunk, sets forth the reasonable value of the trunk and of its contents, pleads that defendant, though requested to pay the value of the same, has refused to do so, and prays judgment in the sum of \$950. Defendant by its answer treated this as a sufficient pleading, made denial of the material allegations,

set up the special contract, and offered, as has been said, to permit plaintiff to take judgment in the sum of \$100. The case throughout was tried upon the theory that issue was joined upon these matters, and that the pleadings sufficiently declared upon the issues. It is too late, after verdict found and judgment rendered, to raise the point. *Horn v. Hamilton*, 89 Cal. 276, 26 Pac. 833. There was not here an absence of a material averment. It was the case of a material averment defectively pleaded, and, while the point might have been well taken upon special demurrer, we think the objection may not now be heard. *City and County of San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66; *Thompson v. De Kum (Or.)* 52 Pac. 517.

The undisputed facts disclosed at the trial were that Mr. Merrill, coming to San Francisco, delivered to the agent of the defendant transfer company certain brass baggage checks or tokens, with the understanding that the baggage called for by them was to be delivered at his house in San Francisco. The agent in return gave to Mr. Merrill a paper upon which, with printed matter, were written the check numbers, the name and address of Mr. Merrill, and the signature of the agent. This paper, over the signature of the agent, contained the following: "Read following conditions of this contract. This company will not become liable for loss of or injury to merchandise, money, or jewelry contained in baggage in any event, nor for an amount exceeding one hundred dollars upon any trunk and contents, or twenty-five dollars upon any valise or package and contents, unless specially agreed for in writing. If these conditions are not acceptable, notify agent, otherwise the party accepting this contract of carriage is bound thereby." The plaintiff, receiving the receipt, read the address to see if it was correct, and read the penciled memoranda. He read nothing else upon it. He was familiar with the usual method of the transaction of the business of the transfer company, had traveled a good deal, and had always been in the habit of giving his checks to and taking a receipt from the agent of the transportation company. It was light enough to read. There was time enough for him to have read the printed portion, but he could not with certainty have done so without using his eyeglasses. He did not, however, think to read it or attempt to read it. He put the receipt in his pocket. He does not recollect that he ever read the printed portion of any receipt. He read the printed portion of this one only after the trunk was lost. He did not know that there were conditions on the receipt. He regarded it merely as a receipt,—as the only thing he had to connect him with his baggage. He paid the price usually charged, which was 50 cents for each trunk. The trunk with other parcels of baggage, was sent by

the company in one of its wagons for delivery after nightfall. There was only one man in charge of the wagon. He, of necessity, in delivering baggage was compelled to leave his wagon standing in the street, unwatched and unattended. On returning to it after making delivery of a piece of baggage, he observed that the trunk had been stolen. He delivered the other parcels at the Merrill residence, stating that this particular trunk had been overlooked and would be delivered later. He did not announce the theft, fearing that he would be detained and delayed, and thus prevented from catching a certain train to which he was under orders to deliver baggage.

Appellant complains of certain instructions given and refused by the court. Section 2176 of the Civil Code provides that "a passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated; and also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes, is lost or injured, when the value of such property is not named; and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same." Defendant proposed an instruction as follows: "In regard to the so-called receipt given by defendant's agent to Mr. John F. Merrill, acting for Mrs. Merrill, it is claimed by plaintiff that it was received by Mr. John F. Merrill without notice of its terms or of the limitation of liability printed thereon. Now, in regard to what constitutes notice, I instruct you that notice may be either actual or constructive. Notice is actual when it consists in express information of a fact, and constructive when imputed by law. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact. Accordingly, if you find that when the receipt in question was delivered by defendant's agents to Mr. John F. Merrill, acting for Mrs. Merrill, the circumstances of which Mr. Merrill had actual notice were such that a prudent man could and would have read the limitation as to liability in said receipt, then I instruct you that in law Mr. John F. Merrill, as agent of Mrs. Merrill, had due notice of such limitation of defendant's liability, and that it is no excuse of Mr. John F. Merrill to say that he did not then read said limitation of liability, if he had free opportunity to do so." This instruction was refused; the court basing its refusal upon its construction of section 2176 of the Civil Code, which it held to mean that

the passenger must have actual knowledge of the terms of the alleged contract, or his acceptance of it did not bind him. It is observed that the instruction is framed upon the theory that if Mr. Merrill, by all the circumstances of the case, was put upon notice of the terms of the contract, he was, in accepting it, bound by them.

Coming to the law of the matter, section 18 of the Civil Code provides that notice is actual which consists of express information of a fact, and constructive which is imputed by law; and section 19, that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which by prosecuting inquiry he might have learned such fact. Mr. Merrill denied that he had actual knowledge of the limited liability clause of the contract. If actual knowledge alone would bind him, as was the theory of the trial court, the instruction was properly refused. The question is new in this state, but in New York, where it has frequently arisen, it has been uniformly held that the determination whether, under all the circumstances, the passenger was chargeable with knowledge under the doctrine of notice, actual or constructive, was for the jury, and that it is not sufficient for the passenger to disclaim actual knowledge. Thus, in *Madan v. Sherard*, 73 N. Y. 335, it is said: "The fact that the receipt was printed in large type, and could be easily read; that it was received in the daytime, or when there was sufficient light to enable the traveler to read it; that he was acquainted with the methods of the business,—these and other facts may be shown, not as conclusive against a recovery, but as bearing upon the ultimate fact to be proven, that the plaintiff when he accepted the receipt knew of its limitations, or that it contained special terms for the carriage of the property." So, again, in *Kirkland v. Dinsmore*, 62 N. Y. 171, it is said: "He [the passenger] cannot escape from the terms of a contract, in the absence of fraud or imposition, because he negligently omitted to read it; and, when the other party has a right to infer his assent, he will be precluded from denying it to the other's injury. The plaintiff is, we think, in that position. The contract was one which the parties might lawfully make. The defendant had a right to infer from the plaintiff's acceptance of the receipt without dissent that he assented to its terms. Now, after a loss has occurred, it is too late to object that he is not bound. If he had objected at the time, the defendant would have been entitled to exact as a condition of carrying the parcel a compensation equivalent to the risk of insurers. The circumstances imposed upon the plaintiff a duty to read the receipt." Such, without further multiplying citation or quotation, is the true principle. Objection is made by respondent that "knowledge" is not synonymous with

"notice," and this is certainly true to the extent, at least, that the two words are not always interchangeable in meaning. "Notice," in one sense, means the legal instrumentality by which knowledge is conveyed, or by which one is charged with knowledge. One having knowledge that he is a defendant in a suit is not bound to appear until there has been brought home to him the legal instrumentality of knowledge, a proper notice. But, upon the other hand, where the Code speaks of actual and constructive notice, it means no more than that under the indicated circumstances a man is legally chargeable with knowledge. It is too narrow a view of section 2176 of the Civil Code, therefore, to hold that the passenger can be charged with the conditions of the contract only by a showing of his actual knowledge of them. The knowledge itself may be imputed to him by conduct. The instruction in question was therefore improperly refused; for it was with the jury to say whether, under all the circumstances as disclosed by the evidence, Mr. Merrill had the actual or constructive notice or knowledge contemplated by the law.

But respondent makes further answer that even if the court erred in its theory of the law of the case, and consequently in its refusal to give the offered instruction, the error was harmless, because the evidence conclusively shows that the defendant was guilty of gross negligence, and that, therefore, even if the passenger had knowledge of the limiting clause of the contract, it would not exempt the defendant in this case from the full measure of his liability for loss, because of the fact that the loss was occasioned by its own gross negligence. In this, reliance is had upon section 2175 of the Civil Code, to the effect that a common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence, fraud, or willful wrong of himself or his servants. Such, unquestionably, is the law of this state. *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 47 Pac. 874, 52 Pac. 302. But the question whether or not the common carrier was guilty of gross negligence was in the first instance one for the jury to pass upon, under proper instructions from the court; and this court may not be asked to usurp this function of the jury, and thus decide a question which has never been submitted to them.

It appears, therefore, that a new trial in this case must be ordered. In contemplation of such new trial only one further point demands consideration. The evidence offered and admitted in reference to the expenditure by Mrs. Merrill of the sum of \$300 for wearing apparel should have been excluded. It could not have tended to enlighten the jury as to the actual damage which was suffered by the loss of the trunk, and it might well have tended to confuse them and mislead them into the belief that her expenditures in replacing wearing apparel, apart from and

outside of the value of the contents of the trunk, were to be considered by them in assessing damages. The judgment and order are therefore reversed.

We concur: TEMPLE, J.; McFARLAND, J.

131 Cal. 572

RECLAMATION DIST. NO. 556 v. THISBY.
(Sac. 720.)

SAME v. THISBY et al.

(Supreme Court of California. Feb. 15, 1901.)

NEW TRIAL—MOTION—NOTICE OF INTENTION
—SUFFICIENCY—PREMATURE NOTICE—
TRIAL BY COURT—APPEAL.

1. Code Civ. Proc. § 659, declares that a notice of intention to move for a new trial shall be filed within 10 days after notice of the decision of the court, when the action is tried without a jury, and within the same time after verdict when tried by a jury. *Held*, that where special issues submitted to a jury formed only a portion of the controversy, and the remaining issues were tried by the court, and on its findings of fact, together with the answers of the jury, the judgment was rendered, a notice of intention filed before the decision of the court, but within 10 days after the answers of the jury, was premature, as the action was one tried by the court.

2. Where, on an appeal from an order denying a motion for a new trial, the bill of exceptions showed that the notice of intention to move for a new trial was insufficient, in that it was prematurely filed, a statement in the bill that appellants had served and filed notices of their intention to move for a new trial within the time allowed by law did not cure the defect, such statement being but a legal conclusion.

3. While the notice of intention to move for a new trial forms no part of the record on appeal from an order denying a motion for a new trial, yet where the bill of exceptions shows that the notice of intention was insufficient, and it does not appear that respondent has waived such objection by accepting service of either the notice of intention or of the proposed statement and bill of exceptions, or that it suggested any amendment thereto, or was present at the settlement, the order would be affirmed.

Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Actions by reclamation district No. 556 against Mrs. R. Thisby and others. From orders denying motions for a new trial, defendants appeal. Affirmed.

Hiram W. Johnson, Grove L. Johnson, and Johnson, Linforth & Whitaker, for appellants. M. S. Wahrhaftag and A. L. Shinn, for respondent.

HARRISON, J. The plaintiff seeks by these actions to condemn a right of way over a strip of land belonging to the defendants for the purpose of constructing thereon a levee and canal. The two actions were tried together as a single cause, and have been presented here in a single record, and upon the same argument. Certain issues were submitted to a jury, and its verdict thereon adopted by the court, and additional findings were made upon other issues. Upon these findings the court rendered judgment in favor

of the plaintiff, and afterwards denied the defendants' motions for a new trial. From these orders the defendants have appealed. No appeal has been taken from the judgments.

The sufficiency of the complaint or of the findings to support the judgment, or the right of the plaintiff to maintain the actions, cannot be considered upon an appeal from the orders denying a new trial. *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186. The respondent contends that the order of the superior court must be sustained upon the ground that it was without jurisdiction to entertain the motion for a new trial, inasmuch as no proper notice of an intention to make such motion had been given. Although certain special issues were submitted to a jury, these issues formed only a portion of the controversy between the parties to the actions, and the remaining issues were tried by the court, and findings of fact made by it thereon, upon which, together with the answers of the jury to the questions submitted to them, the court rendered its judgment in favor of the plaintiff. The "actions" were, therefore, tried by the court, and, under section 659, Code Civ. Proc., until the court had rendered its decision, it was not competent for either party to give notice of its intention to move for a new trial. The notices of intention to move for a new trial were given and filed November 1, 1897, while the decision by the court was not made until April 21, 1898. These notices were within 10 days after the jury had given their answers to the special issues submitted to them, but, as the "actions" were not tried by a jury, the notices were premature, and gave to the court no power to act upon the motion which should thereafter be made under the notices. *Bates v. Gage*, 49 Cal. 126; *Bell v. Marsh*, 80 Cal. 411, 22 Pac. 170. No judgment could have been rendered in the case at the time the jury rendered its verdict, and the trial of the action was not concluded until the court had rendered its "decision" upon all of the issues submitted to it. "A case has not been tried until all the issues have been disposed of, and there has been no decision until the court has passed upon the facts, and drawn its conclusions of law therefrom." *Bell v. Marsh*, supra; *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074; *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211. The rule of procedure for causes tried by the court is the same whether they are cases in equity or actions at law. *Hastings v. Hastings*, 31 Cal. 95.

The notice of intention to move for a new trial does not form part of the record on appeal, and need not be incorporated in the statement therefor (*Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706); and it has been held, for the purpose of sustaining the action of the court below, that, where the record is silent upon the subject, it will be assumed that the notice was given within the proper time (*Patrick v. Morse*, 64 Cal. 462, 2 Pac. 49); yet

if the notice is in fact set forth in the statement or bill of exceptions, and it appears therefrom that it was either insufficient or not given within the proper time, it then becomes necessary for the appellant to have it appear by the record that this defect was overcome or waived. There is nothing in the record herein from which it can be held that the respondent waived this objection to hearing the motion for a new trial, and it may be assumed, in support of the order, that it was made in consideration of the fact that the proper notice had not been given. The statement in the bill of exceptions that the appellants served and filed the notices of their intention to move for a new trial "within the time allowed by law" is but a legal conclusion, and is overcome by the fact that the date of such service and filing is itself given in the bill of exceptions. It does not appear that the respondent accepted service of either the notice of intention, or of the proposed statement and bill of exceptions, or that it suggested any amendments thereto, or was present at the settlement. See *Dominguez v. Mascotti*, 74 Cal. 269, 15 Pac. 773. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

131 Cal. 577

PEOPLE v. HILTEL (Cr. 686.)

(Supreme Court of California. Feb. 15, 1901.)
ARSON — JURISDICTION — INDORSING COMPLAINT AS FILED—EVIDENCE—FIRING ADJACENT BUILDING—TRIAL—INSTRUCTIONS—DEFINITIONS — WEIGHT OF TESTIMONY — PROOF.

1. Under Pen. Code, § 811, providing that, where an information of the commission of a public offense is laid before a magistrate, he must examine the informant and any witness he may produce, etc., the omission of a magistrate to indorse on a complaint for arson the fact that such complaint was filed did not deprive the magistrate of jurisdiction of the case.

2. A dwelling and two outhouses were destroyed by fire, which was first seen breaking through the roof of one of the latter, which had been locked a short time before, and the key thereof hid in the dwelling. When the first neighbor arrived, defendant was coming from behind one of the outhouses. The fire in the dwelling was then breaking through an interior partition. Defendant made no effort to extinguish the flames till after neighbors arrived, and no cry of help or of fire had been heard. Defendant, whose wife owned the house, was the only one seen around when the fire broke out. He had been greatly excited shortly before, and was very angry at his wife, who intended getting a divorce. Defendant testified that he had lain on the bed about 8 o'clock, was soon asleep, and was awakened by the outhouse fire, but said nothing about the fire in the dwelling. The fire was discovered shortly after 8 o'clock, and had then been burning for some time. *Held*, that the evidence warranted a conviction of arson against the defendant.

3. Where a dwelling and two outhouses were so close together that the burning of one must have resulted in the destruction of the others, it was competent in a prosecution for burning the dwelling to show that the three buildings were fired simultaneously.

4. Where the court instructed the jury that, though they could not find the defendant guilty of arson for burning a wine cellar which he was not charged with burning, still if they found that he set fire to the wine cellar willfully and maliciously, beyond a reasonable doubt, and that it was so close to the dwelling that the burning of the former must necessarily cause and did cause the dwelling to take fire and be consumed, this would constitute arson, there was no error.

5. Where the trial court, in a prosecution for arson, was not requested to define circumstantial evidence to the jury, it was not error to omit to do so.

6. A requested instruction, in a prosecution for arson, that the jury should give the same weight to defendant's testimony as they would give to that of any other witness, was properly refused.

7. A requested instruction, in a prosecution for arson, that intent was a material ingredient in every crime, and must be proved by positive evidence, was properly refused.

Commissioners' decision. Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

John Hittel was convicted of arson, and he appeals. Affirmed.

E. L. Webber, C. H. Beerstecher, and Weber & Rutherford, for appellant. Tirey L. Ford, Atty. Gen., for the People.

CHIPMAN, C. Defendant was convicted on an information charging him with the crime of arson. He appeals from the judgment and from an order denying his motion for a new trial.

1. When brought into court to plead, defendant moved to set aside the information on the ground that no complaint was ever filed against him, and that the warrant of arrest was issued without authority of law, and the magistrate had no authority to inquire into the charge laid in the information. It was admitted that a complaint was made and sworn to before a justice of the peace, who certified to the fact in the usual way; that the justice entered in his docket the fact that the complaint was filed; thereafter he issued the warrant of arrest, and defendant appeared in person and by counsel, and the complaint was read to him, whereupon he said he was ready to proceed with the hearing, and the hearing was had, witnesses being sworn for the people, and defendant was held to answer, the order being indorsed on the back of the complaint. There was no indorsement showing that the complaint was filed, and it is urged that this omission left the magistrate without jurisdiction, and was fatal to any proceedings by the trial court. The provisions of the Penal Code are found in chapter 4, and in section 811 the duties of the magistrate are pointed out. It is nowhere required that the complaint shall be marked "Filed," although the magistrate should so mark it for purposes of identification, if for no other reason. In the case here there is no question as to the identity of the complaint, and that defendant had it read to him, and was committed upon it after due

hearing. The jurisdiction of the magistrate did not depend upon his having first marked the complaint "Filed." It was sworn to before him, and was entered "Filed" in his docket, was left with him, and upon it he issued the warrant of arrest. This was sufficient to give him jurisdiction.

2. Defendant contends that the evidence did not support the verdict. There is evidence that defendant and his wife lived unhappily together; that he was given to drink, and abused his wife to such extent as to make her life with him insupportable, and proceedings for divorce had either been commenced by her or were in contemplation. Some years prior to the alleged arson there had been a separation, and defendant conveyed to his wife property he owned in the country, about two miles from Calistoga, he retaining certain saloon property in the town. On the 12th of June, 1900, the family resided on this country property, and consisted of defendant, his wife, son, and daughter, the children being both over age. A few days previous to the above date defendant had so ill treated his wife as to compel her to go to a near neighbor's for shelter and protection. Towards evening of the 12th defendant went in search of his wife. He first called at John Maunder's, one-half mile from defendant's home, about 7 o'clock. Maunder testified: "He wanted to know if his wife was there. I told him 'No,' and he said she had not been home for three days. I said I didn't know anything about it. Well, he says, 'My God,' he says, 'I mean to fix this business before to-morrow night.' He was angry, and very excited. That was about three-quarters of an hour before the fire. * * * He said further that they had done him out of \$2,500 within the last three weeks. I said: 'How is that? What is that?' Well, he says, 'Out of all the machinery and cooperage.'" He next went to M. S. Boland's, about one-quarter of a mile from defendant's home, where his wife had taken refuge. Boland testified that when he came there he was very mad, accused Boland of improper relations with defendant's wife, and applied opprobrious epithets to Boland, whereupon the latter compelled him to leave the premises. Boland testified that defendant "was very excited and angry; comparatively sober." This was between 7 and 8 o'clock. Defendant then returned to his own place. Defendant's son testified that he and his sister left their father at their house to go to a party at some neighbor's about 20 minutes before 8 o'clock. The son testified that he spoke with his father just before leaving, and that his father was very much excited, and called him and his mother and Boland vile names. In the rear of the dwelling, and about 12 or 15 feet distant, was a frame structure called the "wine cellar," in which was stored some machinery, the cooperage referred to by defendant, some wine, fruit, and other articles. A tank house stood

about 33 feet from the dwelling. All three buildings were constructed of wood, and in the tank house was a stove and some family supplies. When the son left to attend the party, he locked the front door of the dwelling house, leaving the door in the rear open, and defendant was then in the dwelling. He also locked the side door of the wine cellar, having first bolted on the inside the only other door leading into the building, and hid the key in the dwelling. The door of the tank house was left unfastened. The son testified that his father told him "several times that we never would make no wine in those cooperage, and he knew my mother was going to have a separation—that is, a divorce—before long." Witness Bennett lived about 70 rods from defendant's place. He passed defendant's house in a wagon about 8 o'clock the evening of the 12th, and saw a light in the tank house, but nowhere else. On reaching his home, and while unhitching his horses, his attention was attracted by a bright light in the direction of defendant's house, and, looking, discovered that fire was breaking through the roof of the wine cellar. It was, he thought, about 15 minutes past 8 o'clock. He ran to defendant's place. He heard no noise coming from the Hiltel premises. When he first got there he ran close to the house, and a dog came out at him. That was the first noise he heard. He went to the tank house to find a hose, and get some water to put out the fire. He testified: "I couldn't find any buckets, and directly Mr. Hiltel stepped out from behind the tank house, and I got some cans and threw three or four cans of water onto the shed adjoining onto the house near the cellar." Defendant was fully dressed, except his coat was off. Witness went into the tank house, and also into the kitchen and dining room. These buildings he describes as full of smoke. In the dwelling a fire was breaking through one of the interior partitions, tending to show that it could not have started from the wine cellar fire, and so were the indications as to the fire in the tank house. Several neighbors came soon after Bennett arrived, and, while there is some difference in their testimony, the result of the evidence was that all three buildings seem to have been fired by some one or more persons nearly simultaneously. Some of the witnesses were of the opinion that the dwelling was destroyed by the fire communicated from the wine cellar; others saw the fire in the dwelling before the outside caught from the cellar, and testified that it was not put out, and would have destroyed the house. The evidence was that up to the time the first neighbor arrived defendant had made no effort to extinguish the flames in any of the buildings, and none of the neighbors heard any cry of fire or for help. After they arrived, defendant assisted in removing articles from the house. Defendant testified in his own behalf. His statement was that he took his coat off and

laid down on the bed about 8 o'clock, and soon fell asleep, and was awakened by the light shining from the tank fire through the window of his bedroom. He made no explanation of the fire issuing from the partition in the house, and which had filled it with smoke by the time Bennett arrived. It is highly improbable that a stranger to the premises could have set fire to all three houses in the interior of each in so short a time without attracting defendant's attention. All the neighbors agree that the fire occurred shortly after 8 o'clock, and, as it must have burned some minutes before attracting their attention, it would follow that the fire must have originated before defendant says he laid down and slept. Without stating other evidence tending to support the verdict, we think enough appeared to warrant the jury in fixing the guilt upon defendant.

3. The testimony as to Mrs. Hiltel being the owner of the premises on which the fire occurred was admissible. The land was fully identified as the same as that conveyed to defendant by deed, and by him deeded to his wife. It was competent to show what the wine cellar contained, and to show that the cellar and the tank house and dwelling were apparently fired simultaneously, although the information charged defendant with burning the dwelling, and did not include the other two buildings. There was evidence tending to show that the dwelling would inevitably have been destroyed from the fire in the cellar, and likewise the tank house. They were so close to each other that the burning of any one would warrant the belief that all would inevitably perish, especially as there were no appliances to extinguish the fire, and the distance from the neighbors would make it out of the question for them to reach the scene in time to be of much, if any, avail.

The court—properly, we think—instructed the jury that, while they could not find the defendant guilty of arson for burning the wine cellar, inasmuch as he was not charged with having caused the burning of this particular building, still if they should find from the evidence, beyond any reasonable doubt, that he set fire to the wine cellar willfully and maliciously, and that it “was situate so close to the building alleged in the information as having been burned by defendant, as that the burning of said wine cellar necessarily caused, and did then and there cause, the flames from said wine cellar to be communicated to said house charged * * * as having been burned by defendant, and that said fire was thus communicated from said wine cellar to said alleged house alleged to have been burned, and then and there caused said house to take fire and be consumed, this would constitute a burning within the meaning of the law of the crime of arson.” We discover no error in this instruction.

The court instructed the jury as to what constituted direct or positive evidence, and that there is another kind of evidence called

circumstantial. The court did not undertake to define this latter kind of evidence, but the court said that it “is where it is sought to convict a person by a chain of circumstances which are sufficient in themselves to establish the guilt of the party to the satisfaction of the jury beyond all reasonable doubt. Both of these classes of testimony are proper, and upon either the jury may convict, providing they are sufficient to satisfy their minds beyond all reasonable doubt of the guilt of the party.” It is complained that the instruction “left the jury to judge for themselves” as to what constituted circumstantial evidence. It would have been proper enough for the court to give to the jury a definition of circumstantial evidence, but it was not error to fail to do so. The court was not asked to define this class of evidence.

Defendant asked, and was refused, certain instructions, and now urges error for such refusal. We find here no ground for reversal. He asked, for example, that the jury be told that they should give the same weight to defendant's testimony as they would give to any other witness; that intent is a material ingredient in every crime, and must be proved by positive evidence, etc. Neither of these instructions correctly stated the law. The other instructions were to the effect that the defendant could not be convicted if the jury should find from the evidence that the dwelling caught fire from the burning of the wine cellar or tank building. But the court—we think, correctly—instructed the jury on this phase of the case, and did not err in refusing the instruction asked by defendant. The judgment and order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

131 Cal. 597

BANK OF UKIAH v. REED et ux.
(S. F. 1,543.)

(Supreme Court of California. Feb. 18, 1901.)

MORTGAGES—FORECLOSURE—REAL AND PERSONAL PROPERTY—ORDER OF SALE—APPEAL—REVIEW—PRESUMPTIONS—HARMLESS ERROR—DEFICIENCY JUDGMENT—PLEADING—CONTRACT TO PAY TAXES—CONSTITUTIONAL LAW—EXONERATION FROM INTEREST—AFFIRMATIVE DEFENSE.

1. On foreclosure of mortgages, plaintiff asked that each of two separate parcels of land subject thereto, and each of two species of personality, one of which was subject thereto, and the other pledged to secure the mortgage notes, should be sold separately, but without designating any particular order for the sale. To sell all of the property as an entirety was impracticable. To determine what order was best, the court took testimony, and directed sales of the personality first; the sale of the pledged personality taking precedence. No objection was taken to the form of the decree, nor appeal taken therefrom till after the sales,

which resulted in a deficiency judgment. Appellants did not bring up the evidence, nor show that they were injured. *Held*, that there was no error, since the court would have been justified in following by analogy the requirements of Code Civ. Proc. § 682, cl. 1, for the terms of an ordinary writ of execution, warranting a like order of sale, and, moreover, the presumption on appeal was in favor of its validity, and it was incumbent on defendants to show error, and that they were injured.

2. Bank stock was assigned to secure notes also secured by two separate mortgages covering both real and personal property, and in an action on the notes and to foreclose the mortgages the counsel fees for the foreclosure were included in the aggregate sum, which was declared to be a lien on the property given to secure the notes, and the bank stock was directed to be sold before the other property. *Held*, that an objection that the direction caused the proceeds of such stock to be applied to counsel fees, no portion of which was a lien thereon, was unfounded, and that it was immaterial to defendant, since the stock was security for the entire debt, and, the entire property being insufficient to satisfy the judgment, defendants were not injured thereby.

3. On foreclosure of two separate mortgages, an omission to make counsel fees allowed for the foreclosure of each a specific lien on the property described in that mortgage is only a technical error, which does not invalidate the sale of all the mortgaged property; the proceeds being insufficient to satisfy the judgment.

4. That a portion of property included in mortgages was not included in the judgment on foreclosure thereof is no ground for reversal, though the mortgagors are entitled to have all of the mortgaged property sold before there can be any personal liability, since such portion was thereby freed from the mortgage lien, and if the judgment was not satisfied by the sale a reversal was unnecessary, as the mortgagors' rights could be fully preserved by modifying the judgment by striking out all liability for the deficiency, and plaintiff's voluntary satisfaction of the deficiency judgment had the same result.

5. An averment in a complaint on the foreclosure of mortgages that they provide "that the plaintiff may pay all taxes, liens, or assessments upon the said property, and that the same shall be repaid with interest thereon at the rate of one per cent. per month," falls short of showing a contract by which the mortgagor is obligated to pay any taxes on the money loaned or on the mortgages given therefor, and which is for that reason null and void, under Const. art. 13, § 5; the exoneration from liability to pay interest being an affirmative defense.

6. Defendants to a mortgage foreclosure cannot complain that a franchise, sale of which is forbidden by statute, but which was included in the mortgage, was directed to be sold, since if such property were sold no title would pass, and they could sustain no harm therefrom.

Department 1. Appeal from superior court, Mendocino county; S. K. Dougherty, Judge.

Action by the Bank of Ukiah against John S. Reed and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Heller & Powers (James L. Robison, of counsel), for appellants. J. A. Cooper, for respondent.

HARRISON, J. Action in foreclosure. The appellant John S. Reed executed to the plaintiff July 23, 1892, his promissory note for \$15,491, and at the same time, to secure its payment, executed a mortgage upon certain real estate in Mendocino county, known

as the "Reed Ranch." December 5, 1893, he executed to the plaintiff another promissory note, for \$4,702, together with a mortgage for securing its payment upon the property described in his former mortgage, and at the same time transferred and assigned to the plaintiff certain shares of stock in the Bank of Ukiah as additional security for the payment of both of his said promissory notes. April 2, 1894, as further security for the payment of said notes, he executed a mortgage upon certain other real property in the county of Mendocino, and also a chattel mortgage upon certain sheep held by him in that county. The present action is brought to recover judgment for the amount of the promissory notes, and that the above property be sold in satisfaction thereof. The appellant Anna M. Reed is the wife of the mortgagor, and is made a defendant under the averment that she claims some interest in the property. John S. Reed demurred to the complaint, and thereafter withdrew his demurrer and consented that his default be entered. Anna M. Reed filed a consent that default be taken against her, stating also that she declined to further answer or appear in the action. Their defaults were thereupon entered by order of the court, and on September 18, 1897, judgment against them was entered in favor of the plaintiff, determining the amount due to it, and directing a sale of the property described in the complaint. In its judgment the court directed that the bank stock should be sold first, and the other personal property next, and thereafter the real estate in two specific parcels, as therein designated. Under the order of sale issued thereon, as appears from the briefs filed in behalf of the respective parties, and also from copies of the records of the superior court filed herein, the property described in the judgment was sold for less than the amount found due to the plaintiff, and a deficiency judgment entered against the mortgagor. This deficiency judgment was afterwards voluntarily satisfied by the plaintiff. After the sale had been made and the return thereon filed by the sheriff, viz. March 18, 1898, the present appeal was taken, and is presented here upon the judgment roll, without any bill of exceptions.

1. The court did not err in directing the order in which the property should be sold. The appellant had mortgaged to the plaintiff two separate parcels of real estate and two distinct species of personal property. The plaintiff had asked in its complaint that the lands respectively described in each of the two mortgages thereof should be sold in one lot or parcel, and that each of the two species of personal property should be sold separately in one lot or parcel. No particular order for the sale of these particular pieces was designated or requested therein, and the court was not required to follow the order in which the parcels had been enumerated by the pleader or set forth in the

complaint; nor were there any equities of third persons to be considered in determining the order in which the sale should be made. It would have been impracticable, if not inequitable, to direct all the property to be sold as an entirety. In the absence of any showing upon the subject the court would have been justified in following by analogy the requirements of the statute (Code Civ. Proc. § 682, cl. 1) for the terms of an ordinary writ of execution, and directing that the personal property be sold before resorting to the real estate. Acting as a court of equity, it was proper for it to direct the property to be sold in such order as would be for the best interests of the parties to the action; and it appears from the judgment that the court took testimony for that purpose, and found therefrom that it was for the best interests of all parties that the property should be sold in the order therein directed, for the reason that it would sell to better advantage and bring a better price by being sold in that order. This provision in the judgment is not erroneous as a matter of law, nor is there any presumption against its validity. If, as claimed by appellants, it is erroneous as a matter of fact, it was incumbent upon them to cause such error to appear. If there was any ground upon which the court could have given this direction, it must be assumed that such ground was shown to it. The appellants have not brought up the evidence, nor do they show that they have been in any respect injured. In *Cord v. Southwell*, 15 Wis. 211, it was held that the court might in its judgment direct the order in which the mortgaged premises should be sold, without any foundation being laid therefor in the pleadings, and might determine this order upon facts shown at the hearing, and that, if such directions were erroneous, it was incumbent upon the defendant to show that to be so. The same principle is sustained in *Macomb v. Prentiss*, 57 Mich. 225, 23 N. W. 788; *Gregory v. Campbell*, 16 How. Prac. 417; *Wilts. Mortg. Forec.* § 491; *Ping. Chat. Mortg.* § 1918; *Jones, Mortg.* § 1618; *Hopkins v. Wiard*, 72 Cal. 262, 13 Pac. 687. *Carmichael v. McGillivray*, 57 Cal. 8, cited by appellants, does not present a different rule. In that case the plaintiff asked for the "usual decree" in foreclosure suits, and as its conclusion of law the court held that the plaintiff have judgment "as prayed for in the complaint." Instead of following this direction, the judgment directed that the ditch be sold before the sale of the mining claims. Upon the appeal therefrom it was made to appear to the supreme court by an affidavit to that effect that this provision of the judgment was inequitable and would work an injustice to the mortgagors. The judgment was reversed upon the ground that the decree was a departure from the "usual form," and was not warranted by the "finding of the court." See, also, *Broder v.*

Conklin, 98 Cal. 363, 33 Pac. 211. In the present case no objection to the form of the decree, or attempt to modify its terms, was made to the superior court, nor was the appeal therefrom taken until after the property had been sold in accordance with its terms; nor has it been made to appear here that the defendants have been in any respect injured, or that a greater sum of money would have been received if the sale had been made in any other way than that directed by the court.

2. The court allowed to the plaintiff \$800 as counsel fees for the foreclosure of the mortgages upon the real estate and the sheep, and this amount was included in the aggregate sum which was declared to be a lien upon the property given as security for the payment of the notes. It is urged by the appellants that the effect of directing that the bank stock be sold before the sale of the other property was to cause the proceeds of such sale to be applied to the payment of these counsel fees, whereas it appears from the findings that no portion of the counsel fees was a lien thereon. This objection is, however, specious rather than real. The bank stock was a security for the entire indebtedness upon the promissory notes, as much as was the other property; and it was immaterial to the defendants whether the bank stock or the other property should be sold first, so long as the sale of the entire property would be insufficient to satisfy the judgment. Unless the bank stock should sell for the entire amount of the judgment, exclusive of the counsel fees, the defendants would not have been injured by having it sold first. As the proceeds of the entire property were insufficient to satisfy the judgment, the defendants have suffered no injury by reason of the order in which the sale was directed. If the judgment had directed that the other property be first sold, and that, after paying to the plaintiff the counsel fees, if the balance of its proceeds should be insufficient to satisfy the judgment the bank stock be then sold, the position of the appellants would be the same as it would under the decree first rendered. For the same reasons the omission to make the counsel fees allowed for the foreclosure of each of the several mortgages a specific lien upon the property described in that mortgage was only technical error.

3. The mortgage, as alleged in the complaint, included as a portion of the mortgaged property the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 27, T. 22; but the judgment does not declare that this parcel is subject to the lien, nor does it contain a direction for its sale. The appellants urge that the court thereby erred, and that, inasmuch as they have the right to have all of the mortgaged property sold before there can be any personal liability, the judgment must be reversed. The error of the court, if any error there was, was its omission to include this parcel with the lands

subject to the lien. It could properly direct the sale of only that property which it had found to be so subject. It is highly probable that the omission results from a mistake of the scrivener in describing the property, either in the complaint or in the judgment. The same omission or mistake is found in the prayer of the complaint, which enumerates the property that the plaintiff asks to have sold, and the judgment follows the terms of this prayer. But, even if the parcel were included in the mortgages, the failure of the plaintiff to have it included in the judgment would merely have the effect to free it from the lien of the mortgage, as well as from a sale in satisfaction of the judgment. *Mascarel v. Raffour*, 51 Cal. 242; *Ould v. Stoddard*, 54 Cal. 613; *Bull v. Coe*, 77 Cal. 54, 18 Pac. 808; *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200; *Woodward v. Brown*, 119 Cal. 283, 51 Pac. 2, 542. If the judgment is satisfied by the sale of a portion of the mortgaged premises, the mortgagor will hold the omitted portion discharged of all lien. If the judgment is not satisfied by the sale, a reversal of the judgment is not necessary, but the rights of the mortgagor are fully preserved by directing that the judgment be modified by striking out all liability for the deficiency. In the present case the same result has been obtained by the plaintiff's voluntary satisfaction of the deficiency judgment.

4. It is further objected that the court was not authorized to make any portion of the taxes paid by the plaintiff upon the real estate included in the mortgage a lien upon the other property given as security for the indebtedness. It is a sufficient answer to this objection that it does not appear that the judgment includes any amount for the payment of taxes. It is not specifically declared therein that any portion of its amount is for taxes paid by the plaintiff, nor does it appear from a comparison of its amount with a computation of the indebtedness claimed in the complaint that any amount paid for taxes is included therein.

5. The claim that the provision in the mortgages for the payment of taxes takes away all liability for the payment of interest upon the indebtedness is not sustained by the record. The mortgages themselves are not set forth in the complaint, but it is averred that they provide "that the plaintiff may pay all taxes, liens, or assessments upon the said property, and that the same shall be repaid with interest thereon at the rate of one per cent. per month." Section 5 of article 13 of the constitution declares that every contract by which a debtor is obligated to pay any tax or assessment "on money loaned or on any mortgage, deed of trust, or other lien," shall, as to the interest specified therein, be null and void. The above averment falls far short of showing a contract by which the mortgagor is obligated to pay any taxes upon the money loaned or upon the mortgages given therefor. This exoner-

ation from liability is an affirmative defense which must be established on the part of the defendant. There is no substantial difference between the averment herein and the provision in the mortgage considered in *Marye v. Hart*, 76 Cal. 291, 18 Pac. 325, which it was held did not have the effect claimed by the appellants herein.

6. It is next contended that the court erred in directing a sale of the franchise of the Ukiah Gas Works, for the reason that such franchise is not the subject of a sale under execution. As the appellants included this mortgage in their mortgage to the plaintiff, it might well be held that they are estopped from questioning plaintiff's right to a judgment for its sale in the foreclosure of that mortgage; but if, as claimed by them, a transfer of the franchise, either by way of mortgage or by judicial sale, is forbidden by statute, no title would pass by the sale, and the appellants can sustain no harm therefrom. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

131 Cal. 605

McLEOD v. BARNUM. (S. F. 1,555.)

(Supreme Court of California. Feb. 18, 1901.)

MORTGAGES — CHATTEL MORTGAGES — STATUTES — VALIDITY — PROPERTY SUBJECT TO MORTGAGE — CONTRACTS — SALES — RETENTION OF GOODS OF VENDEE — RESCISSION — EVIDENCE — HARMLESS ERROR.

1. A mortgage of a leasehold interest in land, with the improvements thereon, which the lessee had a right to remove at the expiration of the term, on certain conditions, was a mortgage of an interest in real estate, and hence valid, under Civ. Code, § 2947, declaring that any interest in real estate capable of being transferred may be mortgaged.

2. The amendment of 1895 to Civ. Code, § 2955, placing after the words "mortgages may be made on the following personal property" the words "and none other," does not render a mortgage on personal property not enumerated invalid as between the parties; no rights of third parties being involved.

3. A vendee holding possession of the property purchased may not set up in defense to an action for the price that the vendor's title was defective.

4. Where, in an action for the price of property sold, a letter written by defendant to a former owner of the property was not shown to have been lost, but a witness was permitted to state that the letter was an offer by defendant to purchase the property for a greater sum than she had contracted to pay plaintiff, the error was harmless, since the testimony was immaterial.

5. Where the loss of a letter written by defendant was not shown, but its recipient testified as to its contents without objection by defendant, and the witness was cross-examined as to the contents, defendant could not object to the subsequent testimony of another witness as to the contents on the ground that the loss had not been shown; such witness giving the contents substantially the same as the recipient.

6. Where, in an action for the price of property sold, defendant contended the seller's title to have been defective, it was not error to permit plaintiff to introduce a bill of sale which formed a link in her chain of title.

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Angus McLeod against Amelia D. Barnum. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Crandall & Bull, for appellant. Hepburn Wilkins, for respondent.

PER CURIAM. Appeal from judgment and order denying a new trial. On the 13th day of March, 1896, one Helen M. Atwater was the owner and in the possession of a certain lot in Tiburon, Marin county, and a lease thereof for the term of 11 years from the 15th day of February, 1896, at a monthly rental of \$15 per month, with a two-story frame building thereon, known as the "El Dorado Hotel," together with the furniture, bar, and bar fixtures, and other personal property in and connected with said hotel. By the terms of the lease the lessee was given the right to remove all improvements then on the said lot, or that might be thereafter placed thereon, at the termination thereof, upon complying with the conditions therein named. On said day the defendant purchased of said Helen M. Atwater the lease, improvements on the leased premises, furniture in the hotel, bedding, cooking utensils, bar, and bar fixtures, wines, liquors, and other personal property in and about the hotel, for the sum of \$1,950. As part of the purchase price for all of the aforesaid property, the defendant executed to plaintiff the promissory note set forth in the complaint for the sum of \$500, and at the same time executed and delivered to plaintiff a mortgage, which mortgage recited that the mortgagor mortgaged "that certain lot, piece, or parcel of land [describing lot], and including the building and improvements on said land known as the 'El Dorado Hotel,' * * * and all the interest of the mortgagor in said land; * * * the said interest being a leasehold interest under that certain lease from Israel Kashaw to Helen M. Atwater dated the 17th day of February, 1896." The plaintiff acted as the agent for said Helen M. Atwater in taking said note and mortgage. After the said sale and the execution of the said note and mortgage the defendant went into possession of the said leased premises and personal property. The said promissory note has not been paid, nor the interest thereon. The court filed findings, and by its judgment and decree directed a sale of the mortgaged premises to satisfy the judgment.

It is contended that the mortgage was of personal property, and of personal property not enumerated in Civ. Code, § 2955, and for that reason void even between the parties. The mortgage was of an interest in real estate, and therefore within the provision of section 2947 of the Civil Code. If the property mortgaged were personal property, the mortgage would be valid as between the parties. *Bank v. Moore*, 106 Cal. 673, 39 Pac.

1071; *Bank v. Gibson*, 109 Cal. 197, 41 Pac. 1008; *Tomlinson v. Ayres*, 117 Cal. 572, 49 Pac. 717. It is said that by the amendment of 1895 to Civ. Code, § 2955, after the words "mortgages may be made upon the following personal property," the words "and none other" were added, and that since the amendment a mortgage of personal property not enumerated is absolutely void even between the parties. We do not think such is the law. Neither do we think the legislature intended any such consequence. It would require very plain and imperative language to convince us that the legislature intended to prevent parties from making a mortgage upon any personal property, as between themselves, where the rights of no third parties are involved. In section 2957 it is provided that a mortgage, unless accompanied by the affidavit required by the statute, and acknowledged and recorded, is void as to creditors and subsequent purchasers and incumbrancers for value. But the mortgage is, without the affidavit or acknowledgment, good between the parties. A law that would prohibit competent parties from making a valid contract, as between themselves, where no rights of third parties intervene and no public policy is violated, would be a very serious infringement of the right of making contracts.

The defendant in her answer alleged that the title to the property is and was defective, and that she has never been given a good and valid title to the said property. The court found, in finding 1, that defendant did receive a good title to the property. The different steps or links in the chain of title are very fully and minutely set out. Defendant's counsel have devoted several pages of their brief in attempting to show that the different and independent parts of this finding are not supported by the evidence. It is unnecessary to examine the specifications as to the insufficiency of the evidence to sustain the finding, for the reason that the court found—and the finding is sustained by the evidence—that defendant "ever since the 13th day of March, 1896, held and retained, and now holds and retains, the possession of all the said property, and has ever since said day had the use and profits thereof." The law will not allow a vendee to obtain possession of property under a contract of sale, and while in possession to defend against an action for the purchase money upon the ground of the title being defective. *Peabody v. Phelps*, 9 Cal. 213; *Hicks v. Lovell*, 64 Cal. 18, 27 Pac. 942; *Gross v. Kierski*, 41 Cal. 112. In this case the plaintiff seeks to foreclose upon the property mortgaged, and defendant seeks to retain possession and prevent the foreclosure upon the ground that the title of the vendor was and is defective. If the title could be tried in this way, and should be found defective, the defendant might retain possession forever, without paying the amount she agreed to pay, or restoring the plaintiff

to his former rights. The court found "that the said cross complainant never rescinded or offered to rescind with said Helen M. Atwater the purchase which was made by the said cross complainant of the said hotel and leasehold interest and personal property described in the said cross complaint, or the contract which was made between the said cross complainant and the said Helen M. Atwater with relation thereto, and that the said cross complainant never returned or offered to return to the said Helen M. Atwater any of the property mentioned and described in the said cross complaint." This finding is not challenged. In view of the finding that defendant has remained and is in possession of the property, and that she has made no attempt at rescission, and that she has not paid the note, it becomes unnecessary to discuss all the criticisms of findings made in appellant's brief. The material findings are supported by the evidence, and it would serve no useful purpose to discuss the evidence as to those which are immaterial.

The witness Cochrane, while on the stand, was permitted, under defendant's objection, to state the contents of a letter written by defendant to one Mrs. Delcroix; and it is now urged that such ruling was prejudicial error. The principal objection to the contents of the letter being given in evidence was that the loss of the letter had not been proven. The witness testified that in the letter defendant offered Mrs. Delcroix \$3,500 for the property,—\$1,200 cash, and the balance in installments of \$500 every six months. We regard the evidence as immaterial, and therefore harmless. But, if it were material, appellant is not in a position here to avail herself of the error. The witness Delcroix was permitted to testify without objection to the contents of the letter in her direct examination. She gave the contents substantially as given by Cochrane. Appellant's counsel fully cross-examined her as to the letter and its contents. There is no contradiction of the evidence of either of these witnesses as to such contents. The appellant, therefore, did not object to the evidence as to the contents of the letter when such evidence was first offered. Not only this, but she fully interrogated the witness as to such contents. She will not now be allowed to say that it was error for the subsequent witness to be questioned concerning the contents of the letter. If the objection had been sustained, the record would still contain the evidence of Mrs. Delcroix as to the contents of the letter.

A bill of sale of the property from Jane Delcroix to James W. Cochrane was offered in evidence. To this defendant objected upon the ground that it was immaterial, irrelevant, and incompetent. The admission of the bill of sale is now claimed to be error. Defendant had denied the title of plaintiff to the property, and alleged that the title was defective. This bill of sale was a link in the chain of title, and made apparently necessary

by the defense interposed by defendant. The defendant objected to the title as being defective, and objected to all proof offered by plaintiff to show that it was not defective. It would be trifling with justice to say such ruling was error.

We have examined the other assignments of error, but they require no special notice. We find no error that would justify a reversal of the case. The judgment and order are affirmed.

expiration of 20 days from the date of the order directing its payment, a right of action for the entire assessment shall accrue, the acceptance by the district of an installment so delinquent is a waiver of its right of action thereunder for the entire assessment, so that the right of action for the remainder of the assessment is not barred in 3 years from the time such installment became delinquent.

Department 2. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by reclamation district No. 536 against J. W. Hall to recover delinquent assessments. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Devlin & Devlin, for appellant. John M. Gregory and W. A. Gett, for respondent. A. L. Shinn, amicus curiæ.

PER CURIAM. The defendant was at all times named in the complaint the owner of lands in reclamation district No. 536. The assessment list, properly made and certified, was filed with the county treasurer of the county of Solano on December 4, 1891, where it remained for more than 30 days; and, the assessments not having been paid, the treasurer of said county returned the same on the 11th day of January, 1892, to the board of trustees of the plaintiff. The trustees at various times made calls for installments on the various assessments so made. The defendant paid the first nine calls or installments, but paid only a portion of the tenth, and has wholly refused to pay the eleventh. More than 20 days elapsed after the eleventh call before the commencement of this action. The eleventh call was made July 1, 1896. On October 12, 1897, the board of trustees of plaintiff made an order that, by reason of the failure of the defendant to pay such calls or installments, the whole amount of his said assessment should be due and payable at once, and that an action be commenced for the same. This action was commenced, in pursuance of said order, to collect the balance due by defendant on his whole assessment, and to have the same declared a lien upon the real estate owned by him upon which the said assessment was levied. The case was tried before the court, and findings filed, upon which judgment was ordered and entered in favor of defendant. Plaintiff has appealed from the judgment upon the judgment roll.

The question here is as to whether or not the judgment is the legal conclusion from the facts found. The court found "that on January 21, 1893, the said board of trustees, by an order duly entered on the minutes of said board, determined to call in an installment of $6\frac{1}{4}$ per cent. of the whole of said assessment, to wit, \$566.26; that owing to the said third installment not having been paid within twenty days from the date of said call, to wit, on or before February 11, 1893 (but was paid March 2, 1893), a cause of action for the collection of the same, and for the whole of said assessment remaining unpaid, against the land of said defendant, J. W.

131 Cal. 662

RECLAMATION DIST. NO. 536 v. HALL.
(Sac. 706.)

(Supreme Court of California. Feb. 25, 1901.)

DRAINS—RECLAMATION DISTRICT—IMPROVEMENT ASSESSMENTS—ACTIONS—LIMITATION—WAIVER—INSTALLMENTS—ACCEPTANCE.

Under Pol. Code, § 3466, providing that, if any installment of an assessment due a reclamation district shall remain unpaid at the

Hall, to wit, 75 per cent. thereof, accrued, and as the complaint in this case was not filed within three years of time, reckoned from February 11, 1893, the cause of action stated in the complaint is barred by the provisions of subdivision 1 of section 338 of the Code of Civil Procedure of the State of California." The call of January 21, 1893, remained unpaid for some 20 days after the time named in the call; and the court below proceeded upon the theory that a cause of action accrued thereupon for the whole assessment, and as the suit was not brought within 3 years after February 11, 1893, it was barred by the provisions of section 338, Code Civ. Proc. In this the court erred. The amount of the call of January 21, 1893, was paid March 2, 1893, and accepted by the plaintiff. Thereafter calls were made for installments August, 1893, November, 1893, January, 1894, September, 1894, April, 1895. These were the fourth, fifth, sixth, seventh, eighth, and ninth installments. They were all paid by defendant and accepted by plaintiff. It is provided in section 3466 of the Political Code as follows: "At the end of thirty days, the treasurer must return the list to the board of trustees of the district, and all unpaid assessments shall bear legal interest from the date of the return of the list to said board, and shall thereafter be collected and paid in separate installments, of such amounts and at such times, respectively, as the board, from time to time, in its discretion, may, by order entered in its minutes, direct; and a cause of action for the collection of any such installment shall accrue at the expiration of twenty days from the date of the order directing its payment: provided, that if any such installment shall remain unpaid at the expiration of said twenty days, then the whole of the assessment against the land owned by the person failing to pay such installment shall become due and payable at once, and may, in the discretion of the board, be collected immediately, in one and the same action." Under the provision of the said section quoted, the installment called for by the order of January 21, 1893, not having been paid within 20 days thereafter, the board of trustees could have regarded the whole amount of defendant's assessment as due and payable, and could at any time after the expiration of said 20 days, and before accepting payment thereof, have commenced an action therefor. But by accepting the amount of said installment March 2, 1893, the plaintiff waived its right to consider the whole amount due. If after March 2, 1893, and before making another call or order for payment, plaintiff had brought an action for the whole amount of the assessment, it could not have maintained it. It could not receive the payment, and at the same time claim the benefit or advantage it might gain by the failure to pay. The provision was inserted for the benefit of reclamation districts, and to insure prompt payment of installments as called for

by the board. If the district in such case desires to take advantage of the provision, it must do so before it has received the money from the party in default. It will not be allowed to take the money, and at the same time take the benefit or advantage arising from the money not being paid. It is too elementary to need citation of authorities that a provision in a promissory note that the whole amount of principal shall become due upon default of interest is waived by the payee afterwards accepting the interest. So a provision in a lease that it shall be void if the rent is not promptly paid when due is waived by the acceptance of the rent by the lessor after default. The same principle applies here. The defendant was indebted to the plaintiff for the entire assessment, payable in installments as ordered by plaintiff's trustees. The statute formed part of the contract, and is to be read into it. The whole amount by the assessment became due plaintiff upon default in the payment of the third installment. It afterwards accepted the payment. Defendant was, by the indulgence of plaintiff, allowed to make the payment after default. He cannot now claim advantage by reason of the indulgence shown him. The judgment is reversed, and the court directed to enter judgment for plaintiff upon the findings for the amount due, as prayed for, and declaring the same a lien upon the premises of defendant, and directing a sale thereof to satisfy the claim of plaintiff.

131 Cal. 647

PEOPLE v. TAPIA. (Cr. 683.)

(Supreme Court of California. Feb. 21, 1901.)

CRIMINAL LAW—APPEAL—RECORD—OPINION OF TRIAL JUDGE—MURDER—EVIDENCE—SUFFICIENCY—NEW TRIAL—CORPUS DELICTI—CONFESSION—INSTRUCTIONS.

1. On appeal from a conviction and an order denying a new trial, though the opinion of the trial judge attached to the bill of exceptions showed clearly that a new trial should have been granted because of the insufficiency of the evidence, such opinion cannot be considered in determining whether the conviction should be set aside, since it is not a part of the record.

2. Deceased was found among the ruins of his house, a great deal of his body consumed by fire. Tracks of a horse were discovered near the burned house, which, though not owned by defendant, had been in his possession a few days before. There was evidence that a purse found on defendant had been the property of deceased, though it was not clearly identified, and some evidence that defendant had been seen carrying a gun which had belonged to deceased, though he was not clearly identified as the person seen with it. An Indian, a comparative stranger to defendant, who was also an Indian, testified that defendant confessed to him that he killed deceased. *Held*, that a refusal of a new trial cannot be set aside on appeal, since it cannot be said, as matter of law, that there was no evidence to sustain a conviction of murder in the first degree.

3. Under Pen. Code, §§ 1093, 1127, providing that the court must state all matters of law necessary for the information of the jury, and must charge on any points pertinent to the issue if requested, it was error to fail to instruct

that in determining whether there was sufficient evidence of the corpus delicti the asserted confession or other evidence, which did not tend to prove the corpus delicti, but merely tended to connect defendant with the crime charged, could not be considered, though the instructions requested on such question were not correctly drawn.

4. Where, in a prosecution for murder, defendant's sole defense was that he did not commit the act, it was error to instruct that, the commission of the homicide by defendant being proved, the burden of proving circumstances of mitigation or excuse devolved on him, since it was not applicable to the case.

In bank. Appeal from superior court, San Diego county; J. W. Hughes, Judge.

Ramon Tapia was convicted of murder in the first degree, and appeals. Reversed.

George H. P. Shaw, H. K. Heffleman, Nutt & Shaw, and Neale & Goodbody, for appellant. Trety L. Ford (Henry A. Melvin, of counsel), for respondent.

McFARLAND J. The defendant was convicted of murder in the first degree, and sentenced to life imprisonment. He appeals from the judgment and from the order denying a motion for a new trial.

The appellant is an Indian, evidently unlettered and ignorant. He was charged with the murder of one Jacob J. Veitinger, who was a somewhat elderly man, and lived alone in a small house in the country. On July 28, 1899, his nearest neighbor, Mr. William Cooper, discovered that Veitinger's house had been burned down since the previous day, and found among the ruins the dead body of Veitinger. A great deal of his body had been entirely consumed by the fire; still we think it was sufficiently identified as the body of the deceased. But the evidence of the other facts necessary to make full proof of the corpus delicti—that is, that his death was caused by criminal means used by another person, and not by his own act or by accident—was very slight. We hardly think that any jury would have found that a murder had been committed without certain evidence tending somewhat to connect appellant with the crime charged, and particularly without the testimony of another Indian, named Francisco (who was comparatively a stranger to appellant), to the effect that appellant had made a confession to him that he (appellant) killed the deceased. Apart from this alleged confession, the main evidence relied on by the prosecution consists of some testimony that tracks of a certain horse were discovered at a point not very far away from the burned house, and at other points within a few miles, and that the horse, although owned by another party, had been a few days before in the possession of appellant; some testimony that a purse found on appellant had been the property of the deceased; and some testimony that appellant had been seen carrying a gun which had been the property of the deceased. The testimony as to these matters was, to say the

least, not very satisfactory; and these matters, if considered as proved, are not very convincing as to any of the facts necessary to appellant's conviction of murder.

There is in the bill of exceptions, regularly settled and certified, an opinion of the judge before whom the case was tried, given on denying the motion for a new trial, from which it certainly appears that he ought to have granted the motion. The judge examines the evidence in detail, and clearly shows that, in his opinion, it was not sufficient to warrant the verdict. He shows that the purse was not sufficiently identified as the purse of the deceased, that appellant was not identified as the person seen with the gun, and that the horse tracks do not "cut a very material figure." As to the asserted confession to Francisco, the judge says: "I do not see how anybody can possibly read that, or hear the man testify, and believe him at all. I do not give it a particle of credence. He is an enemy who is prosecuting the defendant. He is in jail himself.

* * * Then as to that confession,—if I know anything about weighing evidence whatever,—after reading the testimony, that bears external and internal evidence of falsity from beginning to end." He then speaks of the unreliability of the testimony of certain Indians who were hostile to appellant, and, imagining that Francisco was on trial for the murder of Veitinger, shows that the facts would make as strong a case against him as against appellant, and says, "Therefore I say the evidence is unsatisfactory." But, after showing clearly that the evidence, in his opinion, was not sufficient to warrant the verdict, he questions whether "my doubts amounted to such reasonable doubts as would warrant the court in setting aside the verdict on the ground of the insufficiency of the evidence"; and he concludes as follows: "I believe I shall deny the motion, and let the supreme court pass on these questions." But "these questions" were questions of fact, over which the trial judge had full jurisdiction; while this court has appellate jurisdiction in criminal cases "on questions of law alone." As was said in *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228: "He [the trial judge], too, had to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict. If he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial." See, also, *People v. Knutte*, 111 Cal. 453, 44 Pac. 166; *People v. Baker*, 39 Cal. 686; *People v. Flood*, 102 Cal. 330, 36 Pac. 663; *People v. Chew Wing Gow*, 120 Cal. 298, 52 Pac. 657. The sufficiency of the evidence is a "question of law" only where the question is whether there is any evidence to support the verdict, or whether the evidence is so unsubstantiated as to practically amount to no evidence. "That the defendant may move for a new trial on the ground of the preponderance of the evidence in his favor upon

some issue which is material for the prosecution to establish, and that the court below, if of the opinion that there is such preponderance, should set aside the verdict, is a well established and recognized rule. It is also settled that this court will not deal with the question of the preponderance of evidence." *People v. Ashnauer*, 47 Cal. 98. We are not unmindful that a ruling of a trial court cannot be set aside here merely because a wrong reason was given for it. We are aware, also, that ordinarily an opinion of a lower court is not the subject of review here, and is not a legitimate part of the record. Therefore, in determining the question whether the trial court should have granted a new trial on the ground of the insufficiency of the evidence, we must disregard the opinion above noted; and, thus looking at the case, we are not prepared to say that, as a matter of law, there was no evidence to support the verdict. But, with the opinion before us, we cannot avoid a somewhat strong impression that the defendant has been wrongfully convicted of the high crime of murder in the first degree; and as, in such a case, a very slight error of law committed during the trial might have improperly influenced the jury, it is our duty to look with very close scrutiny into the assignments of error. Of course, a judgment will not be reversed for an erroneous ruling, where it appears that it could not have been prejudicial to the party who complains of it; but, considering the peculiar character of the evidence in the case at bar, it cannot be said that certain errors which we shall notice were not prejudicial.

As before stated, the main evidence against the appellant was his alleged confession to the witness Francisco. Of course, it is well-settled law that the corpus delicti must be established independently of evidence which merely tends to connect the defendant with the crime charged, and independently of any asserted extrajudicial admissions or confessions of the party charged, and that such admissions or confessions cannot be considered as evidence of the corpus delicti. In *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440, this court declared the rule as follows: "The term 'corpus delicti' involves the elements of crime," and that "defendant's admissions cannot be used to establish any necessary element in the commission of the crime." See, also, *People v. Thrall*, 50 Cal. 415. In *Gray v. Commonwealth*, 101 Pa. St. 380, the court says: "The true rule in such cases is believed to be this: When the commonwealth has given sufficient evidence of the corpus delicti to entitle the case to go to the jury, it is competent to show a confession made by the prisoner connecting him with the crime. Under such circumstances the jury should first pass upon the sufficiency of the evidence of the corpus delicti. If it satisfies them beyond a reasonable doubt that

the crime has been committed, then they are at liberty to give the confession such weight as it is entitled to." In the case at bar, if it be considered that there was some evidence of the corpus delicti, without the confession, which entitled the case to go to the jury, still that evidence was exceedingly slight, and it is highly probable that the jury considered the confession in determining that the corpus delicti had been sufficiently proved. In *Territory v. Farrell*, 6 Mont. 12, 9 Pac. 536, the lower court had instructed the jury substantially that they might find defendant guilty upon his admissions alone; and the appellate court reversed the judgment on account of such instruction, and said: "There was other evidence from which the jury might have found the corpus delicti, yet we cannot say but the jury might have found the conviction of the defendant upon his confessions alone under this instruction for their guide." In the present case the court refused to give certain instructions on this subject asked by appellant, and numbered 4 and 6. The clear purpose of these instructions was to inform the jury that in determining whether the crime charged had been committed they could not consider the confession, or any evidence which tended solely to connect the appellant with the supposed crime. Perhaps neither of these instructions, when closely examined, will be found to be absolutely perfect; but we think that either of them might have been given without any prejudice to the prosecution. By instruction 4 the court was asked to instruct the jury that: "If * * * you are not satisfied beyond a reasonable doubt whether Jacob J. Veitinger met his death from natural or accidental causes, or from the act of some person, you cannot consider any evidence introduced herein for the purpose of or tending to connect the defendant with the crime upon which he is now being tried." The evident purpose of this instruction was to tell the jury that in determining whether the corpus delicti had been sufficiently proven they should not consider evidence which tended solely to connect defendant with the crime, and, if so understood, it would have been correct; but, as there might be evidence which tended to prove the corpus delicti, and also to connect the defendant with the crime, the instruction is perhaps subject to the criticism that it does not distinguish evidence having that double character. The instruction numbered 6 contains a correct statement of the meaning of corpus delicti, and the kind of evidence necessary to establish it. The last paragraph of the instruction is as follows: "Alleged confessions, and any other evidence the purpose of which is to connect, or attempt to connect, the accused with the offense charged, cannot be considered by you until the corpus delicti has been proved to your satisfaction to a moral certainty, and beyond a reasonable doubt." This is subject,

also, to the same criticism as that above noticed as applicable to instruction 4. But we think that if, in the opinion of the court, these instructions, as offered by appellant's counsel, did not apply or with perfect correctness state the principle of law that was evidently intended, it should, under the peculiar circumstances of this case, either have modified them so as to comply with its views, and given them as modified, or should have given an instruction upon the subject in its own language. A court is not always called upon to instruct on a point when not asked to do so, and ordinarily counsel cannot complain of the refusal of an instruction which is not perfectly correct; but on a trial for murder, where a man's life or liberty is at stake, and with such a condition of evidence as is here exhibited, a court is not justified in refusing to instruct at all upon the paramount and vital questions in the case, simply because a particular form of instruction asked by counsel may be safely refused. Sections 1093 and 1127 of the Penal Code provide that the court, in charging a jury, must state to them "all matters of law necessary for their information," and must charge "on any points pertinent to the issue, if requested by either party." In the case at bar the defendant certainly requested instructions on a point clearly and paramountly "pertinent to the issue"; and, considering the peculiar circumstances of this case, we do not think that the court was justified in ignoring the point entirely on account of the form in which the request was made. We do not want to be understood as saying that, as a general rule, a judgment will be reversed for want of full instructions; but in this particular case we do not see how the jury could have properly come to a conclusion without an instruction that in determining whether there was sufficient evidence of the corpus delicti they could not consider the asserted confession or other evidence which did not tend to prove the corpus delicti, but merely tended to connect the appellant with the crime charged; and yet such instruction was not given in any part of the charge, although an instruction on that point was of the highest importance to a proper consideration of the evidence by the jury. The only instruction given which at all approached the point was appellant's instruction No. 2, which was merely to the effect that in determining whether the remains found in the ruins "were the remains of the body of Jacob J. Veitinger" they could not consider evidence tending to connect the appellant with the crime charged. Under the instructions given, the jury were at liberty to consider the confession as evidence of any fact necessary to be proven, and it is impossible to say that they did not so consider it; indeed, in view of the character of the other evidence, it is highly probable that the confession was the main evidence upon which they found that a crime had been commit-

ted. An instruction on this subject was clearly essential to a proper consideration of the evidence by the jury; and we think that in this case it was prejudicial error for the court not to give such instruction, after its attention was directly called to the point; and that, without such instruction, the appellant did not have a fair trial.

We think that it was also prejudicial error, considering the nature of the issues, to give the following instructions: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justified or excusable. But you will observe in this connection that the burden of proof thus cast upon the defendant is not used in any literal sense. It is not necessary that the defendant shall in this matter, more than in any other, prove affirmatively that he did not intend such consequences. It is sufficient that it appears to your understanding by testimony given, by inferences correctly and properly drawn from the whole of the testimony in the case, that, notwithstanding the burden was cast upon him, there still exists in your minds a reasonable doubt of his guilt." Of course, this instruction should not have been given, for it was entirely inapplicable to the case. The appellant did not set up any defense by way of excuse for or justification of an alleged act. He denied that he committed the act, and that was his sole defense. The first part of the instruction is taken from section 1105 of the Penal Code, and is applicable only when a defendant sets up circumstances of mitigation, excuse, or justification of an admitted or proved homicide. But the instruction goes beyond the statute, and states further principles not applicable to the case. Of course, a judgment will not be reversed for an instruction containing a mere abstract principle because it is not applicable to the case, where it appears that no injury was done. But can that be said in the case at bar? The instruction assumed repeatedly the fact of the "commission of the homicide by the defendant being proved," and while the judge may not have intended to intimate that there was proof of such fact, yet the jury may readily have understood the language used to have that meaning. It is difficult to imagine why the instruction was given at all, and it cannot be said that it might not have influenced the jury, and thus prejudiced the appellant.

For the foregoing reasons the judgment must be reversed, and therefore it is not necessary to consider the exceptions to the very voluminous charges on the subjects of reasonable doubt and circumstantial evidence, some parts of which are at least doubtful. It will be assumed that, if there shall be an-

other trial, the instructions on those points will be confined to a few simple propositions. In conclusion we desire to say that this decision is based upon the very peculiar features of this case as above shown, and that in many cases the errors above noticed would not call for a reversal. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN DYKE, J.; HARRISON, J.; HENSHAW, J.

131 Cal. 635

HARDISON v. DAVIS. (L. A. 765.)

(Supreme Court of California. Feb. 21, 1901.)

BILLS AND NOTES — INDORSEMENT — CROSS COMPLAINT — OVERRULING DEMURRER — HARMLESS ERROR — EVIDENCE — ADMISSIBILITY — INDORSEMENT BY MISTAKE — AVERMENT — SUFFICIENCY — QUESTION OF FACT — REVIEW — NEGLIGENCE OF DEFENDANT — BURDEN OF PROOF — MISTAKE OF FACT — REASONABLE DILIGENCE.

1. Where, in an action against an indorser of a note, he answered that the indorsement was made by mistake, and without consideration, and also filed a cross complaint to the same effect for cancellation of the indorsement, and the court, sitting as a jury, found in defendant's favor on the issue raised by the petition and answer, an order overruling plaintiff's demurrer to the cross complaint was not prejudicial to plaintiff.

2. Where defendant, in his cross complaint and answer, averred that he indorsed a note sued on by mistake, an objection that the question as to how he came to sign his name on the back of the note was not admissible under the pleadings cannot be sustained.

3. Where defendant alleged that he indorsed the note in suit by mistake, and without consideration, it was not necessary to aver that the mistake was not due to his negligence.

4. Where, on an issue as to whether defendant indorsed the note in suit by mistake, and without consideration, defendant testified that he indorsed the note believing it was another for a less amount, which had been executed by the maker to carry out a joint enterprise of the maker and defendant, evidence as to whether any consideration moved from the maker, or plaintiff, the present holder, to defendant, for indorsing the note at the time the indorsement was made, was properly admitted.

5. A decision of the trial court on a question of fact will not be reviewed where there is substantial evidence to support it.

6. Where defendant averred that he indorsed the note in suit by mistake, and there was no evidence that the mistake was caused by defendant's negligence, the burden was not on defendant to show that he had not omitted any legal duty.

7. Under Civ. Code, § 1577, defining a mistake of fact as one arising from an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, that defendant indorsed the note in suit under the impression that he was indorsing another note, executed by the same maker, to be used in an enterprise in which defendant was interested, constituted a mistake of fact.

8. Where the court found that defendant's indorsement of the note in suit was made by mistake, and without consideration, the question of reasonable diligence required in rescinding a contract has no application, as there was no contract to rescind.

Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Edwin Hardison against F. E. Davis. From a judgment in favor of defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Blackstock & Ewing, for appellant. Toland & Andrews and Orestes & Orr, for respondent.

PER CURIAM. Action upon a promissory note for the principal sum of \$832, alleged to have been made and executed by James Mack to plaintiff on December 28, 1894. It is also alleged in the complaint "that on or about the 20th day of June, 1895, the defendant, Davis, wrote his name upon the back of said note, to give it credit, and delivered the same to plaintiff." Judgment is sought against defendant only, Mack not being a party to the suit. Plaintiff appeals from a judgment entered against him and from an order denying a new trial.

The defendant admits that he placed his signature upon the back of the note on the date stated in the complaint, but alleges that his doing so was the result of a mistake; that he did not intend to indorse the note in question, but did intend to indorse a \$400 note given on that date by plaintiff to the First National Bank of Santa Paula; that he had never agreed to indorse the note in suit, but did agree to help to obtain \$400 from said bank to be furnished to said Mack that he might go on the racing circuit of California with a certain race horse jointly owned by plaintiff, defendant, and said Mack; that in pursuance of this agreement the said \$400 was obtained from said bank, and defendant wrote his name thinking that he was indorsing the said \$400 note given to said bank for said last-mentioned sum; that he inadvertently wrote his name on the wrong note; that said note for \$400 was fully paid and satisfied by the plaintiff, defendant, and said Mack before the commencement of this action; and that the indorsement by defendant of the note in suit was without consideration therefor. The defendant pleaded the foregoing facts in his answer in defense to the action. He also set up the same facts in a cross complaint, and prayed that the court order the note in suit to be taken into custody of the court, and his name be canceled therefrom, and that it be declared that cross complainant is not liable upon said note, and for general relief. Plaintiff demurred to the cross complaints for want of facts to constitute a cause of cross complaint in said action. This demurrer was overruled, and plaintiff answered said cross complaints. A trial was thereafter had before the court, a jury having been specially waived. The defendant testified to the facts substantially as hereinbefore set out. The findings were to the same effect, and the judgment was that plaintiff take

nothing, that defendant's name be canceled from the note, that plaintiff be forever estopped from bringing any action against defendant on account of said note, and that defendant recover his costs.

1. There was no error prejudicial to appellant in overruling his demurrer to the cross complaints. The facts stated in the cross complaints were also pleaded in the answer as a defense; and, found to be true, they constituted a good defense, and it was on account of those facts that it was decreed that plaintiff take nothing in the action. On the complaint and answer alone the court could determine, as it did, from the evidence, that the signature of defendant was not binding upon him—First, because it was made by mistake; and, second, because it was given without consideration. The judgment that plaintiff take nothing estopped him from maintaining another action against defendant on this cause of action. The signature on the back of the note could be of no further value to plaintiff, and it could do him no harm to have it canceled. The error, if any was made in overruling the demurrer to the cross complaints, was, therefore, without prejudice to any substantial right of appellant.

2. The objection to the question asked of defendant as to how he happened to put his signature on the back of the note, based on the ground "that there is no averment of a mistake in the cross complaint," was properly overruled. There was such an averment in the cross complaint, and in the answer also, and the evidence sought was relevant under both. It was not necessary to allege that the mistake relied on was not the result of defendant's negligence.

3. Against the objection and exception of appellant the defendant, as a witness, was allowed to answer, and did answer in the negative, the following questions: "Did any consideration ever move to you from either Hardison or Mack for the indorsing of this \$832 note? Was there any consideration, at the time you indorsed this note, moved from Hardison to Mack for your indorsement?" The rulings in allowing these questions to be answered were not erroneous. The witness had already testified fully as to the circumstances under which he wrote his name on the back of the note in suit, and as to what induced him to do so. This testimony showed that there was no consideration for his indorsing the said note; and, being in a position to know the ultimate fact, and appellant having the opportunity to cross-examine him, it was not improper for him to testify directly that there was no consideration. *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109. The other objections to testimony are not of sufficient importance to require special notice. It is sufficient to say that there was no error prejudicial to appellant in overruling them.

4. Appellant contends that the finding fa-

vorable to the defense of mistake is without support in the evidence. Defendant testified to facts which, if believed, established this defense beyond any question. And in support of the finding we must assume that defendant told the truth. This court has many times declared that it would not interfere with the decision of the trial court as to questions of fact, where there was any substantial evidence supporting it. This rule is not affected by the degree of evidence required under the law. It is left to the trial court to determine whether the evidence establishes the fact, just as it is left to that court to say where the preponderance of evidence is in other cases. *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930. Even in criminal cases, where the rule of proof beyond a reasonable doubt is firmly settled, the decision of the tribunal before which the witnesses appear as to questions of fact is rarely interfered with by the appellate court. There is no evidence that defendant's mistake was caused by the neglect of a legal duty on his part, and, in the absence of any evidence on the subject, the presumption is against any neglect of legal duty. There is, therefore, nothing in appellant's contention based on the alleged failure of defendant to make a negative showing on this subject. Defendant's mistake arose out of "an unconscious ignorance" of a present fact. Civ. Code, § 1577. The case of *Ruhl v. Mott*, 120 Cal. 668, 53 Pac. 304, does not contain anything applicable to the case in hand.

The facts contended for by the respondent, and found by the court to be true, established the nonexistence of the alleged contract upon which the action was based. In other words, it was shown that there was no meeting of minds in the matter, and that no such contract ever existed. There was, therefore, no contract to rescind; and the rule of reasonable diligence, etc., laid down in the Code as applicable to cases of rescission, finds no application here.

The other points urged by appellant are without merit. The judgment and order denying a new trial are affirmed.

131 Cal. 481

FLINN et al. v. MOWRY. (S. F. 1,604.)

(Supreme Court of California. Feb. 21, 1901.)

Modification of judgment. For former opinion, see 63 Pac. 724.

PER CURIAM. The judgment heretofore rendered herein is set aside, and the following judgment is rendered in lieu thereof: That portion of the judgment decreeing a lien against the lands of the defendant in the sum of \$238.76, and directing a sale of said lands in satisfaction thereof, is affirmed. The judgment against the defendant for the sum of \$1,146, with interest thereon, for the paving and curbing of Laguna street, is reversed, and a

new trial is ordered of the issues upon which the said personal judgment was given. The order denying a new trial, so far as it applies to the issues upon which the judgment was rendered for laying the sidewalk, and decreeing a lien therefor, is affirmed.

6 Cal. Unrep. 637

LATHROPE et al. v. FLOOD. (S. F. 1,703.) 1 (Supreme Court of California. Feb. 20, 1901.)

PHYSICIANS AND SURGEONS — CONFINEMENT CASE—UNWARRANTED ABANDONMENT—DAMAGES.

Defendant was employed to attend plaintiff during her first confinement. He assumed charge of the case, visiting plaintiff at intervals, until he deemed it the proper time to employ instruments to aid in the delivery of the child, whereon the plaintiff shrank back and screamed, compelling the defendant to let go the instruments. Defendant threatened the plaintiff that if she did not quit screaming he would quit the case, and on the failure of a second or third attempt to use the instruments he abruptly left the house. This was at midnight, and it was an hour or more before another physician could be obtained, who, on examination, found that plaintiff's condition was not such as to require the use of instruments just then. *Held*, that a verdict of \$2,000 was not excessive for the unwarranted abandonment of the case and the mental suffering occasioned plaintiff thereby.

Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by Margaret A. Lathrope and another against P. H. Flood. From a judgment in favor of the plaintiffs, the defendant appeals. Affirmed.

Garret W. McEnerney, for appellant. Wm. S. Barnes and Edgar D. Peixotto, for respondents.

HENSHAW, J. This is an action against a physician to recover damages for the alleged injuries occasioned by his negligent and unskillful treatment of his patient, and for injuries resulting from the violation of his contract of employment in abandoning her case, and leaving her, in a critical period, without proper or any medical attendance. The case was tried by a jury, which rendered a verdict for plaintiff in the sum of \$2,000. This appeal is taken from the judgment and from the order denying the defendant a new trial.

The defendant, P. H. Flood, a practicing physician in San Francisco, was employed by the plaintiffs to attend Margaret Lathrope in her prospective confinement. She was a young married woman, and pregnant with her first child. At the beginning of her labor, Dr. Flood was sent for and attended. He concluded that the case would be a prolonged one, and went away, visiting the house at intervals. He returned on the evening of the 27th day of April, and after examination of his patient decided that it would be necessary to employ instruments to aid in the

delivery of the child, and that the time for the use of such instruments had arrived. He therefore ordered the attendant nurse to place the patient in proper position, and inserted the instruments, whereupon the sick woman, in fear, or pain, or both, shrank back, compelling the doctor to let go of the instruments or greatly imperil the lives of both mother and child. He made a second effort with like result, and perhaps a third, though this is in controversy. He testifies that he warned the woman to be quiet, and explained to her the danger, both to herself and unborn infant, occasioned by her conduct, and finally told her that, if she "did not quit, he would quit." Upon the part of the plaintiff the evidence is that the woman was suffering excruciating pain, which was increased by the insertion of the instruments; that she screamed, whereupon the doctor said: "You quit your screaming. If you don't quit, I'll quit." Upon the failure of a second or a third effort to employ instruments, the defendant abruptly left the house, without a word of explanation or suggestion to any one. This was about midnight. The husband followed him into the street, imploring him to return, and not to leave his wife in that condition. The defendant refused. "The doctor's reply was, in substance, that the woman screamed, and he was not used to working for women that screamed. The doctor also said that there were plenty of doctors around, and that I could go to the German Hospital. I said, 'I know you cannot get doctors from the German Hospital at this time of night.'" Mr. Lathrope asked him to recommend somebody, and the doctor replied: "You can get any one you like. Get whoever the devil you please. I am not going back." Then he walked away. After an interval of an hour or more, during which time the patient was left with knowledge that the physician had abandoned her, and without any medical attendance, the presence of another physician was secured. He found her not so far advanced in parturition as to require the use of instruments until some six or eight hours afterwards, when, by their aid, he delivered her of an infant, which lived about eight minutes. It does not appear that defendant's treatment of the case up to the time of his abandonment of it was either negligent or unskillful. It does not appear that undue physical injuries were inflicted by his treatment, either upon the mother or the child. If either suffered in this respect, it is demonstrated that the actuating cause was the conduct of the patient in moving and shrinking while the instruments were actually inserted. Upon this it is contended by appellant that the verdict is grossly excessive, and that it would be difficult to sustain a verdict even for nominal damages. But other considerations enter into the determination of the question. It is the undoubted law that a physician may elect whether or not he will

¹ Reversed in banc. See 67 Pac. 683, 135 Cal. 458.

give his services to a case, but, having accepted his employment, and entered upon the discharge of his duties, he is bound to devote to the patient his best skill and attention, and to abandon the case only under one of two conditions: First, where the contract is terminated by the employer, which termination may be made immediate; second, where it is terminated by the physician, which can only be done after due notice, and an ample opportunity afforded to secure the presence of other medical attendance. Much expert testimony was given by physicians in this case to the effect that the relation of confidence between physician and patient is all-important, and that a physician is justified in abandoning a case where that relationship does not exist. This is quite true, but the circumstances of abandonment are equally important. He can never be justified in abandoning it as did this defendant, and the facts show a negligence in its character amounting well-nigh to brutality. A young woman is in the throes of labor with her first child. She is suffering apparently not only the natural travail, but something more. Her condition is such that the physician has decided that the time to employ instruments to aid her delivery is at hand. He does employ them; and because the woman, in her fear and anguish, is refractory, he, as he himself testified, "became disgusted"; "he was not a child, to be trifled with"; and so leaves the house in the dead hour of the night, without time or opportunity afforded for the family to procure the attendance of another doctor. Such conduct evidenced a wanton disregard, not only of professional ethics, but of the terms of his actual contract. It was a violation of that contract, and for all damages that resulted the defendant is justly responsible. *Barbour v. Martin*, 62 Me. 536; *Ritchey v. West*, 23 Ill. 385; *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627. The plaintiff testifies that her physical sufferings greatly increased after the doctor's departure, and while she was thus left unattended. What her mental sufferings, perturbation, and fear were, the evidence abundantly shows; and, indeed, it was most natural, under the existing circumstances, believing she was going to die, passing through woman's martyrdom thus unaided, that her mental anguish should have been most acute. The law has no scales by which to measure with exactness such mental suffering and the reflex effect of such mental suffering upon the physical condition. The jury, for the injuries suffered by plaintiff, were instructed that in fixing compensatory damages they were to take into consideration the physical injury and suffering and the mental suffering and humiliation, if any, caused by the defendant's negligent act or breach of contract. We can perceive nothing excessive in the verdict which they rendered, and nothing to indicate that they must have been influenced by passion or prejudice. The judgment

and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

131 Cal. 625

TUERS v. TUERS et al. (S. F. 1496.)

(Supreme Court of California. Feb. 20, 1901.)

HUSBAND AND WIFE—DIVORCE—FRAUDULENT CONVEYANCING—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Under Civ. Code, § 3439, declaring that every transfer of property made with intent to delay or defraud any creditor or other person on his just demand shall be void, the transfer of certain property by a husband to his daughter after his wife had commenced suit for divorce, but before himself or his daughter had any knowledge of such action or its contemplation, was valid.

2. A woman who had commenced suit for divorce prior to her husband's conveyance of his property to his daughter had no rights under Civ. Code, § 3457, subd. 4, providing that an assignment for the benefit of creditors is void as to such creditors if the assignor reserves any interest in the assigned property before all his existing debts are paid, since she was not strictly a creditor, nor was the assignment one for the benefit of creditors.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Martha J. Tuers against William G. Tuers and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

J. C. Block, for appellant. Chas. H. Hogg, for respondents.

HENSHAW, J. This action was brought by Martha J. Tuers, divorced wife of William G. Tuers, against William G. Tuers, Grace Patterson, his daughter, and her husband, to obtain a judgment declaring null and void a deed and transfer of his property made by defendant William G. Tuers to his daughter. The consideration for the transfer was love and affection, "and that the said Grace Patterson shall afford and give to me a home in her house for the term of my natural life." Before the execution of this instrument Martha Tuers had commenced her action for divorce against her husband on the ground of extreme cruelty. She obtained a decree awarding her a divorce with permanent alimony and counsel fees. In the present complaint she charges that the transfer was made by her husband after the commencement of the divorce proceedings, and was made and received with the common intent upon the part of the grantor and grantee to hinder, delay, and defraud her of her property rights in the divorce action, and that by reason of the transfer, and of the additional fact that William G. Tuers has no other property, she is in fact hindered, delayed, and defrauded in the collection of her alimony and counsel fees. The court found that at the time of the deed and transfer neither William G. Tuers nor Grace Patterson had any knowledge or information that Martha J. Tuers had begun or contemplated

beginning an action for divorce, alimony, and counsel fees against the defendant; and that the transfer was made and received in good faith, and for a valuable consideration, and without the intent upon the part of either party thereto to hinder or delay or defraud the plaintiff, or any creditor, or any other person out of any property right or rights whatsoever. *Martha Tuers*, at the time of the commencement of her action for divorce against defendant, was not, in strictness, a creditor. *Murray v. Murray*, 115 Cal. 266, 47 Pac. 37. She became such creditor at the time of obtaining her judgment. *Livermore v. Boutelle*, 11 Gray, 217; *Chase v. Chase*, 105 Mass. 385; *Burrows v. Purple*, 107 Mass. 428; *Morrison v. Morrison*, 49 N. H. 69; *Tyler v. Tyler*, 126 Ill. 536, 21 N. E. 616; *Ullrich v. Ullrich* (Conn.) 37 Atl. 393. Plaintiff, therefore, cannot bring her case within the provisions of subdivision 4 of section 3457 of the Civil Code, which declares that an assignment for the benefit of creditors is void as to such creditors if the assignor reserves any interest in the assigned property before all his existing debts are paid. The transfer here was not an assignment for the benefit of creditors, nor, as has been said, was plaintiff a creditor at the time it was made. But, upon the other hand, plaintiff had a right of action founded upon section 3439 of the Civil Code, declaring every transfer of property made with intent to delay or defraud any creditor or other person of his just demands to be void. It was upon this section of the Code that the action was based; but, before recovery may be had, plaintiff must establish the material averments of her pleading, and this, under the findings of the court, she has utterly failed to do. The judgment and order appealed from must, therefore, be affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

131 Cal. 628

VOSBURG v. VOSBURG. (L. A. 918.)

(Supreme Court of California. Feb. 20, 1901.)

APPEAL—MOTION TO DISMISS—ORDER OF COURT—REFUSAL TO OBEY.

Defendant appeals from a judgment granting plaintiff a divorce, from an order denying a motion for a new trial, and from a subsequent order directing him to bring one of the minor children from New York and give him into the custody of the plaintiff. Defendant did not obey this order, but kept the child, and stayed himself outside the jurisdiction of the court, for the purpose of preventing the execution of the judgment of the court with regard to the custody of the child unless such judgment were favorable to him. *Held* not sufficient ground on which to dismiss defendant's appeals.

In bank. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Kate S. Vosburg against John S. Vosburg. From a judgment in favor of plaintiff, from an order denying a motion for a new trial, and from an order granting plaintiff custody of minor children, de-

fendant appeals. Motion to dismiss appeal. Denied.

Works & Lee, for appellant. J. S. Chapman and Charles Silent, for respondent.

McFARLAND, J.: This case is before us on a motion of respondent to dismiss three appeals of appellant,—from the judgment, from an order denying a motion for a new trial, and from an order made subsequently to the judgment modifying the decree as to the care and custody of the minor children of the parties. The action is for divorce, brought by the wife against the husband, and was commenced in the superior court of Los Angeles county, in this state, where the parties resided. By the judgment plaintiff was granted a divorce, and it was decreed that, of the three minor children of the parties, plaintiff should have the custody of the two younger, and defendant the custody of the eldest, a son named Roydon. It was found by the court that before the commencement of the action defendant had taken the boy Roydon to the state of New York, upon a promise to plaintiff that he would return the child in the fall of the year 1898, but that he did not comply with the promise and had kept him in New York; and it was decreed that defendant should bring said boy back to Los Angeles and keep him within the jurisdiction of the court, and allow the plaintiff to have his society at certain stated times, and that upon defendant complying with that part of the decree he should have at stated times the society of the two children whose custody was awarded to plaintiff. Defendant made a motion for a new trial, and, it having been denied, he appealed from the judgment, and from the order denying said motion. Afterwards plaintiff filed a petition alleging that defendant had not brought Roydon back to California, but still kept him in New York, and praying for further direction as to the control of the children. Defendant appeared and contested the petition; and the court on July 7, 1900, made an order giving the custody of Roydon to plaintiff, and again directing defendant to bring him to California. From this order defendant also appealed.

The present motion to dismiss these appeals is based on the records on appeal, and on an affidavit of plaintiff in which certain facts are stated,—the most important ones being that defendant has not obeyed the order of July 7th, and has not brought the boy Roydon to California, or within the jurisdiction of said superior court; that his refusal to obey said order is without excuse; that he keeps said Roydon in New York, and stays there himself, for the purpose of preventing said superior court, or this court on appeal, from executing or compelling obedience to the judgment already given, or to any judgment which may be given with respect to the custody of said Roydon, unless it be agreeable

to him; and that he is speculating on the results of his appeals, and is thus guilty of contempt of courts. It further appears by the affidavit and the findings of the court that the appellant also took one of the younger children to New York at the time he took Roydon, and that, on a habeas corpus proceeding instituted by respondent before a New York court, the custody of said Roydon was awarded to appellant. These statements in the affidavit of plaintiff constitute substantially the grounds upon which the motion to dismiss the appeals is based. The situation as above set forth seems to afford the appellant some advantage which, perhaps, a party, under the circumstances, should not have; but we cannot see that it presents any legal ground for dismissing the appeals.

In determining the motion, we do not deem it necessary to pass on some of the points made by appellant,—as, for instance, that there was no jurisdiction to make any order as to the custody of the child out of the state; that pending the appeal from the judgment there was no authority in the court to change it by the order of July 7th; that this motion depends on questions of fact which were litigated at the main trial, and can be properly considered here only on an appeal from the judgment; and that the adjudication of the New York court on habeas corpus is conclusive as to the custody of the boy Roydon. Assuming, for the purposes of this opinion, that respondent's views on these matters are correct, still the case presented does not warrant a dismissal of the appeals. It certainly does not present one of the grounds for dismissing an appeal prescribed either in the Code or the rules of this court, and it seems to be admitted that there is no precedent for a dismissal for the reasons here relied on. It is contended that there should be applied to this motion the principle upon which certain appeals in criminal cases have been dismissed, because the appellant had broken jail and disappeared, but this contention cannot be maintained. In *People v. Redinger*, 55 Cal. 290, the leading case on the subject in this state, many of the authorities are reviewed, and the decision is put mainly on the grounds that a criminal action can proceed only when the accused is in custody, either actual or constructive; that he has the right "to appear and defend in person, and with counsel," and that, although our Code prescribes that "the defendant need not personally appear in the appellate court," still "he has no longer the right to appear by counsel when he has escaped from custody, until he has returned to custody"; that by breaking jail and escaping he had waived the right to have counsel appear for him, and had waived his right of appeal; and that courts are not required "to encourage escapes and facilitate the evasion of the justice of the state by extending to escaped convicts the

means of reversing their convictions." In such a case the defendant, by an act done after judgment, has so changed his status as to make the execution of the judgment impossible. But there is no such situation in the case at bar. The status of appellant and of the boy Roydon is exactly the same as it was at the rendition of the judgment and order from which he appeals. Whatever part of the judgment was enforceable at the time it was rendered and at the time the appeals were taken, would in like manner be enforceable upon its affirmance. In addition to the specific grounds for dismissing appeals prescribed by statute and rules of court, an appeal will also sometimes be dismissed where it clearly appears that the judgment has been satisfied or the case settled, so that there is no dispute remaining between the parties, and no actual controversy pending; but no such condition appears in the case at bar. And, moreover, we cannot see any other general ground upon which this motion to dismiss can be placed. The motion to dismiss the appeals is denied.

We concur: TEMPLE, J.; HENSHAW, J.; GAROUTTE, J.; HARRISON, J.

131 Cal. 631

ROSE et al. v. MESMER et al. (S. F. 2,455.)
(Supreme Court of California. Feb. 20, 1901.)

PRACTICE—INJUNCTION—SUPREME COURT—
ORIGINAL JURISDICTION.

Where an appeal was taken to the supreme court from a judgment decreeing that a certain dam was maintained without authority, such court had no jurisdiction to grant a petition for an original injunction, alleging that certain of the defendants had threatened to enforce the judgment by removing the dam, and would do so unless restrained; such act amounting only to a threatened trespass by the parties, involving no act by the court.

In bank. Action by Anderson Rose and others against Louis Mesmer and others. Pending an appeal from the judgment therein, José Antonio Machado applies for a restraining order. Denied.

Graves, O'Melveny & Shankland, Dunn & Crutcher, and Lee & Scott, for petitioners. Clarence A. Miller and M. J. McGarry, for respondents.

HARRISON, J. Application for a restraining order. The superior court rendered its judgment in this action August 1, 1900, and it was entered of record August 6th. By the judgment the rights of the several parties to the action in certain lands described therein, and in certain waters held to be appurtenant to said lands, were defined and determined. It was also adjudged that no party to the action has any right to maintain a certain dam then existing, or any dam or other obstruction in the channel of La Ballona creek, upon parcel No. 55 of the lands described in the decree, or to divert any water by means

of such dam or other obstruction through any portion of a certain ditch denominated the "Upper Ditch," leading from said dam through and over a portion of the lands. An appeal was afterwards taken to this court, and an undertaking in the sum of \$300 filed in support of said appeal. An application is now made to this court on behalf of the appellants for an order restraining the respondents from removing said dam, or any part thereof upon the ground, as stated in said application, that at the time of the rendition of the judgment the dam was upon said parcel of land, and in such condition as to divert all the waters of the creek across which it is constructed, and still remains in the same condition, and that by means thereof the petitioners divert and convey the waters upon their lands; that certain of the respondents "threaten that they will enforce the said judgment by entering upon the said land whereon said dam is situated and removing the said dam," so as to cause all the waters of the creek to flow elsewhere than upon the lands of the petitioners; and that said respondents will, unless restrained by an order of this court, enforce said decree by so entering upon said lands and removing said dam, and will prevent your petitioners from diverting the waters of said creek by means of said dam"; and that, in case said dam is removed, said petitioners will sustain great damage. The petitioners have cited several cases in support of their motion, wherein this court has restrained the superior court from enforcing the judgment appealed from, or set aside the proceedings taken by it therefor, upon the ground that by the appeal the power of the superior court to enforce its judgment was suspended until the determination of such appeal. But in each of these cases the superior court was itself seeking to enforce its judgment by some process issued thereon, or by proceedings instituted for the purpose of punishing the respondents for contempt in disregarding the judgment. It does not appear in the present case that the superior court is attempting to enforce its judgment, or that any process has been issued for that purpose. The statement in the petition that the respondents threatened to enforce the judgment "by entering upon said land whereon said dam is situated, and removing the said dam," does not indicate that the court is, in any respect, seeking to enforce its judgment. Whether the appeal herein has the effect to supersede the power of the court to enforce its judgment is not involved in the present proceeding. It does not appear that any application has been made to that court for this purpose, and, in the absence of any action by it, we are not called upon to determine whether the appeal has such effect, or, if it has, that the court would disregard it. In *Dulin v. Coal Co.*, 98 Cal. 304, 33 Pac. 123, we had occasion to consider the function of a writ of superse-deas, and the power of this court to control

the enforcement of a judgment of the superior court after an appeal therefrom had been taken. It was there held that the writ is directed to the court whose action is sought to be restrained, or to some officer of that court who may be about to enforce its judgment, and is limited to restraining any action under the authority of the court upon the judgment appealed from. It was also said: "The writ cannot be used to perform the functions of an injunction against the parties to the action restraining them from any act in the assertion of their rights other than to prevent them from using the process of the court below to enforce the judgment." The provision in section 949, Code Civ. Proc., by which an appeal in certain classes of judgments "stays the enforcement of the judgment," is, by the terms of the section, limited to "proceedings in the court below upon the judgment," and has no effect elsewhere. If the respondents have no right to remove the dam, their act in so doing may constitute a trespass for which the petitioners would have their remedy in the proper forum; but it is not within the jurisdiction of this court to issue an original injunction to prevent the commission of a trespass. The principles declared in *Dulin's Case* must control the rights of the parties in the present application. The application is denied.

We concur: McFARLAND, J.; VAN DYKE, J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.

131 Cal. 650

SIMS v. PETALUMA GASLIGHT CO.

(S. F. 2,215.)

(Supreme Court of California. Feb. 23, 1901.)

CONTRACTS—VALIDITY—DIRECTORS—QUANTUM MERUIT—EVIDENCE—SUFFICIENCY—GAS PLANT.

1. A contract made on behalf of a corporation, by a person who is its president and one of its directors, with a partnership composed of himself and another person, is void, since the director occupies a fiduciary relation to the corporation, such that he cannot take part in any transaction where he has an interest adverse to that of the corporation.

2. Defendant contracted to pay plaintiff \$4,000 for erecting a gas plant to have a capacity of 3,000 feet per hour. The contract was invalid, and suit was brought on a quantum meruit. The capacity of the plant was between 1,000 and 2,000 feet. There was no testimony showing the value of the labor or materials used in erecting the plant. *Held* not sufficient to support a finding that \$4,000 is the reasonable value of the labor and materials used in constructing the plant.

In bank. Reversed.

For opinion in department, see 62 Pac. 300.

VAN DYKE, J. The complaint in this case contains two counts. The first declares upon a contract in writing alleged to have been entered into between Harvey J. Lewelling and Stephen W. Van Syckel, partners in business under the name and style of Lewelling & Van

Syckel, and the defendant gas company, August 20, 1896. It is alleged that by the terms of said contract Lewelling and Van Syckel agreed to build and erect certain water-gas apparatus at the gas works of said defendant, in Petaluma, Cal., for the purpose of manufacturing gas from crude oil, or distillate, by a process known as the "Van Syckel Water-Gas System," the work to be done and the materials to be furnished at the expense of the said Lewelling & Van Syckel, and the plant to have a capacity of 3,000 cubic feet per hour of 22 to 23 candle power gas, for which it is alleged that the defendant agreed to pay said Lewelling & Van Syckel the sum of \$4,000; and it is further alleged that the said Lewelling & Van Syckel constructed said gas plant according to the terms of said agreement, and that thereafter, and before the bringing of the suit, they assigned to plaintiff all their right, title, and interest in said contract, and that no part of the contract price had been paid. The second count is in the nature of a quantum meruit for work, labor, and services performed and for materials furnished by said Lewelling & Van Syckel to and for the defendant in the erection and construction of a water-gas apparatus at the gas works of said defendant, the reasonable value of which work, labor, and materials, it is alleged, is the sum of \$4,000. The court found, among other things, that the said S. W. Van Syckel on the 31st day of July, 1896, purchased of I. G. Wickersham, then the owner thereof, all the stock of the said Petaluma Gas Company, except five shares, for the sum of \$16,500, paying thereon the sum of \$1,000, and giving his note for the balance, payable in two years, at 6 per cent. interest; that to secure the payment of the said note said S. W. Van Syckel transferred the said stock to I. G. Wickersham, and agreed, as a further security for the payment thereof, to erect and attach to the said plant of the said Petaluma Gas Company his water-gas system; that, while said Van Syckel was so the owner of the stock of said gas company as aforesaid, the defendant entered into the agreement set out in the plaintiff's complaint, with Van Syckel & Lewelling, to construct the said water-gas system; that, the said Van Syckel neglecting to pay said indebtedness to said Wickersham, the said property subsequently reverted to the said Wickersham, the former owner thereof. From the record it appears that at the trial of the cause the written contract referred to was introduced on behalf of the plaintiff, showing that the same was executed by Lewelling & Van Syckel, as one of the parties thereto, and the Petaluma Gaslight Company, by S. W. Van Syckel, president, and F. A. Wickersham, secretary, as the other party thereto. It is set forth in the appellant's opening brief, and not controverted by respondent, that, after the cause had been submitted to the court upon argument, the court below held the written contract to be invalid, it appearing to have been executed by Van Syckel, as president of

the defendant company, on the one part, with himself and Lewelling as parties of the other part; but the court nevertheless found that Lewelling and Van Syckel finished and completed the gas plant according to the terms of the agreement mentioned in the first cause of action pleaded in said complaint. It also found that within two years next prior to the commencement of the action the defendant became indebted to Lewelling & Van Syckel in the sum of \$4,000 for work, labor, and services performed by them in the erection and construction of the water-gas apparatus at the gas works of the defendant, and for material furnished by said Lewelling & Van Syckel in and about said work at the special instance and request of said defendant; that the sum of \$4,000 is the reasonable value of said work and labor and materials so furnished. From the judgment entered in favor of the plaintiff on said findings, and from an order denying defendant's motion for a new trial, this appeal is taken.

The court was clearly correct in holding that, for the reasons stated, the contract introduced in evidence on the part of the plaintiff was invalid. Being president of the defendant corporation, Van Syckel necessarily was one of the directors thereof (Civ. Code, § 308); and as such he occupied a fiduciary relation to the corporation and its stockholders. "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." Id. § 2229. He cannot take part in any transaction in which he, or any one for whom he acts, has an interest, present or contingent, adverse to that of his beneficiary. Id. § 2230. In fact, this rule did not have its origin with the Codes, but is much older. It is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee. "Hence the rule is unyielding that a trustee shall not under any circumstances be allowed to have any dealings with the trust property, with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary." *Wickersham v. Crittenden*, 93 Cal. 29, 28 Pac. 788. In *Railway Co. v. Blakie*, 1 Macq. 461, it is said: "So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into. It obviously is or may be impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interests of the cestui que trust which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could be obtained from any other

person; they may even at the time have been better; but still so inflexible is the rule that no inquiry on that subject is permitted." See, also, *Cook, Stock & S.* § 648; *Mor. Priv. Corp.* § 516; *Graves v. Mining Co.*, 81 Cal. 303, 22 Pac. 665; *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777.

The written contract being out of the way, the question was not whether Lewelling & Van Syckel completed the gas plant according to the terms of that agreement, as there was no such agreement in law in existence; but the real question was what work and labor was performed and materials furnished for the company of which it received the benefit, and what the value thereof was, without regard to any express contract. The plaintiff could not recover on the written contract, but he might recover, as upon a quantum meruit, for what the defendant actually received in value. But the evidence does not support the finding that the plant was finished according to the contract. By the terms of that contract the plant was required to have a capacity of 3,000 cubic feet per hour, of 22 to 23 candle-power gas. Van Syckel, on behalf of the plaintiff, testified that it required two hours to heat the plant so that it would make gas, and then it would make from 1,000 to 2,000 feet until heated again. "The ordinary make, however, was from 1,000 to 1,500 feet." Lewelling, also on behalf of the plaintiff, testified: "I know the capacity of the machine per hour. It is inside the amount stated in the contract." He says on cross-examination that he "tested the capacity and found that it would make from 1,000 to 1,500 feet of gas per hour; that he saw it make that amount of gas two or three times." Mr. Cheffins, witness for the plaintiff, who had charge of the plant, testified that some days it would make 3,000 feet, and sometimes less, taking 14 to 15 gallons of oil per thousand feet. William Mills, witness for the defendant, who had charge of the plant from the first, testified that it would not make 3,000 feet per hour. This is the substance of the testimony in reference to the capacity of the plant constructed by plaintiff's assignors, from which it is seen that it does not support the finding referred to. There is no testimony whatever introduced showing the amount of work and labor, either in number of days or value of services, or the amount and value of materials furnished. The case seems to have been tried entirely upon the theory of the validity of the written contract, as the testimony introduced related to that only, and not to that of the second count on the quantum meruit. Defendant's attorneys sought to obtain testimony in reference to the value of the plant as constructed, and asked the following question of the witness Mills: "Has this plant been any addition to the original plant for making gas, or adds anything to the value of that plant?" This was objected to by the plaintiff as being irrelevant, incom-

petent, and immaterial, and the objection was sustained. Defendant further sought to ascertain which machine—the old or the new one—would make the best and cheapest gas, and the same objection and ruling were had thereon as to the other question. If the question before the court was whether the written contract had been performed or not, the objections were properly sustained; but, if it was whether the defendant had received any benefit from the work and labor performed or material furnished, the questions were proper, and the answers thereto should have been allowed. The finding that the defendant became indebted to Lewelling & Van Syckel in the sum of \$4,000 on account for work and labor performed and materials furnished in the erection and construction of water gas apparatus, and the further finding that the sum of \$4,000 is the reasonable value of said work, labor, and material furnished by said Lewelling & Van Syckel to the defendant, have not, nor has either, any support in the evidence. Judgment and order reversed.

We concur: TEMPLE, J.; HARRISON, J.

McFARLAND, J. I concur in the judgment. I concur, also, in the opinion of Mr. Justice VAN DYKE, except that part of it in which is discussed the general proposition that a trustee cannot deal with his beneficiary. In my opinion, the rule is stated too broadly. I think that under the rule the contract here involved was invalid, but the law as declared in the opinion would exclude exceptions which have been often sanctioned.

I concur: GAROUTTE, J.

131 Cal. 590

SCOVILLE v. ANDERSON. (S. F. 1,677.)

(Supreme Court of California. Feb. 16, 1901.)

INSOLVENCY—ATTACHMENT—TIME—COM-
PUTATION—CALENDAR MONTH—
DAYS—FRACTIONS.

1. Under Insolvency Act 1895, p. 139, § 21, providing that an attachment is dissolved if levied within one month prior to the commencement of insolvency proceedings, the commencement of such proceedings is an act, within Code Civ. Proc. § 12, declaring that the time in which any "act provided by law" is to be done is computed by excluding the first day and including the last; as the latter provision relates to acts "permitted by law," and not merely to acts commanded.

2. Insolvency Act 1895, p. 139, § 21, provides that an attachment is dissolved if levied within one month prior to the commencement of insolvency proceedings. Code Civ. Proc. § 12, declares that the time in which any act provided by law is to be done is computed by excluding the first day and including the last; and Civ. Code, § 14, subd. 4, enacts that the word "month" means a calendar month, unless otherwise provided. *Held*, that the rule given for the computation of time applied in computing the time between the levy of an attachment and the institution of insolvency proceedings, and fractions of a day would not be considered, as they are to be considered only in determin-

ing priority of events happening on the same day.

Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Bill by J. J. Scoville, assignee in insolvency, against A. Anderson, to quiet title. From a judgment for plaintiff, defendant appeals. Affirmed.

Reed & Nusbaumer and H. W. Hutton, for appellant. Henry N. Beatty and W. W. Sanderson, for respondent.

HENSHAW, J. Upon January 22, 1896, A. Anderson, defendant and appellant herein, commenced an action in the superior court of the county of Alameda against one William Schmidt to recover a money judgment. Thereafter, on the 24th day of January, at the hour of 12:30 p. m., he caused an attachment to be levied upon certain real estate of William Schmidt, a member of the co-partnership of George F. Smith & Co., which real estate is situated in the city and county of San Francisco. At the hour of 4:20 p. m. of the 24th day of February, 1896, a petition was filed in the superior court of the city and county of San Francisco, asking that the partnership of George F. Smith & Co. be adjudged insolvent. An adjudication to this effect was given on the 17th day of November, 1896, upon which day Scoville, plaintiff herein, was appointed assignee. Meanwhile, by order and permission of the court in insolvency, Anderson was allowed to prosecute his action then pending in the superior court of Alameda county to a judgment, and he did so. He subsequently caused execution to be issued upon his judgment, and the land in San Francisco upon which the attachment had been levied was sold on the 1st day of September, 1896, Anderson himself being the purchaser at the sale. On the 5th day of September, 1897, he received his sheriff's deed for the land. Upon the 29th day of May, 1897, Scoville, as assignee of the insolvent co-partnership, commenced this action to quiet title to the land, and from the judgment and decree so quieting the assignee's title Anderson appeals.

Upon his appeal he presents two points for consideration: First, that Scoville's action is a collateral attack upon the order of the superior court granting Anderson permission to prosecute his action, and upon the judgment and execution of the superior court of Alameda county; and, second, that the attachment in the action prosecuted in the superior court of Alameda county was levied more than one month prior to the initiation of the insolvency proceedings. It is conceded that the fee of the property was in William Schmidt, and that all of Schmidt's title, except as affected by the lien of the attachment, passed to the assignee under his appointment, so that the assignee took title by relation as of the 24th day of February,

1896. Insolvency Act 1895, p. 139, § 21; Dambmann v. White, 48 Cal. 450. It is likewise unquestioned that an attachment of the property of an insolvent is dissolved by operation of law if levied within one month prior to the commencement of the proceedings in insolvency. Insolvency Act 1895, p. 139, § 21; Cerf v. Oaks, 59 Cal. 135. Section 49 of the insolvency act provides that, if the amount due the creditors is in dispute, the suit by leave of court in insolvency may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proven in insolvency, but execution shall be stayed. It was in pursuance of this provision of the insolvency act that the order of the court in insolvency was made permitting Anderson to prosecute his suit to judgment, and it does not appear that the order was any broader or went any further than this. In the present action there is no controversy over, and consequently no attack direct or collateral upon, the sufficiency of the judgment, nor the justice of the sum awarded. The respondent assignee admits Anderson's right to prosecute his action to final judgment. His contention is that the attachment lien was dissolved by operation of law by virtue of the fact that insolvency proceedings were commenced within one month next after the levy of the attachment; that, the attachment lien being dissolved, it was not merged into the judgment obtained by Anderson, and that the assignee's title acquired upon the 24th day of February, 1896, was freed from the lien of the attachment, and absolutely perfect; that, notwithstanding this, the existence of the sheriff's deed constituted a cloud upon his title, which he is entitled to have removed by a court of equity. Upon the other hand, respondent concedes that, if the attachment was filed more than one month before the commencement of the insolvency proceedings, it was and continued to be a valid, subsisting lien upon the property, antedating and superior to his own title, a lien that was subsequently properly disposed of by execution sale, and that the question, therefore, is not at all one of collateral attack upon a judgment the validity of which is not assailed, and the sufficiency of which is not in question, but is the single one, namely, did the assignee, on the 24th day of February, 1896, acquire a title to the real property described in the complaint, free of the lien of the attachment imposed upon said property by the levy of January 24, 1896? This position is sound.

Respondent relies upon the provisions of section 21 of the insolvency act, declaring that the "assignment shall dissolve any attachment made within a month next preceding the commencement of the insolvency proceedings." Appellant, recognizing that the validity or invalidity of his attachment lien depends upon this section, insists that in the computation and measurement of time, to protect his private right, the law will

regard the fractions of a day, and that between 1:30 o'clock in the afternoon of January 24, 1896, and 4:30 o'clock in the afternoon of February 24, 1896, more than one month had elapsed, and that his attachment lien was, therefore, not dissolved. In measuring and computing time it has been the rule from a very early day in this state to exclude the day upon which the event happened,—a rule and method of computation differing from that of the earlier English practice, which was the inclusive method, under which the time began to run upon the day of the happening of the event. Thus, while in *People v. Clark*, 1 Cal. 408, it is said that the general rule seems to be that in the computation of time from an act done the day of the act is to be computed, in the next case, of *Price v. Whitman*, 8 Cal. 412, the exclusive rule is adopted, and it is said: "Of late the general rule of construction seems to have been to exclude the first day;" and in *Iron Mountain Co. v. Haight*, 39 Cal. 540, where it was sought to have the court return to the earlier or inclusive rule, it is said: "We think we are bound by the gravest considerations of public order and security not at this late day to disturb the rule so distinctly and authoritatively settled." Finally, the matter was definitely put at rest by a provision placed in the Codes to the effect that "the time in which any act provided by law is to be done, is computed by excluding the first day and including the last." Code Civ. Proc. § 12; Cr. Code, § 10; Pol. Code, § 12. Still further as bearing upon the question we have in section 14, subd. 4, of the Civil Code, the provision that the word "month" means a calendar month, unless otherwise expressed. Applying these fixed rules, it is demonstrated that, if the act from which time is to run be considered the commencement of the insolvency proceedings, then the 24th day of February is excluded, and, counting backward one calendar month, there is included all the 24th day of January, upon which day the attachment was levied, and the attachment, consequently, was levied within the month. The same result is reached if the initiatory act be considered as the levying of the attachment upon the 24th day of January, by which method the 24th day of January is excluded from computation, and the month runs to and includes all of the 24th day of February. To this, however, objection is made that the filing of the insolvency proceedings was not, within the meaning of section 12 of the Code of Civil Procedure, "an act provided by law to be done"; but this language does not mean that it is an act the doing of which is commanded by law. It applies equally to all acts permitted by law, of which certainly this is one. The analogy in the case of the time allowed to respond to a summons, as to which it is not doubted that the statute applies, is perfect. The party upon whom service is made is allowed 10 days in which to

plead. There is no compulsion upon him to plead. He is merely permitted to do so if he wishes. It is an act provided by law to be done.

But it is still further insisted by appellant that, having due regard to the private rights of the parties litigant, the law will regard fractions of a day. The principle here involved was expressed in *Iron Mountain Co. v. Haight*, supra, as follows: "Fractions of days are not to be noticed, unless in a case in which it becomes necessary to ascertain the relative order of occurrences happening on the same day." The supreme court of the United States, in *Bank v. Burkhardt*, 100 U. S. 689, 25 L. Ed. 766, and in *Township of Louisville v. Portsmouth Sav. Bank*, 104 U. S. 472, 26 L. Ed. 775, reviews with much care the authorities and the learning of the law upon the question, and voices its conclusion as follows: "For most purposes the law regards the entire day as an indivisible unit, but, when the priority of one legal right over another depending upon the order of events occurring upon the same day is involved, this rule is necessarily departed from." Appellant places reliance upon the language of *Main v. Gilman* (C. C.) 11 Fed. 214, quoted with approval by this court in *Hoyt v. Railroad Co.*, 87 Cal. 610, 25 Pac. 160, 1066, where it is said: "It is insisted that the law knows no fractions of a day, but this ancient maxim is now chiefly known by its exceptions. When private rights depend upon it, the courts inquire into the hour at which an act was done, or a decree was entered, or an attachment was laid, or any title accrued." But the principle underlying this language is easily discerned. Where the law requires or permits an act to be done within a statutory period of time or number of days, the question becomes one simply of the measurement of time, and, so measuring time, the first day is excluded, all of the last day included, and fractions of days are totally and universally disregarded. The acting party has all of the last day within which to proceed. But where the question before the court is one where the determination of private rights depends upon the order in point of time of the performance of two or more acts usually done upon the same day, the courts are, of necessity, required to determine the priority and sequence of these events, and to this end always, as of need they must, consider parts and fractions of days. No one, for example, would consider that a defendant upon whom a summons had been served at 10 o'clock in the morning was in default because his answer was not filed until 4 o'clock of the afternoon of the tenth day. Upon the other hand, where the question is that of priority of time in the levy of two or more attachments,—the recording of deeds and the like,—the actual time of performance becomes the essential question, and fractions of days are scrupulously regarded. Of this latter class of cases was that of *Hoyt*

v. Railway Co., supra, the facts being that a rule of this court provided that, if the transcript was on file when notice was given of a motion to dismiss the appeal for failure to file, that fact should be a sufficient answer to the motion. The transcript in that case was filed upon the day the motion was served, but some hours after service. In resisting the motion to dismiss, it was urged that the law would not regard fractions of a day, and that the appellant was in time, therefore, if his transcript was filed at any hour upon the day of the service of the notice. It was in answer to this that the language of the federal court above quoted was employed. It was thus not a question where fractions of a day were considered in the measurement of time, but merely where they were considered to determine the priority of the happening of one of two acts. *Price v. Whitman*, supra, and *Iron Mountain Co. v. Haight*, supra, were both cases where the measurement of time was under consideration. In both it was urged that fractions of days should be regarded. In both the question was considered, and the fractions rejected. The other cases relied upon by appellant will be found upon examination to be those where the question was not of measurement of time, but a determination as to the priority of the order of events occurring on the same day. The case at bar, then, involves the question of the measurement of time, as to which it is clear that the law will not regard fractions of days, and that the attachment lien was, therefore, avoided by the initiation of the insolvency proceedings upon the 24th day of February. The same conclusion was reached by the supreme court of Connecticut in a parallel case arising under its insolvency act. *Miner v. Manufacturing Co.*, 62 Conn. 410, 26 Atl. 643. The judgment appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

131 Cal. 612

CITY AND COUNTY OF SAN FRANCISCO v.
LA SOCIETE FRANCAISE D'EPARGNES
ET DE PREVOYANCE MUTUELLE. (S.
F. 1,541.)

(Supreme Court of California. Feb. 19, 1901.)
TAXATION — SOLVENT CREDITS — SECURITY—
NONTAXABLE SECURITY—SUPPLE-
MENTAL ASSESSMENT.

1. Under Const. art. 13, § 1, declaring that moneys, credits, bonds, stocks, and things capable of private ownership shall be taxed, outstanding loans are taxable notwithstanding that they are secured by pledge of nontaxable personal property.

2. Where a corporation had returned a sworn statement of its property, which was listed and assessed to it, and the taxes thereon collected, an additional assessment of property, not contained in the list, was properly made thereafter; the previous assessment, based on the verified list, not preventing the assessor from making another assessment of property that has escaped assessment; Pol. Code, §

3885, declaring that no assessment shall be illegal because not completed within the time required.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the city and county of San Francisco against La Societe Francaise d'Epargnes et de Prevoyance Mutuelle. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Stanly, McKinstry, Bradley and McKinstry, for appellant. Alfred Fuhrman, for respondent.

GRAY, C. This is an action to recover \$5,551.60 alleged to be due to plaintiff from defendant as taxes for the fiscal year ending June 30, 1897, on solvent credits, admitted to be owned by defendant, aggregating \$348,721, and secured by nontaxable stocks and bonds. Plaintiff had judgment for the full amount demanded, from which defendant appeals, and urges as the grounds thereof—First, that the credits are not taxable, because they are secured by pledge of property not taxable; second, the assessor had no right or power to assess the said credits, because defendant had already handed in a sworn statement of its property for said fiscal year, which was listed to it, assessed, and the taxes thereon collected by the assessor (it all being personal property), and the said credits were not included in said statement nor in said assessment, but in an additional assessment, made by the assessor subsequent to payment made by defendant as aforesaid, and not based on any sworn statement.

1. We are of the opinion that loans or solvent credits secured by pledge on nontaxable property are taxable. Section 1 of article 13 of the constitution provides that "all property," with certain exceptions therein stated, "shall be taxed in proportion to its value." It further provides that the word "property" as used in said "article and section" shall include "moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership." The admitted credits or outstanding loans of defendant come clearly within the above constitutional definition of "taxable property," and the fact that such loans are secured by pledge of nontaxable personal property in no way affects the question.

2. The assessor was not bound by the verified list of property furnished by defendant, but it was his duty to assess to defendant any of its property that had for any reason escaped assessment. This question is set at rest, and the reasons given, in *People v. National Bank of D. O. Mills*, 123 Cal. 53, 55 Pac. 685; *Savings & Loan Soc. v. City & County of San Francisco* (Cal.) 63 Pac. 665. The power of the assessor to make a supplemental assessment embracing newly-discovered property cannot be limited or in any way affected by the previous assessment based on the verified

list made by defendant. It is the duty of the assessor to assess all the property for the current fiscal year, and this duty continues so long as the assessment books of such current year are under his control, and whenever he discovers property that has up to that time escaped assessment he should list and assess it to the owner in the manner provided in the Political Code. No assessment is illegal "because the same was not completed within the time required by law." Pol. Code, § 3885. We advise that the judgment be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

131 Cal. 618

HELLINGS et al. v. DUVALL et al.
(S. F. 973.)

(Supreme Court of California. Feb. 20, 1901.)
APPEAL AND ERROR—MOTION TO DISMISS—
FORMER MOTION—SLANDER OF TITLE—ISSUES—JUDGMENT.

1. Under Code Civ. Proc. § 182, providing that, if an application for an order made to a court in which an action is pending is refused, no subsequent application for the same order shall be made except to a higher court, a motion to dismiss an appeal will not be considered after a former motion to dismiss has been denied.

2. In an action for slander of plaintiffs' title to certain real estate, a defendant's answer denied all allegations of the complaint, alleged ownership in her, and prayed for costs, and that plaintiffs take nothing by reason of their complaint. On the trial no evidence was offered on behalf of plaintiffs. The judgment, in addition to the relief demanded by defendant, adjudged that plaintiffs were not and that defendant was the owner of the land. *Held*, that so much of the judgment as related to the title to the land was erroneous, since plaintiffs' title was only incidentally involved in the action, and, on their failing to offer any evidence, ceased to be involved in any way, and defendant's title was not involved in the action or defense.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by W. B. Hellings and others against Henrietta Duvall and others. From a judgment for defendant Henrietta Duvall, plaintiffs appeal. Modified.

For former appeal, see 51 Pac. 335.

T. M. Osmont and Chas. H. Hubbs, for appellants. Henry S. Foote and Sidney M. Van Wyck, Jr., for respondent.

SMITH, C. Action for slander of plaintiffs' title to certain real estate. The complaint, besides stating in detail the facts constituting the slander, alleges the plaintiffs' ownership of the property described. The answer of defendant Duvall denies all the allegations of the complaint, and alleges ownership in her. The prayer of the answer is for costs, and that plaintiffs "take nothing by reason of their complaint." On the trial

Cal. Rep. 63-65 P.—19

no evidence was offered on behalf of the plaintiffs. The judgment, besides granting the relief demanded, further adjudges that the plaintiffs are not, and that the defendant Duvall is, the owner of the lands described in the complaint and judgment. There was a motion to dismiss the appeal on the ground of the omission of certain parts of the judgment roll from the transcript, including the answer of defendant Crittenden; and, the motion coming on to be heard, the appeal was dismissed June 7, 1897, as to that defendant, and on December 8th of the same year the motion denied as to the other respondent. 51 Pac. 335. This disposes of the motion to dismiss the appeal, and it would be improper for us to reconsider it. Code Civ. Proc. § 182. The appellants seek by this appeal to have the judgment modified by omitting the adjudication as to the land, and we have no doubt they are entitled to this relief. The plaintiffs' title was only incidentally involved in the action, and, on their failing to offer any evidence, ceased to be in any way involved. The defendant Duvall's title was not involved either in the action or defense, and the allegations of her answer on that point were surplusage. The adjudication of title in her favor was beyond the scope of the action or defense, and therefore erroneous. The defendant Crittenden is in no way interested in this question, and the dismissal of the appeal as to him does not affect it. We advise that the judgment be modified by striking therefrom the third, fourth, and fifth paragraphs thereof, the first-named paragraph commencing with the words, "Good cause therefor appearing, it is ordered, adjudged," etc., and the last ending with the words, "45 feet to the point of commencement," and, as thus modified, that the judgment be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by striking therefrom the third, fourth, and fifth paragraphs thereof, the first-named paragraph commencing with the words, "Good cause therefor appearing, it is ordered, adjudged," etc., and the last ending with the words, "45 feet to the point of commencement," and, as thus modified, the judgment is affirmed.

131 Cal. 639

WARNER BROS. CO. v. FREUD et al.
(S. F. 2,248.)

(Supreme Court of California. Feb. 21, 1901.)

APPEAL—JUDGMENT—DISMISSAL—PAYMENT—ESTOPPEL.

1. Where a judgment creditor has refused to acknowledge a sum paid to be a satisfaction of the judgment, he is thereby estopped from asserting, in a motion to dismiss an appeal from the judgment, that the judgment has been satisfied, and the controversy is at an end.

2. An appeal will not be dismissed on the ground that the judgment appealed from has been satisfied by payment of the sum due thereon, unless such payment was by way of compromise, or with an agreement not to pursue an appeal.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by the Warner Bros. Company against Tiny Freud and others. From a judgment for the plaintiff, defendants appeal. Motion to dismiss. Denied.

W. S. Goodfellow and W. B. Bosley, for appellants. Hart H. North and Henry E. Monroe (W. B. Treadwell, of counsel), for respondent.

PER CURIAM. The respondent moves to dismiss the appeal upon the ground "that, after the taking of said appeal, the appellant Tiny Freud, administratrix with the will annexed of the estate of Morris Freud, deceased, voluntarily paid to the respondent, and the respondent accepted, the whole sum of money specified in the decree appealed from; thus effecting a satisfaction of said decree." The motion is made upon the transcript and an affidavit showing that on August 12, 1899, said administratrix paid to the respondent \$12,209.67 for the purpose of satisfying the judgment appealed from, and that the money was accepted, and the judgment satisfied. Without stating the facts so fully as might appear to be necessary if the merits of the appeal were now under consideration, the following will suffice for the purposes of this motion: Morris Freud died testate in 1882, seised of certain real estate, which he had mortgaged to the German Savings & Loan Society. By his will he devised to his wife, Tiny Freud, a life estate in said real estate, with remainder to five children in equal proportions; and said Tiny Freud is the administratrix with the will annexed of said estate. After the death of Morris Freud the bank foreclosed its mortgage, and on May 31, 1898, the property was sold thereunder, the bank becoming the purchaser. The respondent, having purchased the interest of one of the remainder-men, on November 30, 1898, as a successor in interest of the mortgagor, redeemed the property by paying to the bank the full amount of \$11,609.44, and afterwards brought the present action, against Tiny Freud as administratrix and also in her personal capacity, and against each of the other devisees, praying that the amount of said redemption money which each of the defendants should severally pay be ascertained, and that, in default of such payment by a day to be fixed by the court, each of the defendants so defaulting to be forever barred and foreclosed of all interest in the premises. The answer alleged that the interest which the plaintiff purchased from said devisee was subject to the payment of the debts, charges, and expenses of

administration, and that there are such debts, charges, and expenses remaining unpaid. The court found the proportion of the redemption money that should be paid by each of the defendants, and decreed that, in default of payment within 60 days, the interest of the defendant so defaulting should vest "absolutely and forever unconditionally in the plaintiff." From said judgment all the defendants appealed, and it is that appeal that respondent seeks to dismiss. The grounds upon which said motion is based have already been stated in the notice of motion and in the affidavit of Mr. North in support of the motion.

In opposition to the motion is an affidavit of Mr. Bosley, one of appellants' attorneys, stating very fully the circumstances under which said redemption money was paid by the administratrix, from which it appears that Mr. Bosley, Mr. Goodfellow, and Mr. Vandall went to the office of Mr. North, the attorney in fact of respondent, taking with them the money required to effect the redemption, a written tender, and a form of receipt to be executed by Warner Bros. Company by its attorney in fact and its attorneys, entitled in the court and cause, and the body of which is as follows: "Received from Mrs. Tiny Freud, administratrix with the will annexed of the estate of Morris Freud, deceased, the sum of \$12,209.67, paid by her pursuant to the terms of the decree entered in the above-entitled action, and in full satisfaction of the amount provided to be paid by her as such administratrix by the terms of said decree,"—dated August 12, 1899. The receipt that was given by respondent is as follows: "San Francisco, August 12, 1899. Received from Tiny Freud, as administratrix of the estate of Morris Freud, dec'd, twelve thousand two hundred nine and $\frac{67}{100}$ dollars. [Signed] Warner Bros. Co., a Corp., per Hart H. North, Its Attorney in Fact." This receipt made no reference to the action, or the decree, or to any purpose for which the money was paid; but to all requests that the receipt prepared by the administratrix should be signed the reply was, "You have your receipt." Mr. Treadwell, of counsel for respondent, said, in effect, that they did not propose to sign anything or do anything that would enable appellant to get any of the money back; that it was their point that the administratrix had no right to effect redemption without an order of court. The facts stated in Mr. Bosley's affidavit were not replied to. It will be observed that in the notice of motion to dismiss this appeal there is no statement that the money was received or paid in satisfaction of the decree, but simply that the payment was voluntary, and the money accepted, "thus effecting a satisfaction of said decree"; and the affidavit of Mr. North is equally careful to avoid any statement that it was received in satisfaction of the judgment appealed from, though he concludes his

affidavit with the legal conclusion, "whereby the said judgment became and is satisfied." In an affidavit made by said Tiny Freud in opposition to said motion it is shown that in August, 1900, she filed a petition in the superior court for partial distribution of the estate of Morris Freud, in which she alleged that the land described in the judgment appealed from in this action was the community property of herself and said Morris Freud; that the corporation, respondent herein, appeared and filed an opposition to her said petition, in which it was denied that said property was community property, and alleged that in an action commenced by said corporation against said Tiny Freud and all other persons interested in the estate the superior court, on June 17, 1899, duly made and entered its decree, whereby it was adjudged, among other things, that the interest of Tiny Freud in said real property was a life estate only, and that she had no other interest therein. Her affidavit then proceeds to state that in the present case, in which said judgment was rendered, there was no issue as to whether said real estate was community property; and that she intends to file a supplemental brief, and ask that the judgment be reversed or modified in so far as it may be held to determine that she had only a life estate therein.

The appeal in this case is taken by all the defendants, viz. Tiny Freud, Rosa Vogelsdorf, Hannah Freud, Emily Elaiser, Tiny Freud as administratrix with the will annexed of the estate of Morris Freud, deceased, and Emma Freud as executrix of the last will and testament of Isaac Freud, deceased. The judgment specifies the amount to be paid by each of these defendants, and divested the estate of each one who should not pay within sixty days. The appeal is from the whole of the judgment. The alleged satisfaction of the judgment was made by Tiny Freud as administratrix. It does not appear that any other of the appellants consented to the payment. We see no ground upon which the respondent has any right to have the appeal dismissed as to any of the appellants, unless it be as to the administratrix. It is shown that there are debts, charges, and expenses of the estate of Morris Freud unpaid. It was her duty to protect the estate as far as possible. If she failed to pay the amount required by the judgment to be paid by her as administratrix, and this court should affirm the judgment, the estate would have been lost to the heirs and creditors. We think she was not bound to determine at her peril what the judgment of this court would be upon the questions of law involved. There was no compromise, no concession by respondent, no condition imposed or assurance given that the appeal would not be prosecuted. On the contrary, respondent expressly refused to sign a receipt acknowledging satisfaction of the judgment; nor has it since offered to give or sign an acknowledgment of

satisfaction; nor has any satisfaction of said judgment been entered of record; while the statement of its counsel at the time the money was paid, to the effect that nothing would be signed or done that would enable appellants to get their money back, and that the administratrix had no right to effect redemption without an order of court, would seem to imply that respondent did not intend that the payment should be the end of the matter. But, however that may be, the repeated refusals of respondent to acknowledge satisfaction of the judgment estops it from saying, for the purposes of this motion, that the judgment has been satisfied, and that for that reason the appeal should be dismissed. It cannot, for one purpose, refuse to acknowledge satisfaction of the judgment, and for another purpose insist that it is satisfied. In *Hayes v. Nourse*, 107 N. Y. 577, 579, 14 N. E. 508, it was said: "It must be deemed too well settled by authority to require further discussion that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal." In *Erwin v. Lowry*, 7 How. 184, 12 L. Ed. 660, the supreme court of the United States said: "Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." Upon this point the foregoing is approved in *O'Hara v. O'Connell*, 93 U. S. 150, 154, 23 L. Ed. 840. In *Hayes v. Nourse*, supra, the court further said: "The statute giving the right to appeal only requires that the judgment shall be final; that the appeal shall be taken within one year after it is entered; and, anticipating such a case as that now presented, provides that, if the judgment appealed from is reversed, the appellate court may make or compel restitution. The same rule prevailed before the Code, and it was applied whether the judgment was paid before or after writ of error brought. The only difference was in the manner of proceeding to inform the court of the facts on which the right to restitution depended." Freeman, in his work on Judgments (section 480a), says: "One against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice; and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. The better view, we think, is

that, though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of the right to appeal." In the case at bar the court found that the real estate sold under the mortgage to the bank and redeemed by respondent, Warner Bros. Company, is of the value of \$25,000. The amount paid on August 12, 1899, to respondent, \$12,209.67, was less than one-half the value of the property. The judgment was a strict foreclosure of respondent's claim arising out of its redemption from the foreclosure sale; and under the judgment from which this appeal is taken, unless reversed, or satisfied by payment, the property would become forfeited to respondent. The payment made by administratrix, under these circumstances, was prudent, and might well be regarded as compulsory. In support of the motion, respondent cites several California cases, none of which conflict with those above cited. *Morton v. Superior Court*, 65 Cal. 496, 498, 4 Pac. 489, was considered in *Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 41, where it was said that *Morton v. Superior Court*, supra, "was a collateral attack upon the judgment by way of certiorari, and did not involve the right of appeal from a judgment that had been satisfied"; and that "section 1049 of the Code of Civil Procedure cannot be invoked to abridge the right of appeal where a judgment has been satisfied against the will of appellant." *People v. Burns*, 78 Cal. 646, 21 Pac. 540, and *In re Baby's Estate*, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239, cited by respondent, were cases where the fruits of the judgment had been received by the appellant. It was held in *Kenney v. Parks*, supra, that in such cases "a party in whose favor a judgment has been rendered cannot enforce the judgment, and, while enjoying its benefits, appeal therefrom, and seek its reversal." So, in *Marble Co. v. Black*, 123 Cal. 23, 55 Pac. 600, it was said: "Appellant first contends that the judgment was satisfied, within the meaning of section 1049 of the Code of Civil Procedure, by the execution sale; but this position is not tenable. The judgment was not, in fact, satisfied, and a forced payment by execution sale against a nonconsenting judgment debtor cannot be held to abridge any of his rights upon appeal;" and *Kenney v. Parks*, supra, was cited. *San Diego School Dist. of San Diego Co. v. Board of Sup'rs of San Diego Co.*, 97 Cal. 438, 32 Pac. 517, cited in support of the motion, is broadly distinguishable from the present case. That was mandamus to compel the supervisors to levy a tax for school purposes. The board levied the tax pursuant to the judgment, and afterwards appealed from the judgment which they had executed. This court granted the motion to dismiss the appeal, saying: "A reversal of the judgment would not of itself set aside the levy of the tax which had been made, nor did the appellant, by its compli-

ance with the judgment, lose any property or rights of which restitution could be made in case of reversal. Code Civ. Proc. § 957. The proceeding was for the purpose of compelling the defendant to perform an official duty, and not one in which it had any personal rights to be affected." *Ferreira v. Tubbs*, 125 Cal. 691, 58 Pac. 308, also cited by respondent, has no application here. The question there was as to the effect of a tender pending the appeal. There was no motion to dismiss the appeal, which was taken by the plaintiff from a judgment in his favor. If he had accepted the amount of the judgment, it would, as there said, have been an end of the litigation. The motion is denied.

131 Cal. 620

TOMSKY v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 1,206.)

(Supreme Court of California. Feb. 20, 1901.)

EXECUTORS—GUARDIANS—ATTORNEYS — PROFESSIONAL MISCONDUCT—COURTS—PEREMPTORY ORDERS—JURISDICTION—CONTEMPT.

1. A probate court, on a hearing in the matter of an estate and guardianship, has no jurisdiction to peremptorily order an attorney to refund money received from the executrix and guardian in excess of what the court considers reasonable for the services performed; hence its conviction of the attorney for contempt for refusing compliance with such order was unwarranted.

2. Where an executrix and guardian paid an attorney an amount in excess of what the court thought reasonable, it was error for such court to summarily find the attorney guilty of neglect of professional duty without opportunity of defense in the ordinary way, since the attorney had a right to be heard as to whether or not he had neglected the business of his employment.

Department 2. Certiorari to superior court, city and county of San Francisco; *J. V. Coffey*, Judge.

Certiorari on petition of William Tomsky against the superior court of the city and county of San Francisco to review an order adjudging petitioner, an attorney, guilty of contempt in refusing to refund retainer fees paid by a guardian and administrator. Orders vacated.

Wm. Tomsky, in pro. per. Henry H. Reid, for respondent.

PER CURIAM. Application for a writ of certiorari to review certain orders of said court, department 9 thereof, adjudging petitioner guilty of contempt. The petitioner was the attorney of one Dora Levy, the executrix of the will of Michael L. Levy, deceased, whose estate was being administered in said court, and also of said Dora Levy as guardian of the estate of one Marcus Levy, a minor, which was also pending in said court. The said Dora Levy paid to petitioner the sum of \$80 as a retainer and for costs in the estate, and the sum of \$30 as a retainer and for costs in the guardianship matter. On the 1st day

of November, 1897, the court made an order in the said estate, reciting that petitioner had received the sum of \$80 from the executrix, "which he claims as his attorney's fees," and that no order of court had been made allowing attorney's fees. The order then fixed the sum of \$25 as the attorney's fee for the services of petitioner, and further ordered that he "return to said executrix herein forthwith the sum of \$55." On the same date the court made an order in the guardianship matter reciting that petitioner had received from said guardian the sum of \$30, which "he claims as his attorney's fees herein," and that no order of court had been made fixing attorney's fees. The order then directed the petitioner to return to the guardian "forthwith the sum of \$30." On the 10th day of November, 1897, the petitioner, not having complied with the said orders or either of them, was, after notice, brought before the court on contempt proceedings. An order in the estate was made reciting, among other things, "that said William Tomsky obtained said moneys from said executrix under and by reason of his promise to her to diligently and properly attend to the settlement and final distribution of said estate, and to pay the necessary costs and charges of, and pertaining to, the administration of said estate, but that he has failed, neglected, and refused to perform the duties so undertaken by him, or to pay out of said moneys or at all the necessary costs and disbursements herein pertaining to said estate." The order further adjudged petitioner guilty of contempt of court in neglecting and refusing to return said money, as ordered by the court, and directed that he be committed to the county jail, imprisoned five days, pay a fine of \$100, and that he be further committed to the county jail for the period of one day for every \$20 of the fine, until said fine be paid. On the same day the court made an order in said guardianship matter, reciting the failure of the petitioner to pay the said \$30 as ordered by the court, and that said petitioner "has not used any of said moneys for the purposes for which he obtained the same, but has converted the whole thereof to his own use." The order further adjudged petitioner guilty of contempt in refusing to pay the said money as ordered by the court, and, as a punishment therefor, directed that he be imprisoned in the county jail for five days, and pay a fine of \$100, and, in default of payment, that he be committed to the county jail one day for each \$20 of said fine, until the fine be paid. The foregoing statement shows that the court, without a trial, and without giving the petitioner the right to a defense in the ordinary way, found him guilty of neglect of duty and failure to perform services, and directed him in a summary manner to refund the money that had been paid to him. The court in so doing exceeded its jurisdiction. The money paid to petitioner was not paid to him as a trust fund, nor was it paid to him by order of court for a certain purpose. It had not been embezzled

or fraudulently taken by him. It was money paid to him as a retainer, and for services by Dora Levy, who employed him. She had the right to employ him, and to make a contract with him, and such employment and contract were binding upon her. If petitioner failed to comply with his contract, or to perform the agreed services, she had her remedy by ordinary action against him, and the courts are open to her for such purpose. In her accounts with the estate, the court would allow her for reasonable attorney's fees, and if she paid out money for services that were never performed, or if she paid more than the reasonable value of such services, she might not be allowed such item in her account, but that would not affect the question as to her liability to petitioner. The petitioner had the right to his day in court, and to be heard as to whether or not he had neglected to attend to the business of his employment as agreed. It is true he is an attorney of the court and an officer thereof, but that does not deprive him of the equal protection of the law. The judge of the court could not arbitrarily order him to refund a retainer received by him, for the mere reason that in the opinion of the judge it had not been earned. The court would have the power to allow or reject the items so paid when the account of the executrix or guardian was presented for settlement, but its protecting arm does not extend so far that it can order all parties to refund money which, in the opinion of the judge, has been wrongfully obtained from the representative of the estate. It was said by this court in *Ex parte Hollis*, 59 Cal. 413: "It is a principle that underlies all institutions and forms of government that no man can be deprived of his property, except in proceedings according to law, unless it be confiscated for the necessities or good of the public. If his title is claimed to be invalid or fraudulent and void, he is entitled to be heard according to the forms of law. Proceedings to punish him for contempt for not delivering it up, without a trial according to law, to another who claims it, are not the appropriate proceedings for the trial of issue of title. The issue of such title should be tried in an appropriate action, in which the verdict of a jury or the findings of the court may be had upon issues properly framed for the purpose of definitely determining the question of title." See, also, *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118; *In re Paschal*, 10 Wall. 492, 19 L. Ed. 994. In the latter case it was said by the supreme court of the United States: "The attorney may have cross demands against his client, or there may be disputes between them on the subject, proper for a jury or a court of law or equity to settle. If such appear to be the case, and no professional misconduct be shown to exist, the court will not exercise its summary jurisdiction; and, as the proceeding is in the nature of a contempt, the respondent ought to be permitted to purge himself by his oath. 'If he clear himself by his answers,' says Justice Blackstone, 'the complaint is to-

tally dismissed.'" We do not think the record in this case shows any professional misconduct. No fact is found from which we could say the petitioner was guilty of professional misconduct. If he neglected to perform the professional services which he had agreed to perform, it might be in one sense professional misconduct, but whether he did so neglect or not was a question the petitioner had the right to have tried in the proper manner. The orders are set aside and annulled.

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CROSBY v. CLARK. (Sac. 587.)

(Supreme Court of California. Feb. 25, 1901.)

EJECTMENT — RAILWAY LAND — SETTLERS — PURCHASE — IMPLIED TRUST — FRAUD — TRIAL — PLEADINGS — AMENDMENT.

1. Where defendant in ejectment, who had settled on railway land under application to purchase, alleged that plaintiff, who subsequently purchased the same land, obtained his deed by fraudulently representing that defendant had abandoned the land, and the testimony showed that plaintiff's deed was withheld by the railway until they should obtain a relinquishment from defendant, and that plaintiff subsequently told the railway agent that defendant had left, and his whereabouts were unknown, a finding that plaintiff, knowing all the facts, for the purpose of defrauding defendant, induced the railway to sell to plaintiff, was sufficient to support a judgment for defendant, though it did not state that plaintiff, on making application, falsely represented that defendant had abandoned the land; since Civ. Code, § 2224, declares that one who gains a thing by fraud is, unless he has some better right thereto, an involuntary trustee for the benefit of the person who would otherwise have had such property.

2. Where defendant settled on railroad land under an application to purchase, but plaintiff subsequently applied for and secured the same land by fraudulently representing to the railroad company that defendant had abandoned it, plaintiff held the same in trust for defendant, though the offers under which defendant settled on the land were not absolute, but provided that settlers who in good faith cultivated and improved lands belonging to the company would "generally" be given the preference.

3. Where defendant settled on land under application to purchase, and plaintiff applied for and secured the same land by fraudulently representing that defendant had abandoned it, in ejectment by plaintiff it was not error to allow defendant to amend his cross complaint by pleading a tender of the purchase price, and offer to deposit in court, as Code Civ. Proc. § 473, permits amendments of pleadings in conformity with justice.

In bank. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Judgment by F. C. Crosby against Owen Clark. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

A. M. Seymour, A. L. Hart, and Pullen & Wallace, for appellant. W. H. Carlin and L. L. Chamberlain, for respondent.

VAN DYKE, J. The action is in the nature of ejectment, brought to recover a portion of the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 25, township 13 N., range 6 E., Mt. Diablo base and meridian, the land being situate in

Placer county. The plaintiff derails title to the land in question under a deed dated July 26, 1887, from the Central Pacific Railroad Company, which company, it was admitted, became the owner of the lands in the year 1862 by a grant under the act of congress of that year. By way of cross complaint the defendant set up a prior right to purchase from the railroad company the land in question, based on the offers of said company, contained in its printed circulars inviting settlement on its lands, and the acceptance by the defendant of said offers, and the settlement upon and continuous occupation of the land from the year 1872, and by written application to purchase made to the land agent of the company in pursuance of its offers contained in said circulars on December 7, 1874. It is also alleged in defendant's cross complaint that the deed to the plaintiff was fraudulently procured by means of false representations made by the plaintiff, with full knowledge of the facts and rights of the defendant, to the land agent of the company, to the effect that the said defendant had abandoned the land, which representations were made for the purpose of defrauding the defendant. It is further alleged in the cross complaint that, after the execution of the deed to the plaintiff, the defendant tendered to the plaintiff, and offered to pay him, the full amount of all moneys and expenses paid by him for the said deed and as the purchase price of said land and premises, and demanded a conveyance of said land and premises from the plaintiff, and tendered said money into court, and prayed that it be adjudged and decreed that the defendant is the owner of said land and premises, and that the plaintiff has no right and title in the same, and for general relief.

The case was tried upon the issues raised by the answer to said cross complaint, and the findings of the court were in favor of the defendant. The offers contained in the circulars issued by the railroad company are fully set forth in the findings. They, in substance, invite persons who desire to purchase lands from the railroad company, including settlers, pre-emptors, and other claimants, to make application to the land agent of the company at Sacramento, describing the land by legal subdivisions, stating that such application will be filed, and that the party would be allowed three months to complete the purchase, and that during that time the land would not be sold to another without giving the applicant 30 days' previous notice; that actual occupants of lands belonging to the company will generally have a preference in the purchase at the regular price, and that no addition to the price would be made where there were improvements on the lands made by the settler; that in the case of conflicting claims an adjudication of the respective claims would be made by the land agent, on due notice given to both parties, and that persons desiring to purchase could

buy on a credit of five years, by paying 20 per cent. of the price down, and interest annually in advance on the remainder of 10 per cent. per annum. It is also found that, induced by and wholly relying upon the offers, promises, and inducements made and held out to him by said corporation, the said defendant did, in the year 1872, enter and settle upon the described lands and premises, and has ever since, in such reliance and faith, held possession thereof, and did improve and possess said lands and premises, and that said defendant did accept the said offer and promises of the said corporation contained in the circulars aforesaid, and did file with said corporation, and deliver to, and the same was received and accepted by, it, his said acceptance and application to purchase said lands, in accordance with the terms of said circulars; that at the said time when the defendant filed his application, to wit, December 7, 1874, said corporation had not fixed the price of said lands and premises, and the same were not ready for transfer by said corporation; that the price was not fixed until the year 1887; that from the said December, 1874, down to and including the 27th day of July, 1887, said defendant was and continued to be in the open, actual, and sole possession and use of said lands and premises, visibly and notoriously, and during all said time did use and improve the same, and pay all the taxes thereon; that in the year 1887 the said corporation did fix the said price of said lands, and place and offer the same formally for sale; that the said defendant was at all times willing, able, and ready to pay the said corporation its said price in accordance with the terms of said circulars; that the said corporation failed and neglected to notify the defendant of the fixing of said price of said lands, or that said lands and premises were offered and ready for sale, and that said defendant did not know, or have any knowledge, prior to the date of the deed of plaintiff, that the said lands and premises were offered for sale, or were ready for sale; that said plaintiff was informed and was cognizant of and knew all and singular the matters and things aforesaid, and for the purpose of defrauding said defendant, and of reaping the benefit thereby for himself, and well knowing the rights of the defendant in the premises, did induce the said corporation to sell to him, said plaintiff, the lands and premises in question, and did then, to wit, July 27, 1887, receive from said corporation the deed in question. And as a conclusion of law that the plaintiff have and receive the sum so deposited in court by the defendant, and that the defendant be decreed the owner in fee and entitled to the possession of the land and premises in controversy, and for the costs of suit.

1. The appellant makes the point that the court failed to find that the plaintiff falsely represented that the defendant had abandoned the land in question at the time he made

application to purchase. The land agent of the railroad company testified that the plaintiff was informed of the application of the defendant to purchase, and of his rights in the premises, and the deed was withheld pending the filing of relinquishment or abandonment of the defendant's application, which was then on file in the land department of the railroad company; and that the plaintiff subsequently called at the office of said land department, and stated that the defendant had left the premises in question, and that his whereabouts were unknown. Although the finding is not as specific as the testimony would warrant, it is sufficient, in this respect, to support the judgment. It is that the plaintiff, knowing all the facts and circumstances, and knowing the rights of the defendant, and for the purpose of defrauding him, "did induce said corporation to sell to him." It clearly appears that the plaintiff could not have obtained his deed from the railroad company while the land was in the actual occupation and possession of the defendant, claiming rights under the offers and inducements of said company, without obtaining a relinquishment of the rights of said defendant, or, at any rate, after notice and hearing. "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing for the benefit of the person who would otherwise have had it." Civ. Code, § 2224; Story, Eq. Jur. § 885; Pom. Eq. Jur. § 1053. *Boyd v. Brinckin*, 55 Cal. 427, was a case similar to the one under consideration. That was ejectment commenced by the plaintiff, to which the defendant, by way of cross complaint, set up substantially the same facts as are contained in the cross complaint of the defendant in this case. A demurrer interposed to this cross complaint on the ground that it did not state facts sufficient to constitute a defense or cause of action against the plaintiff was sustained. On appeal the judgment entered upon the demurrer was reversed. In speaking of the nature of the contract between the defendant, who had settled upon the land, and the railroad company, the court remarks that a contract of this character belongs to the group which is said to be "created by representations made by one party and acts done by the other party upon the faith of such representations," Pom. Cont. § 69. "And, further, the defendant alleges that the plaintiff, before and at the time of purchasing, had knowledge of the agreement between the defendant and the railroad company, and of all of the defendant's acts thereunder. If so, the plaintiff took the land impressed with a trust in favor of the defendant, and holds it in trust for the defendant, and can be compelled at the suit of the defendant to specifically perform the agreement of the railroad company by conveying the land in the same manner

and to the same extent as the railroad company would have been liable to do had it not transferred the legal title; and the plaintiff is the proper party in the suit against whom to demand the conveyance." *Railroad Co. v. Terry*, 70 Cal. 484, 11 Pac. 769, was an action of ejectment to recover possession of the land occupied by the defendant. The defendant settled upon the land under the provisions of the printed circulars of the railroad company inviting settlers to go upon such lands and occupy and use them until such time as it would be ready to sell,—similar to the circulars and offers in the present case. When the land was graded, and the price fixed, the defendant made application under the circulars and offers to the land agent of the company to purchase, and his application was refused. The court, in its opinion, says that the company could not legally do this, "because the offer which it made to sell its lands to actual settlers, having been accepted by the defendant, who settled upon a portion of the lands, constituted a contract of sale, and established the relation of vendor and vendee between the company and defendant as a bona fide settler," and affirmed the judgment in favor of the defendant.

2. The appellant contends, however, that the cases referred to are not authority, for the reason that the offer of the company contained in the circulars in this case is different from the offer in the other cases, in this: The language of the offer in this case, as already shown, is, "Settlers and actual occupants who in good faith cultivate and improve lands belonging to the company will generally be given preference of purchase at the graded price." The word "generally" was omitted from the offers in the cases under consideration in *Boyd v. Brinckin* and *Railroad Co. v. Terry*, supra. However, in *Kelly v. Railroad Co.*, 74 Cal. 557, 16 Pac. 386, the terms of the offer contained in the circular were identical with the offer in the present case. That was an action to compel the defendant to specifically perform a contract for the sale of the land. It appears that one Cole had settled upon the land in question, and continued to reside thereupon, and make improvements, relying upon circulars issued by the railroad company similar to those referred to in this case, and believing that he would have the prior right to purchase from the company; and it appears that Kelly resided in the vicinity, and knew all the facts, and of Cole's equities. Cole intervened in the action, and prayed for the conveyance of the land in controversy to him. The court below decreed that the land be conveyed to Cole, and Kelly appealed. The findings showed that by reason of false repre-

sentations made by Kelly to the land agent of the railroad company, which were untrue, and known to be untrue by him at the time, the company was deceived, and entered into said contract; and, upon becoming aware of the deception which had been practiced by Kelly, refused to carry out the contract and make a conveyance. On the appeal, in reply to the contention of Kelly that the false representations were not productive of injury to the railroad company, this court said: "It is not necessary that the injury should result to the vendor. It is sufficient if it would result to third persons;" and the judgment was affirmed. In *Stark v. Starrs*, 6 Wall. 419, 18 L. Ed. 930, it is said "that, where one party has acquired the legal title to property to which another has a better right, a court of equity will convert him into a trustee of the true owner;" and in *Johnson v. Towsley*, 13 Wall. 85, 20 L. Ed. 487, the court said: "If, for any reason recognized by courts of equity as a ground for interference in such cases, the legal title has passed to one party, when in equity and in good conscience it ought to go to another, a court of equity will convert him into a trustee." In this case it appears that the railroad company held itself ready to carry out its offer to the defendant under the circulars in question, and was only prevented from doing so by the fraudulent interposition of the plaintiff; and under well-settled principles of law the plaintiff should not be permitted to reap the fruits of his fraud.

3. The court did not err in allowing the defendant to amend his cross complaint pleading a tender and offer to deposit in court, nor in denying plaintiff's motion to strike out said amendment. Amendments to pleadings so as to enable the party to prove all the facts necessary to his cause of action or defense are favored. If, by reason of such amendment, the opposite party is taken by surprise, the cause can be continued, or time allowed to meet the amendment, or such other terms imposed as may be just under the circumstances. It can very rarely happen that a court would be justified in refusing a party leave to amend his pleading so that he may properly present his case. *Code Civ. Proc.* § 473; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *Stringer v. Davis*, 30 Cal. 321; *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86.

The conclusion reached renders it unnecessary to consider the question of adverse possession and the statute of limitations. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.

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SCHAAKE v. EAGLE AUTOMATIC CAN CO. et al. (S. F. 1,501.)

(Supreme Court of California. Feb. 20, 1901.)

ACTIONS—JOINDER — PLEADINGS — PARTIES—COMPLAINT — UNCERTAINTY — DEMURRER—LEAVE TO AMEND — REFUSAL — MOTION TO VACATE—APPEAL—ABUSE OF DISCRETION—STATEMENT OF CAUSE OF ACTION—CORPORATIONS — DISTRIBUTION OF ASSETS — LIABILITY—PROPERTY CHARGED WITH LIABILITY—ACCOUNTING.

1. Where the court sustained demurrers to a complaint without leave to amend, and the complaint stated a cause of action, the face of the record showed an abuse of the court's discretion to allow or disallow amendment of the pleadings.

2. Where an order refusing leave to amend was inserted in an order sustaining demurrers to the complaint, the former order was excepted to by force of Code Civ. Proc. § 647, providing that an order allowing or refusing to allow amendments to the pleadings would be deemed to have been excepted to, and it was not necessary for the plaintiff to move to vacate or modify the order entered in order to have the point reviewed on appeal.

3. A complaint alleged that a contract between the inventor of certain patented machines and improvements and a can company provided that if such machines and improvements were sold by the can company, or transferred for use under a license outside of certain territory, the inventor was to have a certain per cent. of the profits accruing thereby to such can company. It further alleged that the can company did sell such inventions and improvements to be used outside of such territory without any reserve or limitation, and that the buyer at such sale and its licensees were using such machines and improvements outside of such territory. *Held*, that the complaint stated a cause of action against the can company.

4. Under Civ. Code, § 309, declaring that the directors of corporations must not divide or pay to the stockholders, or any of them, any part of the capital stock, except what remains after the payment of all its debts on its dissolution or the expiration of its term of existence, the capital stock of one corporation, issued to a number of persons, all but one of whom were the stockholders of another corporation, in consideration of the transfer to the former of all the latter's property, capital, patents, and assets, was in fact the property of such latter corporation, and a fund for the payment of its debts; hence all such corporation's stockholders who had received any of the stock issued by the former corporation were proper parties to a suit against the latter corporation.

5. Where a complaint seeking to recover a certain per cent. of the profits accruing to a corporation by reason of the sale of certain property states that such corporation received no consideration for the transfer of the property, but further alleges that the corporation to which it was sold issued 2,888 shares of its capital stock to the stockholders of the corporation selling it, in payment for such property, the statement as to consideration did not prevent the facts alleged from constituting a cause of action, since it was a conclusion of law erroneously drawn from the facts.

6. Where a corporation issued part of its capital stock to the stockholders of another corporation in consideration of the transfer of all the latter's property, assets, and patents, including the right to use and authorize the use of certain patented machines outside a certain territory, with notice that such transfer created a liability against the latter corporation, and that such corporation could not discharge the same, it took the property charged with

that liability, and was a proper party to a suit against the other corporation on the same.

7. Where a party had a right to a certain per cent. of the profits of the sale by a corporation of certain patents, and the corporation sold the patents, but directed the proceeds to be delivered to its stockholders, a complaint setting up these facts did not fail to state a case for an accounting, in that it failed to show that anything was received by the corporation for which it should account.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action on contract by Henry Schaaque against the Eagle Automatic Can Company and others. From a judgment sustaining demurrers to the complaint, without leave to amend, plaintiff appeals. Reversed, with directions.

J. C. McKee and F. M. Parcells, for appellant. E. S. Pillsbury and Olney & Olney, for respondents.

PER CURIAM. The other defendants are the Pacific Sheet-Metal Works (a corporation), Henry Pierce, Irvin Ayres, C. H. Watt, F. P. Howard, W. H. Talbot, A. L. Ayres, H. L. Hutchinson, E. B. Pond, William Renzie, J. M. Duke, W. P. Johnson, May Martin Philips, and J. W. Philips. These defendants, except the last two, were stockholders in the Eagle Automatic Can Company, and held all its stock (2,000 shares); and Pierce, Ayres, Watt, Howard, and Talbot were directors. The amended complaint was demurred to by each of the corporations, and also by the individual defendants, severally; and these demurrers were sustained, without leave to amend, and plaintiff appeals from the judgment thereupon entered.

The amended complaint alleges, in substance, the following facts:

On October 26, 1892, the said Eagle Automatic Can Company, a corporation engaged in the manufacture of tin cans by the use of certain automatic patented machines and processes, at the city and county of San Francisco, as party of the first part, entered into a contract with the plaintiff, as party of the second part, the substance of which is as follows: The second party agreed to serve as superintendent of the can factory of the first party for three years from the date of the agreement, unless it should be sooner terminated according to the terms thereafter set forth; that, in connection with his duties as superintendent, he should give due attention and care to perfecting, improving, and developing the various machines and machinery in use in the factory, and endeavor to improve said machines and discover and invent others for use in said factory and business; that any and all inventions or improvements which had been or might be invented, discovered, or made by the second party during the time he had been or should be employed as super-

intendent should be perfected and completed by the second party when so required by the first party, and applications for patents to be made when required by the first party at its expense, and to be assigned to it upon request, and, whether patented or not, any and all of such improvements or inventions so made should "be and remain the sole property of the party of the first part during the entire life of the patent or patents, and entirely in the control of said party, and for the exclusive use and benefit thereof: provided, that said party of the second part shall have an indefeasible interest in any and all of said inventions or improvements, whether patented or not, equivalent to twenty-five per cent. of all profits accruing to or received by the party of the first part on account of the sale, use, or license to use, or on account of the manufacture to sell, use, or license to use, any of said inventions or improvements, outside of the city and county of San Francisco." In consideration of the foregoing, the first party agreed to pay the plaintiff \$190 per month during said period of three years, or until the agreement should be duly terminated according to its terms. The first party also agreed "to pay to the party of the second part ten per cent. of the cost price of any and all machines or parts of machines or improvements on machines made, discovered, or invented by the party of the second part as hereinbefore set forth, which said party of the first part shall cause to be used or authorize the use of outside of the city and county of San Francisco; also to pay to the party of the second part twenty-five per cent. of all profits accruing to or received by the party of the first part on account of the sale, use, or license to use, or on account of the manufacture to sell, use, or license to use, any of said inventions or improvements outside of the city and county of San Francisco." It was further agreed that in the event that the first party retired from the business of manufacturing tin cans, and for that reason had no further use for the services of the party of the second part, "then this agreement to cease and determine, and all future obligations hereunder shall be mutually canceled and annulled," and the first party released from payment of said salary, and the second party from the duties of superintendent or other service, and that inventions or improvements thereafter discovered should be for the exclusive use of the second party: "provided, that no rights or interests or obligations arising or originating before this agreement is terminated as herein set forth shall be affected in any manner by the said termination hereof."

The plaintiff further alleges performance of his said contract, enumerates 12 inventions for which patents were issued, 8 for which patents were allowed but not yet issued, and 7 improvements not patented, all of which were assigned and delivered to the

said Eagle Automatic Can Company, and solely used by it; that in October, 1895, the defendant the Eagle Automatic Can Company entered into an agreement with the Pacific Sheet-Metal Works, a corporation, and a defendant herein, to sell to it all its capital, patents, property, rights, franchises, privileges, and assets owned, held, or controlled by the defendant the Eagle Automatic Can Company, including all the inventions and improvements made by the plaintiff; that the same was so sold and delivered, to be used outside of the city and county of San Francisco, "or anywhere, without reserve or limitation," and that no consideration therefor was received by the Eagle Automatic Can Company, but that the Pacific Sheet-Metal Works, with the knowledge and approval of all the defendants, issued 2,888 shares of its stock to the following named defendants: Henry Pierce, 700 shares; F. P. Howard, 354 shares; Irvin Ayres, 835 shares; O. H. Watt, 520 shares; H. L. Hutchinson, 340 shares; W. P. Johnson, 10 shares; and to May Martin Philips, 129 shares. And it is alleged that said defendants gave no consideration for said stock, but received the same, according to said agreement, for procuring, consenting to, and ratifying said sale, and that thereby the Eagle Automatic Can Company was deprived of all its property, capital, and assets, has ceased to do business, and is insolvent. It is then alleged that the cost price of the machines and machinery patented, invented, and improved by plaintiff, and by him assigned and delivered to the Eagle Automatic Can Company, and by that company sold and delivered to the Pacific Sheet-Metal Works, was \$160,000, and the value of the stock issued therefor to the defendants above stated was \$190,000. It is then alleged that at the time of said sale "several of the said machines and machinery were practically worn out and of little value, and were subsequently abandoned, so that the whole lot was sold for a sum far in excess of its value, and a very large profit—the exact sum being unknown to plaintiff—thereby accrued to said Eagle Automatic Can Company on account of said sale authorizing the use of said machines outside of the city and county of San Francisco, and said profit was received by said defendants in stock, as stated." It is then alleged that the value of the patents on machines and improvements discovered and invented by plaintiff, and delivered to the Eagle Company under said contract, was \$74,000, the equivalent of which was paid to said defendants in stock, and which sum comprised the profits of the Eagle Automatic Can Company by the sale of said patents to be used outside of the city and county of San Francisco.

It is further alleged that said sale and transfer, the issuance of said stock, and the organization of said Pacific Sheet-Metal Works to receive said property and assets,

were in pursuance of a conspiracy theretofore entered into by and between all of the defendants, acting in concert, with the intent of defrauding plaintiff of his rights and interests in said property under said contract, and in pursuance thereof dividing the proceeds and profits resulting from the consummation of said conspiracy, to wit, "2,888 shares of the capital stock of said Pacific Sheet-Metal Works, as stated, of the value of \$288,800," and that all of said parties were fully aware and had notice of the existence of said contract, and that, as a result of said sale, plaintiff was entitled to 25 per cent. of the price paid for the patents sold and delivered to be used outside of the city and county of San Francisco, 25 per cent. of the profits on the machines and machinery so sold, and 10 per cent. on \$160,000, the cost of the same, all with the purpose and intent to wrong and defraud the plaintiff; that plaintiff has no means of ascertaining, and is unable to state, what part of said sum of \$288,800 was paid for the use of said patents inside of the city and county of San Francisco, and what part was for the use of said patents and machinery outside of said city and county; that the Pacific Sheet-Metal Works and its licensees have used and are now using all the said patents and improvements outside of the city and county of San Francisco, "and nothing has been received by plaintiff for or on account thereof from said Eagle Automatic Can Company, or from any of said defendants, or at all; that by reason of the premises said defendants, and each of them, are indebted to plaintiff in a sum, the exact amount of which plaintiff is unable to ascertain, and therefore cannot state, but no part of which has been paid."

The prayer is: (1) "That an accounting be had, and the original cost, as well as the real value at the date of the sale, of the property and assets of said Eagle Automatic Can Company, in which plaintiff had an interest by reason of said contract, sold to said Pacific Sheet-Metal Works, the price paid for the same, the proportion of the price paid for use and authority to use the said patents, machinery, and improvements outside of the city and county of San Francisco, and the profits accruing from the sale, be ascertained." (2) That he have judgment against each for such sum as he may be entitled to, with interest, and for other proper relief. Each of the corporations and the individual defendants demurred separately, specifying that the facts stated do not constitute a cause of action, that there is a misjoinder of parties defendant, that several causes of action are improperly united, that the complaint is ambiguous in certain particulars and unintelligible in others. On November 10, 1897, the court made an order reciting that, the demurrers having been theretofore submitted and taken under advisement, "It is ordered that said demurrers be, and the same are hereby, sustained, with-

out leave to the plaintiff herein to amend the complaint on file herein," and directing judgment to be entered in favor of the defendants for costs.

Respondents contend, however, that the court did not err in sustaining the demurrers "without leave to amend." It is said that the complaint had been once amended, that the allowance of a further amendment was wholly within the discretion of the court below, and that there is nothing in the record which shows an abuse of discretion; citing *Buckley v. Howe*, 86 Cal. 596, 605, 25 Pac. 132, 134, where it is said: "The privilege of amending after trial of the issue of law raised by demurrer is not one of right, but one resting in the discretion of the trial court. Code Civ. Proc. § 472. If the plaintiff desired to again amend, she should have applied to the court below, and, if refused, exceptions should have been taken. It is too late to make the point for the first time in this court, when nothing appears in the record to show an abuse of discretion." We do not question that proposition; but, if a complaint states a cause of action, the face of the record would "show an abuse of discretion" in sustaining a demurrer upon any ground without leave to amend. Accordingly, in *Buckley v. Howe* this court reviewed all the facts which were relied upon to show a cause of action, and concluded that she had failed to state facts sufficient to constitute a cause of action, and that the demurrer to her complaint was properly sustained. The order refusing leave to amend in this case was inserted in the order sustaining the demurrers, and was made at the same time. It cannot be presumed that the plaintiff asked leave to amend in advance of the ruling upon the demurrers, and, the order denying his right to amend having been made, and excepted to by force of the statute (Code Civ. Proc. § 647), it could not be required that he should move to vacate or modify it in order to have the point reviewed upon appeal. Demurrers for ambiguity or uncertainty are in aid of the pleading, and contemplate an amendment in the particulars specified in them. We do not say that there is no limit to the right to amend when such demurrers are sustained, since several failures—perhaps but one or two—may develop a want of facts, or show that the fault cannot be remedied. The case of *Campbell v. Freeman*, 99 Cal. 546, 34 Pac. 113, cited by counsel for the Pacific Sheet-Metal Works, has no application. In that case the fact of an application for leave to amend appeared only by the affidavit of counsel, and there was no bill of exceptions or statement containing any action of the court thereon. The contract between the plaintiff and the Eagle Automatic Can Company is set out in full in the complaint, and its principal provisions have been hereinbefore sufficiently stated. Under its terms the plaintiff had no profit or interest in his patents and improve-

ments so long as their use was confined to the city and county of San Francisco. The contract contemplated, however, that these patented machines and improvements might be manufactured for sale or use under a license by other manufacturers outside of said city and county, and in such case he was to have the interest or profits therein specified. It is also alleged that in October, 1895, the Eagle Automatic Can Company agreed to sell to the defendant the Pacific Sheet-Metal Works "all the capital, patents, property, rights, franchises, privileges, and assets owned, held, or controlled by said defendant the Eagle Automatic Can Company, including all the inventions and improvements discovered or made by the plaintiff as hereinbefore set forth, and to be used outside of the city and county of San Francisco, or elsewhere, without any reserve or limitation whatever"; and that on or about February 12, 1896, the sale was consummated by the board of directors, with the approval of the stockholders. It is directly alleged that the Pacific Sheet-Metal Works was by said sale authorized to use said property outside of said city and county, and it is also alleged that the Pacific Sheet-Metal Works and its licensees have used and are now using the same outside of said city and county. These facts, if proved, would entitle the plaintiff to recover the percentages stipulated for in the contract, at least as against the Eagle Automatic Can Company. It is true, it is alleged that that corporation sold "all its property, capital, and assets of every kind and character, has ceased to do business, now is, and since said sale has been, entirely without assets and insolvent"; but that does not relieve it from liability for its debt. It is also true that it is alleged that it received no consideration from the Pacific Sheet-Metal Works for the property it sold to the last-named corporation; but it is alleged that the Pacific Sheet-Metal Works issued, in payment therefor, to the stockholders of the Eagle Automatic Can Company, 2,888 shares of its capital stock. But said corporation was not authorized to sell all its property for stock in another corporation to be issued not to it, but to its stockholders, as we shall hereafter see; and, the facts being stated, it is apparent that the pleader's statement that the corporation received no consideration for the sale is a conclusion of law erroneously drawn from the facts alleged; and, it further appearing that the property sold was "authorized" by the Eagle Automatic Can Company to be used outside of the city and county of San Francisco, a cause of action against said Eagle Automatic Can Company is stated. We also think that the Pacific Sheet-Metal Works, and the stockholders in the Eagle Automatic Can Company who received any of the stock issued by the Pacific Sheet-Metal Works in payment for the property sold to it by the first-named corporation, are each proper parties to the suit, and that the demurrer for

misjoinder of parties should have been overruled.

It is alleged that the Eagle Automatic Can Company sold all its property, capital, patents, and assets to the Pacific Sheet-Metal Works pursuant to an agreement, and that the last-named corporation issued to Pierce, Howard, Ayres, Watt, Hutchinson, Johnson, and May Martin Philips 2,888 shares of its capital stock in payment therefor,—all of said persons, except Mrs. Philips, being stockholders in the Eagle Automatic Can Company; that said corporation has ceased to do business, and is insolvent. The corporation, however, has not been dissolved, and the effect of this transaction was an attempted distribution of all its property, capital, and assets of every description to its stockholders, in violation of section 309 of the Civil Code, which provides, among other things, as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, * * * except as hereinafter provided. * * * Nothing herein shall prohibit a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence. * * *" Said corporation has not been dissolved, nor has its term of existence expired. It is alleged to be a corporation, and its demurrer admits its existence as such. Section 13 of the act of 1853 (St. 1853, p. 89) contained substantially the provisions now found in said section of the Civil Code, and those provisions were considered in *Martin v. Zellerbach*, 38 Cal. 300. In that case two corporations, each owning in severalty several water ditches, and having no interest in common, agreed to form a new corporation, to which each should convey all its property, the stock of the new corporation to be distributed in certain proportions to the stockholders of said two corporations. One of said original corporations was indebted to the plaintiff, who brought suit against it, attached the property formerly belonging to it, obtained judgment, and became the purchaser at execution sale, and obtained the sheriff's deed therefor. Before the plaintiff recovered said judgment the defendant recovered judgment against the new corporation, and sold the whole of the property held by the new corporation upon execution, and became the purchaser, and obtained a sheriff's deed therefor. Plaintiff sued to recover possession of the property which he had purchased, and the foregoing facts were set up as an equitable defense. The original corporations were the Eureka Lake Company and the Miner's Ditch Company, and the new corporation was named the Eureka Lake Water Company. It was the property conveyed by the first-named corporation that

was in controversy. The court, after saying that the transaction as agreed upon and attempted to be carried out, if effectual in law, would, of necessity, have resulted in an alienation of the entire property and capital of the Eureka Lake Company, and that not a dollar would have remained to satisfy the demands of creditors, said: "The contract was that this stock [in the new corporation] was to be issued, and it was afterwards issued, directly to the stockholders of the Eureka Lake Company. It does not vary the principle that the consideration to be paid was stock instead of money. If the contract had been that on the transfer of the property the Eureka Lake Water Company would pay to the stockholders of the Eureka Lake Company \$100,000 in cash, as the price of the property, the legal proposition involved would have been precisely the same as in this case. In either case the consideration would have been paid, not to the trustees as a fund primarily liable to creditors, but to the stockholders for their own use. * * * If this be not a violation of that provision of the statute which forbids the trustees to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company,' we are unable to conceive a case which would."

Kohl v. Lillienthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520, involved a similar question. There two mining corporations, owning contiguous mining claims, formed a new corporation, to which they severally conveyed their mines, the new corporation paying therefor in stock 100,000 shares to each of the two corporations, one of which was organized under the laws of California. The plaintiffs, who were stockholders in said California corporation, brought suit against it and certain of its officers to compel a distribution of the stock received from the new corporation among its stockholders in proportion to the number of shares held by each. It was held that the stock issued by the new corporation in payment for the mining ground of the former corporation must be considered as part of the capital of such former corporation with which to carry on business, and cannot be distributed among the stockholders thereof until it ceases to exist, either by expiration of its term of existence or by the judgment of a court of competent jurisdiction. In this case *Martin v. Zellerbach*, supra, is cited and approved. See, also, *Railroad Co. v. Bee*, 48 Cal. 398, 405, a case of reincorporation, where it was said: "It was certainly not competent to the members of that corporation to dissipate this fund, and place it beyond the reach of creditors, by merely going through the process of reincorporation, taking on a new corporate name, transferring the assets of the old corporation to the new one without consideration, and issuing the capital stock in the new cor-

poration to the holders of the capital stock in the old corporation. This transaction involved a breach of positive statute law."

It may be said that, at the time the sale by the Eagle Automatic Can Company to the Pacific Sheet-Metal Works was negotiated, there was no indebtedness existing against the former corporation in favor of the plaintiff. But there was a subsisting contract existing between them under which a liability might be created, and was created, by the sale to the Pacific Sheet-Metal Works. Of this contract the stockholders of the Eagle Automatic Can Company are charged with notice, since it was, in effect, their contract, executed by their board of directors; and it is alleged that the Pacific Sheet-Metal Works purchased with notice of it, and therefore with notice that the sale authorizing the use of the machines outside of the city and county of San Francisco created a liability in favor of the plaintiff which the selling corporation, because of the sale, could not discharge, and therefore it took the property charged with that liability. Under these circumstances, we think it clear that the Pacific Sheet-Metal Works is both a proper and a necessary party to the action, and that the stockholders of the Eagle Automatic Can Company who received the stock alleged to have been issued to them in payment for the property sold to the Pacific Sheet-Metal Works are proper parties.

It is also urged that the complaint does not show a case for an accounting. That it is a proper case for an accounting would seem to be clear. These patents and improvements were assigned to the corporation by the plaintiff, but reserving an interest in certain profits which might be realized by the corporation. The relation thus created was fiduciary, and, as to plaintiff's share or part of the profits realized, the corporation was a trustee. But counsel say that the complaint shows that no profit was realized or received by the Eagle Automatic Can Company to be accounted for. The corporation having sold the property, and authorized the delivery of the proceeds of the sale to its stockholders, in violation of the statute, will not be heard to say that nothing was received for which it should account. Nonpayment is sufficiently alleged.

As to the other grounds of demurrer little need be said. There are many faults in the complaint, but they are capable of amendment, and, as to most of them, what has been said will sufficiently indicate what they are. Faults consisting in ambiguities and uncertainties should be viewed, to a certain extent, in the light of the situation of the parties as to their knowledge of the facts; that is, as to facts of which the plaintiff cannot, from their nature, have as full information as the defendant, less certainty is required in the allegations of the complaint, partly because a desirable degree of certainty may be impossible, and partly because, the

facts being known to the defendant, he is not likely to be embarrassed or injured.

The allegation that the Eagle Automatic Can Company received no consideration for the sale has been sufficiently noticed.

In paragraph 9 it is alleged that the Pacific Sheet-Metal Works issued stock to the defendants named "to the value of \$190,000." It is alleged in paragraph 8 that 2,888 shares of its stock were issued to the persons there named, and in paragraph 10 it is alleged that said 2,888 shares were of the value of \$288,800. All of said 2,888 shares were issued to said defendants, and this difference in statement as to the value begets uncertainty. We think the judgment should be reversed, with directions to overrule the several demurrers for want of facts, and to sustain the demurrers for ambiguity and uncertainty in the particulars herein specified, with leave to the plaintiff to amend his amended complaint, if he shall be so advised; and it is so ordered.

132 Cal. 13

PEOPLE v. MOONEY. (Cr. 706.)

(Supreme Court of California. Feb. 26, 1901.)

CRIMINAL LAW—FORMER ACQUITTAL—EFFECT OF VOLUNTARY DISMISSAL AFTER REMAND—ARSON—INSTRUCTIONS—MISCONDUCT OF JUDGE—PHOTOGRAPHS OF HANDWRITING.

1. Defendant was convicted of arson, and appealed, and the cause was reversed and remanded for the insufficiency of the information. On a return of the remittitur the information was dismissed, and a new prosecution instituted. *Held*, that the defendant could not plead a former conviction, based on the theory that, as the appeal was partially from a motion in arrest, on remand the judgment should have been arrested, and that the dismissal was in effect a judgment of acquittal, under Pen. Code, § 1237, providing that an arrest of judgment will operate as an acquittal, since no appeal can be taken from such a motion, and the reversal and remand leave the cause as if no trial had ever been had.

2. A statement by the judge during the progress of a trial for arson bearing on the amount of insurance on the destroyed property, but which is made to the attorneys, and in which he says that he does not wish to be understood as quoting the evidence, is not reversible error, since it is not a statement to the jury.

3. A handwriting expert examined as a witness in a criminal case may testify as to the reasons for his opinion.

4. Photographs of handwriting are admissible in a criminal case in which the identification of handwriting is in issue.

Department 1. Appeal from superior court, Merced county; E. W. Riley, Judge.

K. J. Mooney was convicted of the crime of arson, and he appeals. *Affirmed*.

James F. Peck and Frank H. Farrar, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant has been convicted of the crime of arson, and prosecutes this appeal from the judgment, order denying his motion for a new trial, and order refusing an arrest of judgment. The case has been before the court upon a previous occasion. 127 Cal. 339, 59 Pac. 761. At that time this court declared the information fatally defective, and reversed the judgment and orders appealed from, and remanded the cause for further proceedings. Upon a return of the remittitur to the trial court, the district attorney made a motion, in furtherance of justice, that the court dismiss the information. Thereupon the court dismissed the information and or-

dered the defendant be discharged from custody. Thereafter such proceedings were had that a second information was filed against the defendant, and upon that information he has been tried, convicted, and now prosecutes this appeal.

Upon pleading to the second information, defendant set up a former acquittal, and based his plea upon the proceedings taken at the first trial, including the appeal to this court, and the judgment rendered upon that appeal. Defendant's contention seems to be that his previous appeal to this court being in part an appeal from an order refusing to arrest the judgment, and such order, in conjunction with the judgment and order denying his motion for a new trial, being reversed, upon the going down of the remittitur the judgment should have been arrested, and the subsequent order of discharge made by the trial court was in effect a judgment of acquittal. While it is quite a common practice to appeal from an order refusing to arrest a judgment, and while this court seems to have entertained appeals from such orders in a few cases, yet, upon consulting section 1237 of the Penal Code, we find that no direct appeal is allowed from that character of order. It is in effect an order made before judgment, and should be assailed upon appeal as any other order of that kind is assailed. It follows, therefore, that upon the prior appeal the judgment of this court, in substance, was one reversing the judgment and order denying a motion for a new trial; and, upon that state of facts, when the remittitur was issued the case stood exactly as if no trial had been had. Certainly, upon the going down of the remittitur it would not have been proper for the trial court to have ordered the judgment arrested; for there was at that time no judgment to be rendered, and therefore nothing to be arrested. So far as the motion in arrest of judgment was concerned, it stood exactly the same as a motion for a nonsuit which had been denied. In such a case, the judgment and order denying a new trial being reversed upon appeal, the motion for a nonsuit goes for naught, for there is nothing to be nonsuited. The trial has been set aside, and another must be had de novo. *People v. Schmidt*, 64 Cal. 262, 30 Pac. 815, appears to be directly in point, and the court there said: "The legal effect of the remanding order was to remit the defendant to his original position upon his plea of not guilty to the information on file, just as though a trial had never been had; and, upon the going down of the remittitur to the superior court, that court had jurisdiction to proceed in the case before it in any way authorized by the criminal law." Defendant claims that he has undergone a statutory acquittal, by reason of section 1188 of the Penal Code, but this claim falls to the ground in view of the foregoing authority. Indeed, without invoking that authority, it is apparent that defendant cannot rely upon said section for an acquittal. An acquittal only follows by vir-

tue of that section when the judgment is arrested, and, as already indicated, the judgment in this case never has been arrested. Section 1385 of the Penal Code provides: "The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes." Under the authority vested in the court by this section, it made an order dismissing the information and discharging the defendant. It is unnecessary to decide here whether or not that order be construed as broad enough to amount to a dismissal of the action; for it certainly was an order dismissing the information, and section 1387 declares that an order made under section 1385 does not constitute a bar to another prosecution for the same offense, if that offense be a felony. The offense here involved is a felony, and from the record, taking into consideration all the proceedings of the previous trial, including the appeal taken at that time, we find nothing showing a previous acquittal of this defendant, or establishing a bar to the present prosecution. *People v. Schmidt*, supra.

The contention is made that the court should have given two certain instructions asked by defendant, bearing upon the burning of the building or its contents with the intent to defraud the insurance company. The instructions were not as clear and explicit as they should have been. But, aside from that defect in the wording of them, the court told the jurors that, in order to find the defendant guilty, they must be satisfied from the evidence, beyond a reasonable doubt, that he set fire to the building with the intent to destroy it. This instruction covers the facts set out in the information, and also fully covers the law by which the jury were bound to act in returning their verdict.

The statement made by the judge bearing upon the amount of insurance resting upon the property, as testified to by a certain witness, was a statement made to the attorneys in the course of argument, and not a statement made to the jury. The jurors had no right to consider it. At the same time the judge also stated that he did not wish to be understood as quoting the evidence of any witness in the case. The limitations placed upon the cross-examination of the witness Croop were proper. It was also proper to allow the expert witness Ames to testify as to the reasons upon which he based his opinion given as an expert upon handwriting. *Healy v. Railroad Co.*, 101 Cal. 592, 36 Pac. 125. The admission in evidence of the photographs of handwriting, likewise, was not error. *People v. Crandall*, 125 Cal. 129, 57 Pac. 785. For the foregoing reasons, the judgment and orders are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

132 Cal. 21

BARKER v. HURLEY et ux. (S. F. 2,332.)
(Supreme Court of California. Feb. 26, 1901.)

TRUSTS—EXPRESS TRUSTS—STATUTE OF LIMITATIONS—CHANGE IN FORM OF TRUST PROPERTY—SUFFICIENCY OF EVIDENCE.

1. A denial or repudiation of an implied or resulting trust is not necessary to cause limitations to run in favor of the trustee, but it commences at the time of the creation of the trust.

2. Where there is no express trust created in personal property, and no subsequent declaration of trust, the purchase of real estate with the personality does not create an express resulting trust which will prevent the running of limitations until the trust is repudiated.

3. Civ. Code, § 2221, provides that an express or voluntary trust may be created by any words or acts of the trustor indicating his intention to create a trust, and the subject, purpose, and beneficiary thereof. Section 2222 provides that such a trust is created as to the trustee by acts or words indicating his acceptance of the trust, or his acknowledgment made upon sufficient consideration of its existence, and the subject, purpose, and beneficiary thereof. A few days before his death a decedent executed a will, leaving the larger portion of his property, which was in the form of money, to his sister, but giving a small legacy to his brother and father. A few days thereafter he had the money drawn from the bank, and given to him, and he then gave it to his sister, and told her to keep it all. He then told his brother-in-law to pay certain debts owed by him. The sister afterwards paid the legacy to the brother. Held not sufficient to constitute a trust.

4. Limitations in favor of the sister commenced to run against an action by the public administrator to enforce a trust thereon at the time when she received the money.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; J. M. Mannon, Judge.

Action by J. H. Barker, administrator of the estate of John Carey, deceased, against Richard Hurley and another. From a judgment in favor of the plaintiff, and from an order denying a new trial, the defendants appeal. Reversed.

McNab & Hirsch, for appellants. J. C. Ruddock and Seawell & Pemberton, for respondent.

CHIPMAN, C. Plaintiff brings the action to compel defendants to convey to plaintiff certain real estate, title to which is alleged to be held by them as trustees of the persons interested in the estate of John Carey, deceased. The court gave judgment for plaintiff that defendants pay to plaintiff the sum of \$3,509.25, failing in which that the land described in the complaint be sold, and said amount be paid from the proceeds thereof; and, if there be not sufficient, that plaintiff have judgment for any deficiency. Defendants appeal from the judgment and from an order denying their motion for a new trial.

Plaintiff is the public administrator of Mendocino county, and defendants are husband and wife. John Carey was the brother of defendant Kate Hurley, and on June 6, 1893, was residing with his sister, Mrs. Hurley, on a farm eight miles from Mendocino

City. He died June 8, 1893, leaving a last will, of which the following is a copy: "This is the last will and testament of John Carey, made June 6th, 1893. I give my father, Jas. Carey, of South Ring, Clonacilty, Ireland, the sum of five hundred (\$500.00) dollars; to my brother, Maurice Carey, of Fort Bragg, the sum of three hundred (\$300.00) dollars; and all the remainder of my estate to go to sister, Mrs. Kate Hurley. I request that my body be decently buried in the Catholic Cemetery in Mendocino, and a suitable monument erected over my grave. John Carey. Witness: W. A. McCormack. Clara F. Thurston." Shortly before his death, deceased had on deposit in bank at Mendocino City \$3,509.25. Having been informed by the priest that "he was in danger of death," he sent his brother-in-law, Hurley, on June 6, 1893, with an order on the bank for this money, and Hurley brought it to Carey that day. Neither of the witnesses to the will was called to testify. Hurley testified that on his return with the money he met the doctor on the road, who informed him that he (the doctor) had drawn the will. It was executed before Hurley returned with the money. What took place when Hurley brought the money to Carey was testified to by defendants. No other persons were present. Defendant Hurley testified: "He asked me did I get it. I said, 'Yes.' I asked him if he wanted it counted, and he said, 'Yes.' I counted it out, and placed it back where it was. He said, 'Now, providing I get well, or live, I might want this money back.' I wasn't done putting it in the purse. I said, 'Here, take it now.' He reached out, and took it, and he held it in his hand for probably a minute. He then said: 'Here, Kate; take it. Keep it yourself, and keep it all, and don't give them any of it. Maurice don't deserve it, and father don't need it.' Kate is my wife, John Carey's sister. He handed it to her, and said, 'Keep it all.' He sat up, and reached it to her. He was pretty low at the time. This was on the 6th, and he died on the 8th, two days after. That afternoon I stayed in the room with him. I had further conversations with him in regard to the money. He said, 'If you stay on that train, you're sure to be killed.' I was working on the logging train for the Albion Lumber Company. He said: 'Take my advice. Leave that train. You've money enough now to get along without risking your life on that train.' He said he owed Mrs. Handley some money. Also Dr. Milliken, and Solomon, the Jew, at Navarro. He wanted them paid too." Plaintiff applied for and was granted letters of administration in 1897. Mrs. Hurley testified at the hearing for letters, and her deposition was read in evidence by plaintiff. She testified that after her brother's death she wrote her father that her brother left him \$500 under the will, and that the money was in her possession, and that she would pay him all of

it; that she told her husband to pay her brother Maurice the \$300 left him by the will. She testified: "I kept the rest of it because my brother told me to keep it. He told me to keep it all. * * * I didn't send my father the \$500 because I was sick in bed. If he would have taken it, I would have sent it to him." She testified that she asked for letters because the attorney for the public administrator wanted to make some trouble for her; that he had written her that he would make her pay her father the \$500, and afterwards "stopped that, and wrote about the will." "You [addressing the attorney] wrote me that you were going to sue me for the \$500. I thought there was no need of it. My father gave me the money. Then you wrote me to probate the will. Then I probated the will. When anybody asked me to show the will, I did it." Maurice Carey testified that he was at Hurley's the day after his brother died; that Hurley told him that his brother had left him \$300 by will, and his father \$500. A few days after the funeral Hurley showed him the will, and paid him \$300, and took his receipt, in which he relinquished all claims to the estate of deceased. It was alleged in the complaint that defendants, on November 18, 1893, purchased certain land with the money which they had received from Carey, and "took up their residence upon said land as their homestead, and have ever since had exclusive possession thereof and have resided thereon"; "and that by the said purchase and occupation the said defendants became trustees of a resulting trust in favor of the successors in interest of the said John Carey * * * and others interested in said property, and now hold said property as trustees," etc. It is admitted by defendants that they purchased the land, but they allege that it was for their own benefit, with money part of which was the money received from said Carey and part other money. The foregoing is substantially all the testimony in the case.

The court, among other things, found: That at his death Carey was the owner of the money referred to, to wit, \$3,509.25; that prior to his death he gave Hurley an order for said money, "to be drawn and held for the use of John Carey and his successors in interest, and that the said defendant Richard Hurley, by said order, drew the said money, and has ever since retained and appropriated the same to his own and the use of his wife, defendant Kate Hurley; that part of said money was mingled with defendants' money, and was used to purchase said land, but the exact amount of said \$3,509.25 so used is not shown by the evidence, and said intermingling was the result of the wrongful acts and fault of defendants; that there was no gift causa mortis, or gift at all, but that "said sum of money was placed in the custody of defendants, to be restored to the said John Carey, if he

lived, and disposed of in accordance with the terms of his will if he died." The court found as conclusions of law that defendants "became trustees of a resulting trust in favor of the successors in interest of the said John Carey," and so hold the said property, and judgment was entered as above stated. The fact that Carey made a will was well known to the beneficiaries and other persons. There was no evidence and no finding that it had been fraudulently concealed, or concealed at all. There were but three beneficiaries of the will; one of them Maurice Carey, who was fully paid. There is no allegation and no evidence that the testator's father complains that he has not been paid or desires to be paid, and the only other legatee is defendant Kate Hurley. There is no allegation and no evidence that there are any creditors of the estate, and the only person claiming to have any interest in the action is the public administrator. Defendants contend that the action is barred by the statute of limitations, which was duly pleaded, and we think this contention must prevail. They also claim that the findings are not supported by the evidence either as to the trust or the gift. The rule is well settled that the statute of limitations runs in favor of a defendant chargeable as a trustee of an implied or constructive trust, and that it is not necessary, in order to set the statute in motion, that he should have denied or repudiated the trust. The statute begins to run when the wrong complained of is done, and under our Code the limitation is four years. *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88. The doctrine laid down in this case has been frequently approved. *Nougues v. Newlands*, 118 Cal. 106, 50 Pac. 386; *Broder v. Conklin*, 121 Cal. 288, 53 Pac. 599.

Respondent does not seriously dispute the rule as to implied or resulting trusts generally, but he contends that, as the court found that there was no gift *causa mortis*, or gift at all, it follows that there must have been a voluntary or express trust; that section 2215, Civ. Code classifies trusts as (1) voluntary, which are express trusts, and (2) involuntary, which are implied or constructive trusts; that a trust resulting from circumstances may be either voluntary or involuntary,—or, in other words, may be express, implied, or constructive; and that the circumstances here show a voluntary trust. The direct testimony of Hurley and his wife is uncontradicted that Carey made a gift of all his money to Mrs. Hurley, his sister; and there is nothing in the subsequent conduct of defendants necessarily inconsistent with their testimony. But, waiving the question of gift, so far as the direct testimony goes there is none whatever that when Mr. Carey handed the money to his sister he directed it to be disposed of under the will, as the court found was the fact. The will had been executed some hours before

Hurley returned from Mendocino city with the money, and the testimony was that when Mr. Carey gave the money to his sister he expressly stated that she was to have all of it, and neither her brother nor her father was to have any of it. It was after this money was handed to her, although contemporaneously with that act, that he directed Mr. Hurley, not Mrs. Hurley, to pay certain debts which are not referred to in the will; but he gave no direction whatever as to executing the will. The evidence tending to show that the money handed to Mrs. Hurley (which defendants insist was given to her) was to be disposed of under the will was circumstantial, and consisted of the facts that defendants knew there was a will; that Hurley paid Maurice Carey \$300 (the sum mentioned in the will), and took his receipt; that Mrs. Hurley wrote her father that he had been willed \$500, and she had the money, and would send it to him. We fail to discover sufficient in these circumstances to establish a voluntary or express trust or that there was any understanding of the parties that defendants were to execute the will. An express trust, or what our Civil Code denominates a "voluntary trust," subject to the provisions of section 852, relating to trusts in real property, is created, "as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty (1) an intention on the part of the trustor to create a trust; and (2) the subject, purpose, and beneficiary of the trust" (section 2221); "and as to the trustee, by any acts or words of his indicating with reasonable certainty (1) his acceptance of the trust, or his acknowledgment, made upon sufficient consideration of its existence; and (2) the subject, purpose, and beneficiary of the trust" (section 2222). That the trust in the present instance related in its inception to personal property does not change the rule as to its creation. The nature of the evidence to establish the trust may be different where it relates to personal property than in the case of real property, but the strictness of the rule is not relaxed in the one case more than the other, so far as relates to the creation of the trust. In both the purposes of the trust, the subject-matter, and the beneficiaries must be clearly indicated. The trust, if a trust at all, commenced with the appropriation of the money, and the trust character was not changed by the subsequent mutations of the property. As to the degree of certainty required in the creation of trusts, see *Wittfield v. Forster*, 124 Cal. 418, 57 Pac. 219, and *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 1115.

It is not quite clear from the findings upon what theory the court found a resulting trust, but we presume it was because the money which was used to purchase the land was in part the money originally belonging to John Carey, and from which the court con-

cluded that a trust resulted under section 853, Civ. Code. See, however, *Woodside v. Hewel*, 109 Cal. 481, 42 Pac. 152. But there never was any recognition by defendants that a trust existed as to the land; on the contrary, they treated it as their own. The trust with which they were charged, if at all, arose when they appropriated the money. This money could, of course, be followed, if impressed with a trust, wherever and howsoever invested. The trust could not be evaded by converting the money into land; but a subsequent change from money to land, or to any other form of property, after Carey's death, would not change the character of the trust with which defendants were originally charged. If, by any view of the evidence, a trust may be said to have arisen at all, it was not an express trust.

We search the evidence in vain to determine who were named by the parties as beneficiaries of the trust. We find nowhere any agreement, except as it may be implied, and there is not sufficient evidence to enable the court to define, even by implication, the terms, purposes, and beneficiaries of the trust. There are no words or acts of John Carey showing the extent and character of the trust intended by him to be created, and the evidence is wanting that defendants accepted a trust indicated with any sort of certainty by John Carey. The court found that the terms of the will were the terms of the trust, but there is no evidence that John Carey ever so declared, or that defendants accepted any such trust. That Mrs. Hurley, after the death of her brother, decided to pay her brother, Maurice, the \$300 left him by the will, and expressed a willingness to pay her father the legacy left him, is consistent with her claim to all the money. Many reasons might be suggested why she thought best to respect these legacies, and yet maintain that she was not obliged to pay them; and Hurley testified that when he paid Maurice by Mrs. Hurley's direction he told Maurice that she was not obliged to pay the money. We do not find in the case evidence of a trust voluntarily assumed, which, by the understanding of the parties, was to be a continuing one, as was true in *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108, and *O'Dell v. Moss* (Cal.) 62 Pac. 555, where it was held that the statute did not commence to run until the trust had been repudiated. If defendants held the money upon any confidence or trust, it was such as by operation of law was forced upon their consciences, and was not created by agreement. The complaint was filed November 27, 1897, more than four years after defendants received the money; more than four years after they purchased the land, recorded the deed, and entered into possession, and occupied the land as their homestead under claim of ownership; and more than four years had elapsed after occupying the land before any demand was made upon defendants. Assuming that some sort

of a trust arose, it was not such as to take it out of the operation of the statute of limitations, and the action was barred.

It becomes unnecessary to determine whether the public administrator could maintain the action, and the numerous other questions presented by the record and urged by appellants. The judgment and order should be reversed, with directions to the lower court to dismiss the action.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, with directions to the lower court to dismiss the action.

'32 Cal. 18

SCHROEDER v. IMPERIAL INS. CO., Limited. (S. F. 1,616.)

(Supreme Court of California. Feb. 26, 1901.)
INSURANCE—PROVISIONS OF POLICY—INSTRUCTION—FORECLOSURE OF MORTGAGE—KNOWLEDGE OF INSURED.

Where a fire policy provided that, unless otherwise indorsed thereon, it should become void, if, with the knowledge of the insured, foreclosure proceedings should be commenced against the property covered by the policy, the policy became void on the service of process in foreclosure, and failure to secure the insurer's consent to the increased risk, notwithstanding insured had no knowledge of the proceedings commenced until such service of process.

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by Philip G. Schroeder against the Imperial Insurance Company, Limited. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Chickering, Thomas & Gregory, for appellant. Van Ness & Redman, for respondent.

HARRISON, J. Action upon a policy of fire insurance. The plaintiff's right of recovery depends upon the construction to be given to the following clause in the policy: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void, * * * if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy, by virtue of any mortgage or trust deed." The policy was issued November 6, 1893, for the term of three years. At that time the dwelling house, which was a portion of the insured property, together with the land upon which it stood, was subject to the lien of a mortgage, and on April 30, 1895, the mortgagee commenced an action for its foreclosure, and made the insured one of the defendants therein. The insured and the other defendants were duly served with process in the action, and on May 18, 1895, a judgment was rendered therein for the amount of the mortgage debt, and directing a sale of the property in satisfac-

tion thereof. Under this judgment the property was sold June 15, 1895, to the plaintiff in the action. The dwelling house was destroyed by fire November 15, 1895. The insured gave no notice of the foreclosure proceedings to the defendant, nor did the defendant have any knowledge thereof until after the property was destroyed. The superior court held that the above clause did not have the effect to avoid the policy, unless the insured had knowledge of the foreclosure proceedings before or at the time of their commencement, and that, as it does not appear herein that she had any knowledge thereof until the service upon her of the process in the action, the policy remained unaffected by the proceedings. Judgment was therefore rendered in favor of the plaintiff, and the defendant has appealed.

A contract of insurance is to be interpreted by the same rules as are other contracts, and is to be so interpreted as to give effect to the mutual intention of the parties; and this intention is to be deduced, if possible, from the language of the contract. Civ. Code, §§ 1635, 1636; Wells, Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397; Yoch v. Insurance Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857. The above clause in the policy is included in that portion which enumerates many grounds for avoiding it, and it is manifest that the parties intended by these several clauses to agree that the defendant should not be liable upon the policy in case the risk that it assumed should be thereafter increased, unless its consent to such increased risk should be indorsed upon the policy. The provision above quoted is directed to the fact of knowledge on the part of the insured of the commencement of foreclosure proceedings, and not to the time at which he may obtain such knowledge, and the reasonable construction to be given to the clause is that whenever he shall have knowledge of the proceedings, and shall fail to obtain the consent of the insurer thereto, the policy shall be avoided. That the risk assumed at the date of the policy would be increased by foreclosure proceedings against the insured property was a fact well recognized in matters of insurance, and it has been held that a proviso in the policy that it shall be avoided by the commencement of foreclosure proceedings has that effect, even though the insured is ignorant thereof. Titus v. Insurance Co., 81 N. Y. 410; Meadows v. Insurance Co., 62 Iowa, 387, 17 N. W. 600. It was doubtless for the purpose of overcoming the harshness of this rule that the standard form of policy limits this effect to those proceedings of which the insured has knowledge. This limitation is for the benefit of the insured, and that he may have an opportunity to obtain the consent of the insurer to the increased risk, and pay an additional premium therefor, if it shall be demanded. The object of the clause is to provide against an increase of the risk, but such increased risk would

not be varied by the knowledge or ignorance of the insured, and it may be assumed that the parties deemed it just that the insured should have an opportunity to procure the consent of the insurer thereto, and therefore provided that the policy should not be forfeited if the proceedings were had without his knowledge.

It would be a solecism to speak of the insured having "knowledge" of proceedings yet to take place. He might be informed of the purpose of the mortgagee to commence proceedings, and he might have a belief that they would be commenced, but this information or belief could not be termed his "knowledge" of their commencement. It is equally unreasonable to assume that the parties intended by this clause to limit the provision avoiding the policy to proceedings of which the insured has knowledge at the identical moment of their commencement. These views find support in *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31; *Woodside Brewing Co. v. Pacific Fire Ins. Co.*, 11 App. Div. 68, 42 N. Y. Supp. 620; *Gibson Electric Co. v. Liverpool, L. & G. Ins. Co.*, 10 App. Div. 225, 41 N. Y. Supp. 675, affirmed in 159 N. Y. 418, 54 N. E. 23; *Norris v. Insurance Co.*, 55 S. C. 450, 33 S. E. 566; *Insurance Co. v. Brown*, 77 Md. 79, 25 Atl. 992.

A contrary construction was given by the supreme court of Idaho in *Bellevue Roller Co. v. London & L. Fire Ins. Co.*, 39 Pac. 196, but the reasoning of the court thereon does not commend itself to our judgment. It urges in support of its conclusion that it would not be a reasonable construction of the clause to so construe it as to require a party to give notice of a fact of which he has no information or knowledge, but, as the clause makes no provision requiring any notice to be given to the insurer, the reason thus given is inapplicable. The policy merely provides that it shall be avoided, if the consent of the insurer is not obtained. The case in Idaho was cited in one of the district courts of appeals in Texas (*Insurance Co. v. Freeman*, 33 S. W. 1091), but the decision therein does not appear to have rested upon this authority. In another district court of the same state the clause seems to have received a different construction. *Insurance Co. v. Clayton* (Tex. Civ. App.) 43 S. W. 910. The judgment is reversed, and the court is directed to render judgment in favor of the defendant upon the facts stipulated by the parties.

We concur: GAROUTTE, J.; VAN DYKE, J.

6 Cal. Unrep. 641

WHITE v. COSTIGAN. (S. F. 1,663.)

(Supreme Court of California. Feb. 23, 1901.)

APPEAL—MORTGAGES—REDEMPTION—JUNIOR MORTGAGEE—UNAUTHORIZED REDEMPTION—REDEMPTEE AS ASSIGNEE—EQUITY.

1. Though a receiver's sale of land had been held to be unauthorized on appeal in another

suit, the facts affecting the validity of the sale not appearing from the record in the case at bar, and it having been expressly found in the trial court that the sale was properly made, it would be assumed, for the purposes of the case, that the sale was valid.

2. Where, on foreclosure of a mortgage, a deficiency judgment was entered in favor of a junior mortgagee, but prior to his judgment a portion of the mortgaged lands not included in his mortgage had been conveyed by receiver's deed, he was not entitled to redeem such lands, under Code Civ. Proc. § 701, giving a right of redemption to creditors having a lien.

3. Where a purchaser at mortgage sale made a quitclaim deed of the land to the owner, such deed operated as a redemption, and perfected the owner's title.

4. By Code Civ. Proc. § 703, a redemption from a mortgagee is followed by a sheriff's deed, and section 705 requires a redemptioner to serve, with his notice of redemption to the sheriff, a copy of any assignment necessary to establish his claim. *Held*, that where, after mortgage foreclosure, the purchaser on mortgage sale gave a deed of the premises to the owner, and prior thereto, and with the knowledge of the owner, one who was unauthorized to redeem attempted to do so, and paid the redemption money to the sheriff, under section 703 the redemption was virtually an assignment of the purchaser's interest, though the sheriff was not authorized to make the deed under section 705, and hence should be regarded as the assignee of the purchaser, and the owner entitled to have her title quieted only on condition of paying the redemption money to the redemptioner.

5. Where the purchaser at mortgage sale gave a deed of the premises to the owner, and prior thereto one not entitled to redeem had paid the redemption money to the sheriff, the redemptioner's right to be regarded as the assignee of the purchaser's interest, being purely one in equity, did not extend to the forfeiture of the owner's title for nonredemption, she not being affected by the transaction between the purchaser and the redemptioner, and the deed from the purchaser being, in effect, a redemption.

6. Where one who was not authorized to redeem from a mortgage sale paid the redemption money to the sheriff, such redemptioner had a right to have his equitable title perfected by a conveyance from the owner, to whom the purchaser thereafter conveyed the land.

7. Where one who was not authorized to redeem from a mortgage sale paid the redemption money to the sheriff, his right to be repaid his money, or to have a conveyance from the owner of the lands, being an equitable one merely, he should be allowed legal interest only on the amount paid by him from the date of payment.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; J. M. Mannon, Judge.

Action by Frankie White against James M. Costigan. From a decree in favor of defendant, plaintiff appeals. Reversed.

Wm. T. Baggett, J. Q. White, Geo. E. Whitaker, and Walter H. Linforth, for appellant. Seawell & Pemberton, for respondent.

SMITH, C. The suit was brought to quiet title to the lands described in the complaint. Judgment was rendered for the defendant. The appeal is from the judgment, and on the judgment roll. Both parties deraign title from one George E. White, plaintiff's divorced husband. White had mortgaged the

lands in controversy and other lands to one Fairbanks, and afterwards some of the same lands, but not the lands in controversy, to the defendant Costigan. Suit was commenced by Fairbanks, January 15, 1895, for foreclosure of his mortgages, to which Costigan was made defendant as junior mortgagee. Pending this suit the mortgages of Fairbanks were assigned to the plaintiff herein, and by her to one Linforth, who was substituted as plaintiff. Judgment for foreclosure was entered,—date not given,—and on March 6, 1897, the lands included in the Fairbanks mortgage were sold by the sheriff, and on the return of the sale, March 25, 1897, a deficiency judgment for \$3,937 was docketed in favor of Costigan. At the sale Linforth became the purchaser of the lands in controversy for the sum of \$500. Costigan redeemed from the sale, within the time allowed by law for redemption, paying the redemption money to the sheriff, and receiving his certificate, and afterwards his deed for the lands sold. The redemption money was paid to, and accepted by, Linforth. The redemption was regular in all respects except as to Costigan's right to redeem. On the day after the redemption, September 8, 1897, Linforth made a quitclaim deed of the land to the plaintiff, who paid no consideration, and took the deed with notice of the redemption and of the acceptance of the money by Linforth. The plaintiff deraigns title under the deed last referred to, and also under a receiver's deed—date not given, but recorded November 21, 1896—made in pursuance of a sale under an order of the superior court of San Francisco of date April 12, 1895, and an order of confirmation of date May 5, 1896, in a divorce suit therein pending between herself and her husband. The validity of this sale was involved in the case of *White v. White* (decided by the court in bank, Dec. 6, 1900) 62 Pac. 1062; and it was there held, on the facts appearing in that case, that the court was without jurisdiction to order the sale, and the sale and deed made in pursuance thereof consequently void. But in this case the facts affecting the validity of the order of sale do not appear, and it is expressly found that the order of sale, and the order confirming the sale, were "duly made and entered" by the court, and that thereafter a deed was executed to the plaintiff by the receiver "conveying to (her) all the right, title, and interest of the said George E. White in and to the lands * * * sold, * * * including the premises described in the complaint." Hence there is nothing in the record here to show want of jurisdiction in the court; and the maxim, "De non apparentibus, et non existentibus, eadem est ratio," must be applied. It must therefore be assumed, in this case, that the sale was valid.

The relations of the parties to the land in controversy appear, then, to be as follows: Mrs. White, after the foreclosure sale, was the legal owner of the land, and entitled to

redeem. By the quitclaim deed from Linforth, she acquired whatever interest he had at the date of the deed, which, unless he had previously parted with his interest as purchaser, perfected her title. But in the meanwhile Costigan had redeemed from Linforth, and, if he thereby acquired any rights, these could not be affected by the deed to Mrs. White. The questions involved relate, therefore, to the validity and effect of this redemption. In considering them, the legal and the equitable aspects of the case must be carefully distinguished. The former will be first considered.

1. The redemption was made by Costigan under his deficiency judgment of March 26, 1897. But before that time the title to the land in controversy had passed by the receiver's deed to Mrs. White. His judgment, therefore, was not a lien upon the land, and did not entitle him to redeem. Code Civ. Proc. § 701. The sheriff's deed was therefore wholly void. "To be entitled to redeem, [the party] must be a creditor having a lien." *Haskell v. Manlove*, 14 Cal. 57. The power of the sheriff to transfer the title of the judgment debtor or his successor, in invitum, "is altogether statutory, and his acts are nugatory, unless the provisions of the statute are pursued." *Wilcoxson v. Miller*, 49 Cal. 194. The case, therefore, in its legal aspect, was not affected by the attempted redemption. The legal title was already vested in Mrs. White, but was subject to forfeiture for failure to redeem within the period prescribed by the statute. The deed removed this liability, and in effect operated as a redemption from the sale. Thenceforth her title, i. e. her legal title, ceased to be subject to forfeiture, and thus became perfect.

2. It remains to be considered whether, by his attempted redemption, Costigan acquired any equitable rights, and, if so, what these may be. With regard to this question, Mrs. White appears in a double capacity, or rather in two capacities, namely, as the successor of the judgment debtor, and as the successor of the purchaser, Linforth. In the former capacity she was the owner of the land, subject to forfeiture for nonredemption, and, as she was not a party to the transaction between Linforth and Costigan, her title was not affected thereby. But as grantee in the deed from Linforth she took subject to any equities existing against him in favor of Costigan. The question between her and Costigan is therefore the same, with regard to such equities, as would have been the question between him and Linforth if the deed had not been made. Stated generally, the question involved is as to the effect of a redemption from an execution sale by an unqualified redemptioner accepted or acquiesced in by the purchaser. On this point it seems to be settled that the purchaser is estopped to dispute the validity of the redemption. 3 *Freem. Ex'ns*, § 317, p. 1870, and cases cited. But whether such estoppel

will operate to transfer the interest of the purchaser to the redemptioner must depend upon the statutory provisions of the particular state. Thus, in Illinois,—where the effect of redemption is simply to extinguish the purchaser's interest, and thus to subject the property to the redemptioner's lien,—it has been held that a redemption by an unqualified redemptioner cannot be treated as an assignment, though it is suggested that even there the redemptioner, in a proper proceeding in equity, might be subrogated to the rights of the purchaser. *Meyer v. Mintonye*, 106 Ill. 414; *Freem. Ex'ns*, § 321, pp. 1885, 1886. But in this state, by the provisions of our statute, the redemption is followed by a deed (Code Civ. Proc. § 703), and hence "the redemption is virtually a transfer of the certificate of sale." *Bagley v. Ward*, 37 Cal. 129, 130; *Eldridge v. Wright*, 55 Cal. 536.

In *Bagley v. Ward* the redemptioner was qualified to redeem, but it was objected that the papers required by the statute were not produced to the sheriff, which ordinarily would render the redemption void. Code Civ. Proc. § 705; *Haskell v. Manlove*, 14 Cal. 54; *Wilcoxson v. Miller*, 49 Cal. 193. It was held that, "as between the immediate parties to the redemption, the production of the papers mentioned in the statute (might) be waived," and that the sheriff's deed passed a good title. In the case at bar the redemptioner was not entitled to redeem, and hence the sheriff was not authorized to make the deed; but the principle that a redemption, under our laws, is virtually an assignment, applies. And, indeed, this is evident from the nature of the transaction; for, as the end and effect of the redemption is to transfer the title, this interest must necessarily enter into the minds of the parties, and the transaction thus contains in itself all the elements of a valid assignment except the formal writing. Civ. Code, §§ 1066, 1636, 1646, 1647. In this case, for lack of the written assignment, the sheriff had no authority to convey (Code Civ. Proc. § 705); but nevertheless the intent is apparent, and the transaction, interpreted in the light of the circumstances, and of the law and usage of the state, must be regarded in equity as an assignment of the purchaser's interest. Accordingly, in *Abadie v. Lobero*, 36 Cal. 396, 397, which was a case of redemption by an unqualified redemptioner, it was assumed (though not expressly held) that, "since (the purchaser) was satisfied and treated the redemption as valid, it was good, or, if not good as a redemption as between the parties, amounted to an assignment of the certificate of sale," and this opinion is referred to with apparent approval in *Eldridge v. Wright*, 55 Cal. 536, 537, and in the concurring opinion in effect affirmed. The defendant must therefore be regarded as occupying the position of equitable assignee of Linforth's interest, and is entitled to have

his equitable right perfected. But his right, which is purely of equity cognizance, does not extend to the forfeiture of the plaintiff's title for nonredemption; for, as to her original title, she was not affected by the transaction between Linforth and the defendant, and from the legal point of view the deed from Linforth was, in effect, a redemption. Nor, were it otherwise, could equity assist him in enforcing a forfeiture. The plaintiff is therefore entitled to have her title quieted, but only on the condition of paying to the defendant the amount paid by him for redemption. The defendant has a right to have his equitable title perfected by a conveyance from the plaintiff, if she do not redeem; and, as his right is merely equitable, he should be allowed and the plaintiff required to pay legal interest only on the amount paid by him (\$560) from the date of payment. The time for redemption should be limited to a reasonable time, not exceeding six months from the entry of the judgment herein ordered. I advise that the judgment be reversed, and the cause remanded, with directions to the court below to render judgment on the findings in accordance with this opinion.

We concur: HAYNES, C.; GRAY, C

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to render judgment on the findings in accordance with this opinion.

131 Cal. 675

HAUGHAWOUT v. HUBBARD et al. (L. A. 799.)

(Supreme Court of California. Feb. 25, 1901.)

MUNICIPAL CORPORATIONS—SEWER IMPROVEMENTS—CONTROL BY COUNCIL—DELEGATION OF POWERS—INVALID ASSESSMENTS.

Finlayson, St. Laws, § 3, requires the city council, before contracting for sewer improvements, to pass and publish a resolution of intention "describing the work" proposed, and provides that the city engineer shall make plans and specifications and estimates of the cost thereof, which, by section 5, become part of the contract, to be awarded when approved by the council. Section 6 provides that the work must be done under the direction and to the satisfaction of the superintendent of streets. The ordinance of intention for the work required it to be done in accordance with plans and specifications on file in the city clerk's office, one of which provided that, "when the ground does not afford a sufficiently solid foundation, the contractor shall excavate the trench to such increased depth as the street superintendent may decide to be necessary, and shall then bring it up to the required level and form with such material and in such manner as the street superintendent may direct." Held, that an assessment levied for work done under a contract based on such plans and specifications was not invalid on the ground that such specifications delegated to the street superintendent powers of the council.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Suit by W. J. Haughawout against Laura A. Hubbard and others to foreclose an assessment lien on a certain lot for sewer work. From a judgment in favor of the defendants, plaintiff appeals. Reversed.

H. J. Stevens and A. B. McCutchen, for appellant. Mulford & Pollard, for respondents.

PER CURIAM. The ordinance for the work requires it to be done "in accordance with the plans and specifications on file in the clerk's office of the city of Los Angeles, said specifications being designated 'C' and 'D.'" The ordinance of intention contains a similar provision. It is claimed by the respondent, in effect, that these specifications delegate to the street superintendent powers vested by the law in the council, and which it had no right to delegate. The specification principally discussed in the briefs, and on the supposed insufficiency of which the decision of the lower court was rested, is as follows: "When the ground does not afford a sufficiently solid foundation, the contractor shall excavate the trench to such increased depth as the street superintendent may decide to be necessary, and shall then bring it up to the required level and form with such material and in such manner as the street superintendent may direct." The point of the objection is that the power is thus delegated to the street superintendent to determine whether the ground does or does not "afford a sufficiently solid foundation," and, in the latter case, the power to determine the depth of the excavation, and the materials to be used in bringing the bottom of the ditch "to the required level and form." The former objection was overruled by the court below. The latter was sustained on the supposed authority of Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, and cases following it. The other objections are similar, but are of a more trivial character, and were regarded by the lower court as without merit. It is assumed in these objections that, under the provisions of the law relating to the subject, it is the function of the council, in ordering any improvement, to determine in advance all the details of the construction; or, in other words, not only to make the specifications, but to make them so complete as to leave nothing to the discretion or judgment of the street superintendent. But to this view of the law there are several decisive objections: First, the function of making the specifications is not imposed by the law on the council, but on the city engineer. The function of the council with reference to them is merely to order them to be made, and to see to it that they are accompanied by an estimate of the cost of the improvement, and are otherwise satisfactory. Next, the law does not impose, either on the council or the engineer, the impossible task of making the specifications so complete

And, finally, it is the obvious intent of the law to devolve upon the street superintendent a certain discretion with reference to the details of the work. A brief review of the act relating to street improvements, and of the several powers and functions imposed by it on the council and other municipal officers, will establish these propositions.

1. By section 2 of the street-work act the power is conferred on the city council "to order" any of the improvements therein specified. Finlayson, St. Laws Cal. pp. 5, 9, § 3. This involves the function of determining the nature or general character of the improvement to be made; and this is also implied in the provision that "a resolution of intention" shall be made and published "describing the work," by which is meant not the work or labor to be done, but the improvement or work to be constructed. This function obviously can be performed only by the council; and if it be delegated, either in whole or in part, to the street superintendent, the assessment for the improvement will be void. *Bolton v. Gilleran*, supra, and cases cited. But the performance of this function does not involve the necessity of determining or describing the details of construction,—a task for which the council is altogether unfitted. This task is devolved by the law on the city engineer, whose duty it is (in the case of sewer work) to make "plans and specifications, and careful estimates of the costs and expenses thereof" (Finlayson, St. Laws, p. 9, § 3), which, when approved, become part of the contract to be awarded (Id. p. 42, § 5). The function of the council with regard to these is simply that of supervision. Ultimately it is its function to determine the cost of the work, and the amount of the tax to be assessed for it (*Bolton v. Gilleran*, 105 Cal. 248, 38 Pac. 881); and this implies that the specifications must be accompanied by an estimate of the cost definitely determining the amount. But, if the specifications comply with this essential condition, and are otherwise satisfactory to the council, its functions are fulfilled; nor—this condition being fulfilled—is its jurisdiction to order the work in any way affected by any defects in the work of the engineer in preparing the specifications. The provisions of the act in this regard are explicit. On the publication of a sufficient resolution of intention "describing the work," and the lapse of the 25 days,—the intervening conditions having occurred,—the council is "deemed to have acquired jurisdiction to order * * * the work"; and all that is required of it in addition is that it shall require the specifications to be made, and the cost of the work to be thus determined. It is clear, therefore, that the defects, if any, in the specifications, are not to be regarded as defaults of the council in performing its functions; and that the power devolving on the street superintendent by reason of such defects cannot be regarded as a delegation of the powers of the council.

2. Hence the objections made must be re-

garded as resting simply upon the supposed defects in the specifications, and upon the proposition, assumed to be law, that these may affect the validity of the assessment. But there is nothing in the act to lead us to suppose that this was intended, and, from the nature of the case, a contrary intention must be inferred. The purpose of specifications is, indeed, to determine and prescribe the details of construction; but this can be effected only approximately. To some extent such details must depend on unanticipated contingencies, and can be determined only by the exigencies of the actual construction. The specifications must, therefore, always fall, more or less, in certainty or completeness of detail; and hence the most accurate and detailed specifications must leave unprovided for many questions arising in the course of the work as to kind and amount of work or materials and other details of construction. The question as to the sufficiency or insufficiency of specifications is, therefore, one merely of degree; that is, not whether they are certain or uncertain, but whether they are more uncertain than is desirable. To this question no general answer can be given; and hence, in the absence of specific provisions of the law, it must be regarded as immaterial to the validity of the assessment.

3. It follows, from the essential nature of all specifications, that many questions as to details must be left to the discretion of the officer superintending the construction,—in this case the street superintendent; and that this must be the case with reference to all details that are in fact not determined by the specifications. This fact is too obvious to have been overlooked by the legislature. Accordingly, it is expressly provided by the act that the work "must in all cases be done under the direction and to the satisfaction of the superintendent of streets, and the materials used shall comply with the specifications and be to the satisfaction of said superintendent; * * * and all contracts made therefor must contain a provision to that effect." Finlayson, St. Laws, p. 61, § 6. There is thus conferred upon the street superintendent not merely the power to see the specifications carried out, but a power or discretion beyond the specifications. This power is, of course, limited by the contract, and by the specifications as part thereof, but extends to all questions of detail not explicitly determined by the specifications, or the contract; and with reference to such questions his own judgment is by the express terms of the law and of the contract itself made the criterion. General rules may be prescribed by the council directing the exercise of this discretion, but this rather affirms than denies its existence. The cases cited by the court are not inconsistent with this view of the law: In the case of *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, the assessment was, indeed, held to be void on account

of defect in the specifications; but the defect was that they did not contain a definite estimate of the cost of the work, but alternative estimates only, of which the one might exceed the other by about 50 per cent. The result was that there was a failure to perform either of the two essential functions imposed by the law on the council, namely, that of determining and describing the nature or general character of the work, and that of determining the amount of the burden to be imposed therefor by assessment on the property of the parties to be charged with the cost. The cases of *Stansbury v. White*, 121 Cal. 433, 53 Pac. 940, and *Chase v. City Treasurer*, 122 Cal. 540, 55 Pac. 414, were decided solely on the authority of *Bolton v. Gilleran*, and must be regarded as mere applications of the principle of that decision. *Fisher v. Prince*, 3 Burrows, 1364; *Osborne v. Rowlett*, 13 Ch. Div. 785. In the former case the decision in *Warren v. Chandos*, 115 Cal. 382, 47 Pac. 132, is cited to the proposition that "a contract which gave to the superintendent of streets the power to increase or diminish the cost of the improvement after the contract had been entered into by requiring a greater or less amount of material for its completion as he should determine, * * * [would render] the assessment invalid." Whether the contract in the case under consideration was of that character or otherwise does not appear from the report, but it seems that authority was given to alter the specifications, which is not the case here. In *Chase v. City Treasurer*, 122 Cal. 540, 55 Pac. 414, the case was decided mainly on the grounds of insufficient publication of the resolution of intention. The specifications are referred to briefly, but are not set out, or their effect stated. It results from what has been said that on the facts found the judgment should have been for the plaintiff. The judgment is, therefore, reversed, and the cause remanded, with directions to the lower court to enter judgment on the findings for the plaintiff.

131 Cal. 667

In re FREUD'S ESTATE. (S. F. 2,246.)
(Supreme Court of California. Feb. 25, 1901.)

EXECUTORS AND ADMINISTRATORS—SALE OF REALTY—SATISFACTION OF MORTGAGE—STATUTES—JUDGMENT CREDITOR—NO STANDING IN COURT.

1. Code Civ. Proc. § 1577, provides that, if it shall be for the advantage of the estate, the superior court may authorize the administrator to mortgage the same; and section 1578 requires the petition asking for such power to state the debts, lien, or mortgage to be paid with the money thereby received. Section 1536 authorizes a sale of the realty for the payment of the debts, or when for the best interests of the estate; and section 1537 prescribes that the petition must contain a statement of the debts and charges of administration already accrued, and an estimate of what may accrue during the administration. *Held*, that it was not error for the court to decree a sale of the realty for the payment of liens thereon and the expenses of administration still to accrue.

2. Under Code Civ. Proc. §§ 1577, 1578, providing that the realty of an estate may be sold or mortgaged for the purpose of paying or renewing liens or mortgages already thereon, an administratrix may mortgage the realty for the purpose of paying existing liens thereon, and may use the money acquired by sale or mortgage to redeem the property of the estate from one who has obtained it at foreclosure sale.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by Tiny Freud, as administratrix with the will annexed, in the matter of the estate of Morris Freud, deceased, for the sale of the realty to pay incumbrances thereon and the expense of administration still to accrue. From an order granting the sale, an order settling the annual account of the administratrix, and an order for mortgaging the realty, the Warners Bros. Company, as mortgagees of part of the realty, appeal. Affirmed.

Hart H. North and Henry E. Monroe (W. B. Treadwell, of counsel), for appellant. W. S. Goodfellow and Wm. B. Bosley, for respondent.

PER CURIAM. Appeals from an order of sale of real estate, an order settling annual account of administratrix, and an order for mortgage of real property. The several appeals will be considered in the order stated.

The deceased died seised of two lots of land, described in the petition, which he devised to his widow, Tiny Freud (now administratrix), "to hold the same during her lifetime in trust for [testator's] five children" named in the will, and "upon the death of [the] wife * * * to be divided among [his] said children share and share alike." The will was admitted to probate and letters testamentary issued to Jacob Freud, the executor therein named, March 19, 1883. An order for a family allowance to the widow of \$250 a month was made December 29, 1883. The executor's final account, showing a balance of \$2,078.62 in his favor, was settled May 25, 1888; and thereupon he was discharged, and Mrs. Freud, the widow of deceased, was appointed administratrix with the will annexed. The estate coming into her hands consisted of the two lots above referred to, found to be of the present value, respectively, of \$6,500 and \$18,500. The latter lot was subject to a mortgage of the testator to the German Savings & Loan Society for \$12,500, and, when the petition was filed, had been sold, May 31, 1898, to the bank, under a foreclosure decree, for \$11,143.46. From this sale the appellant, the Warners Bros. Company, had redeemed, November 30, 1898, as successor in interest of Jacob Freud, the former executor, and one of the devisees, under a deed of date October 1, 1897,—the redemption money being \$11,609.44; and, in a suit brought by him against the administratrix of the estate and the devisees other than Jacob, a decree of strict foreclosure has been

rendered, June 16, 1899, foreclosing their interests, and that of each of them, in the property sold, unless redemption should be made within 60 days from the date of the decree. The mortgage, it will be observed, had not been presented to the executor as a claim against the estate. The petition for the sale of real estate was filed June 7, 1899. Up to this time, as appears from the petition and the findings, the administratrix had received in rents the sum of \$37,582.85, all of which had been disbursed in payment of interest on the mortgage, taxes, repairs, and other expenses of administration, except \$100 per month, which had been applied by her on her family allowance. The balance due to Jacob Freud, the former administrator,—\$2,078.62,—remained unpaid. The estimated amount of the expenses and charges of administration to accrue was \$2,000. The order of sale was based by the court on the double necessity of redeeming the mortgaged premises from the appellant's lien, and of paying "debts, expenses, and charges of administration accruing and to accrue."

With regard to the former ground, the contention is that the court was not authorized to order a sale for the purpose of redeeming the mortgaged premises from the appellant's lien. Such authority, it is said, could be derived only from the amendment of 1893 to section 1536 of the Code of Civil Procedure, which authorizes a sale "for the advantage, benefit, and best interests of the estate, and those interested in it." But under the decision in *Re Packer's Estate*, 125 Cal. 396, 58 Pac. 59, this provision cannot apply to the estate of the decedent, who died in 1883; and hence, if the order is to be justified at all, it must be justified under the provisions of the original section, or, rather, of the section as amended in 1880. The contention thus far, we think, must be admitted; and it may also be admitted, for the purposes of this case, as is contended, that the money needed for redemption did not come within the description of "debts outstanding against the decedent," the payment of which is one of the objects for which a sale may be made under the provisions of the statute. But a sale is also authorized when it is necessary "to pay the debts, expenses or charges of administration"; and this refers not only to accrued debts, expenses, or charges, but to those to accrue. Code Civ. Proc. §§ 1536, 1537. Hence a sale may be ordered when necessary to meet such prospective charges or expenses, though there be "no debts or expenses of administration accrued and unpaid." *Richardson v. Butler*, 82 Cal. 179, 23 Pac. 9. It is clear, therefore, that, if among the powers of the administratrix was the power to make the redemption and to charge the expense to the estate, then the court was justified in regarding the amount necessary for the purpose as a legitimate prospective charge or expense of administration, and in ordering a sale for the purpose of redeeming.

The question then reduces itself to this: Has an executor or administrator the power to use the money in his hands for the purpose of redeeming property of the estate from liens existing on it? The question is an important one, but seems sufficiently clear. The executor or administrator is intrusted by the law with the property of others. Code Civ. Proc. §§ 1452, 1581. And the duty and corresponding power of preserving the estate results necessarily from his character as trustee. 2 Perry, Trusts, § 915. Thus, while generally he has no power to carry on the business of the decedent (*In re Rose's Estate*, 80 Cal. 166, 22 Pac. 86), yet he may do so if necessary to preserve the property (*In re Smith's Estate*, 118 Cal. 466, 50 Pac. 701). He may also spend money in litigation either to recover or protect property of the estate, or for insurance. So though, generally, he may not expend money in the erection of a new building (*In re Moore's Estate*, 72 Cal. 342, 13 Pac. 880), yet he may expend it in repairs to any extent necessary to preserve the property; and in cases that may be readily imagined the power to repair might extend even to the erection of a new building (*Abb. Law Dict. "Repair"*), as, e. g., in the case of a necessary outhouse destroyed by fire, or of land paying a large rental on which the building had been destroyed by fire, or decayed so as to be no longer available, and where the new building could be paid for in a very short time out of the rental. In fine, the governing principle is that, subject to the contingency of the expense being disallowed by the court, he may do whatever is necessary for the preservation of the property of the estate, and the specific character of the act done is altogether immaterial. Hence, necessarily, his power must extend to the preservation of property by paying off liens existing on it, when necessary for the purpose (*Woerner, Adm'n*, pp. 690, 691, § 329; *Burnett v. Lyford*, 93 Cal. 118, 119, 28 Pac. 855), as, e. g., in the case of taxes, tax sales, etc. (*People v. Olvera*, 43 Cal. 494; *Weinreich v. Hensley*, 121 Cal. 657, 54 Pac. 254), or as in case of cattle or horses impounded and held for expense of pasture (*In re Armstrong's Estate*, 125 Cal. 605, 58 Pac. 183). And that this is the intention of the law appears very plainly from the provisions of Code Civ. Proc. §§ 1577, 1578, where provision is made for the payment by the administrator of liens or mortgages on the realty of the estate. Of the cases cited to the contrary by the appellant (*In re Knight's Estate*, 12 Cal. 207; *Tompkins v. Weeks*, 26 Cal. 50, 60), the latter has no application; the decision there resting on the ground, italicized by the court, that "*the prior mortgage of Tomes [the lien paid] was not a charge against the estate, [and that] no part of it could ever have been paid out of the estate.*" The case, therefore, need not be further considered. Nor is the decision in *Re Knight's Estate* applicable here. In that case it was

said, as is doubtless true, that, while it is the duty of the administrator to preserve the estate, "this does not mean that he is, at discretion, to pay off all incumbrances resting on the property upon the notion that the property may increase in value, and thereby a speculation may be made by the estate"; and the point directly ruled was that "he cannot advance money to remove incumbrances unless his intestate was bound to pay the money." Thus, apparently, the decision is placed on two grounds, namely: (1) On the ground expressed, which is in effect that the administrator cannot pay all incumbrances at discretion for speculative purposes, or, it might have been said, for any purpose except for the preservation of the property, and where necessary for that purpose; and (2) on the ground that he cannot pay off incumbrances "unless his intestate was bound to pay the money." Nor can it be determined which of these was the governing consideration in the mind of the court. But the power of the administrator to pay off incumbrances in any case results solely from the necessity of preserving the property, and can be justified only on the ground that the lien is a charge on the estate, and therefore a peril to it; and this is equally true whether the lien was created by the intestate, or, as in the case of taxes, in some other way. The circumstance that the lien was not created by the deceased may therefore be disregarded, and the decision may be construed with reference to the case before the court, and the expressed grounds of the decision. Thus construed, it may be regarded as holding simply that the administrator was not justified, under the circumstances of the particular case, in redeeming from a lien which his intestate was not bound to pay. If, however, the decision be construed as based on the latter circumstances, it does not apply to this case, where the fact is different. Here the mortgage was made and a debt contracted by the deceased. Nor was the debt barred by failure to present it. Suit could still be maintained on it. Code Civ. Proc. § 1500. And it differed from other debts of the estate only in the extent to which it was a lien. Nor was the case materially altered by the sale and redemption. The effect of this, in the legal aspect of the case, was simply to terminate "the effect of the sale," thus restoring the property to the estate, but reviving the lien of the mortgage for the benefit of the party redeeming. Code Civ. Proc. § 703. The appellant acquired no title, but an equitable lien only, by subrogation to the lien of the mortgagee. Pom. Eq. Jur. §§ 798, 799, 1211, 1212. It is therefore still the lien of the original mortgage from which redemption is to be made. In another respect, also, is the case of *In re Knight's Estate* distinguishable from the case at bar. In that decision it was observed by the court, with reference to the case before it, that in such cases, where redemption

was necessary, resort could be had to a court of equity. But under the existing law, where in the course of any regular proceeding the relief becomes appropriate, the resort may be now had to the court in which the administration is pending. *Toland v. Earl* (Cal.) 61 Pac. 914. It follows that, in cases where the administrator is otherwise without power to redeem, authority may be given him by the court, as has been in effect done in this case, by the order of sale. His authority, therefore, can now no longer be disputed, and hence the court had authority to order the sale for the purpose of obtaining the means for redemption.

It is also objected, on the supposed authority of the decision in *Re Crosby's Estate*, 55 Cal. 574, that the right to have a sale of the real property has been lost by laches. But that was a proceeding for the purpose of paying an allowed claim, and the case was regarded as in effect a suit by a creditor against the heirs. Here the proceeding is for the payment of expenses and charges of administration accrued and to accrue, which is a different case. It is unnecessary to consider here the question of the family allowance. That was not passed on by the court, nor have we any reason to suppose that in making the order of sale it entered into its consideration.

With regard to the settlement of the administratrix's account, the question as to the balance of the family allowance claimed by the widow was expressly reserved from the decision by the court, and therefore need not be considered. The sole question is as to the item of \$100 per month credited to the widow on account of family allowance. This was equivalent to a little over six years' full allowance,—a period that covers less than the first two years of her administration; so that, if we leave out of view the delay of payment, the widow has received her full allowance for that period, and no more. Whether her allowance should have been further cut down by reason of her delay in closing the estate was a question for the lower court to determine, and we see no reason to disturb its decision.

With regard to the order for mortgage little need be said. The authority of the court to order a mortgage for the purpose of paying liens on the realty of the estate is expressly given by the provisions of the statute (Code Civ. Proc. § 1578); and the constitutionality of the act has been affirmed by this court in the case of *Murphy v. Bank* (Dec. 27, 1899) 63 Pac. 368. As to the propriety of the order there can be no doubt. The authority given to the administratrix extends only to the mortgage of the property covered by the lien, which will be lost unless redeemed. No one, therefore, so far as his interest in the estate is concerned, can be injured or aggrieved by the order. The appellant is, indeed, interested adversely to the estate as a claimant of the land, but

in this capacity he has no standing in court; and his grievance, if any, in failing to acquire the property of the estate, cannot be considered. The orders appealed from are affirmed.

131 Cal. 501

ADAMS et al. v. CITY OF MODESTO.

(Sac. 659.)¹

(Supreme Court of California. Feb. 4, 1901.)

MUNICIPAL CORPORATIONS—NUISANCES—OPEN SEWERS—ABATEMENT—CLAIMS AGAINST CITY—TORTS—PRESENTMENT—DAMAGES—EVIDENCE.

1. Under Civ. Code, § 3479, declaring that anything injurious to health, or indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life and property, etc., is a nuisance, an open wooden trough, passing about 300 yards from plaintiff's house, and constituting part of the sewerage system of the city, through which, for a distance of about 450 yards, the city sewage passed, constituted a nuisance, entitling plaintiff to its abatement.

2. Municipal Corporation Act, § 864 (St. 1883, pp. 266 et seq.), declares that all "demands" against a city or town of the sixth class shall be presented and audited by the board of trustees, etc. *Held* that, though the term "demands" was sufficiently broad to include claims for torts as well as on contracts, yet the purpose of the act being that the claim should be audited, which could not apply to claims for torts, the act did not require presentation of a claim for damages for the maintenance of a nuisance as a condition precedent to the plaintiff's right to sue thereon.

3. In an action for the abatement of an open sewer as a nuisance, where plaintiff alleged that he was damaged by the conduct of sewage through the sewer, and by discharge of the sewage over land adjacent to plaintiff's, but the finding of the court, by which damages were allowed, referred only to the running of the sewage through the sewer, and there was no evidence to show the amount paid for doctor's and medicine bills for sickness alleged as an element of damage, and the evidence did not show that plaintiff had not been able to rent the property because of the sewer, that part of the judgment awarding damages was not supported by the evidence.

In bank. Appeal from superior court, Sacramento county; William O. Minor, Judge.

Reversed on condition.

For opinion in department, see 61 Pac. 957.

PER CURIAM. Appeal from a judgment in favor of the plaintiffs for the abatement of a nuisance and for damages, and from an order denying a new trial. The plaintiffs are owners of a tract of land in the city of Modesto, on which, until a short time before the commencement of the suit, they resided with their family. The nuisance complained of is an open wooden trough, passing about 300 yards from the plaintiffs' house, and constituting part of the sewerage system of the city, through which, for a distance of about 450 yards, the sewage matter of the city is passed. This the court found was a nuisance, interfering with the comfortable enjoyment and obstructing the free

use of the plaintiffs' property, and that the plaintiffs were damaged thereby in the sum of \$650.

That the use of the open sewer by the city in the vicinity of the plaintiffs' land constituted a nuisance, and that the plaintiffs were entitled to have it abated, is too clear to require discussion. Civ. Code, § 3479; *Peterson v. City of Santa Rosa*, 119 Cal. 392, 51 Pac. 557; *Lind v. City of San Luis Obispo*, 109 Cal. 343, 344, 42 Pac. 437; *Wood, Nuis.* § 781, note 1.

With regard to damages, it is objected that the demand was not presented to the board of trustees, as required by the provisions of section 864 of the municipal corporation act (St. 1883, pp. 266 et seq.), applying to cities of the sixth class, of which the city of Modesto is one, which provides that "all demands against such city or town shall be presented and audited by the board of trustees," etc. But we do not think this provision was intended to apply to cases of this kind. The term "demands" is, indeed, sufficiently broad to include all claims, whether arising from contract or tort; but, when used in this connection, the term does not usually include demands of the latter class. 15 Am. & Eng. Enc. Law, p. 1194. That the term is here used in the narrower sense, as referring only to demands arising from contract, and for determinate amounts, is shown by the purpose for which they are required to be presented, which is that they may be "audited,"—a term that is not applicable to demands arising from torts. Law Dictionaries of Anderson, Abbott, Black, Wharton, etc.; Cent. Dict.

We do not think, however, that the finding as to damages is sustained by the evidence. In the complaint it is alleged not only that the sewage matter of the city was conducted through the trough, but that it was habitually discharged upon and spread over the land towards the land of the plaintiffs, and the damages claimed were alleged to proceed jointly from both causes,—that is, not only from the use of the sewer, but from "running the sewage on the ground"; and the testimony of the plaintiff David Adams is to the same effect. But the finding of the court refers only to the running of the sewage through the trough, and nothing is said about the discharge of the sewage on the ground, and there is nothing in the testimony to determine how much proceeded from the latter and how much from the former cause. The testimony of the plaintiff is also otherwise indefinite. He speaks of sickness in his family caused by the nuisance, which "entailed doctor bills and medicine bills," but no amounts are given. He says, also, he "lost the use of the place for two years," and that he could have rented it for \$250 a year if it hadn't been for the sewer. But the place contained about 20 acres of land, and its use, except as a dwelling place, could not have been lost by reason of the

¹ Rehearing denied March 7, 1901.

nuisance complained of; and, indeed, the witness expressly says he "lost the use of it because [he] didn't care to improve it." The plaintiffs were undoubtedly damaged, but the evidence fails to show they were damaged in the amount found or in any other ascertainable amount. A new trial must therefore be granted, unless the plaintiffs prefer to release the damages.

The order denying the defendant's motion for a new trial is therefore reversed, unless the plaintiffs, within 30 days after notice of the filing of the remittitur, file their stipulation in writing, agreeing that the judgment be modified by striking therefrom the part thereof that relates to damages. Upon the filing of such stipulation, the judgment shall be modified accordingly, and as thus modified shall stand as affirmed.

131 Cal. 681

MEHERIN v. SAUNDERS, Constable, et al.
(S. F. 1,073.)

(Supreme Court of California. Feb. 25, 1901.)

EXECUTION SALE—RECOVERY OF PRICE—CONDUCT OF SALE—RETURN OF OFFICER—CONCLUSIVENESS—RIGHTS OF PURCHASER—RIGHT OF JUDGMENT DEBTOR TO RECOVER EXCESS—LIMITATIONS—DEFENSE—SET-OFF—ESTOPPEL.

1. A purchaser of property at an execution sale who does not pay the entire price will not be heard to question his liability for the remainder on the ground that the sale was illegal because the entire price was not required to be paid in cash.

2. Where a constable sells property on execution under the usual statutory notice, it is a cash sale, and not a sale on credit, though the purchaser does not pay the entire price, and hence the latter cannot escape liability on the ground that the sale was illegal because on credit.

3. The return of a constable showing that the execution purchaser of property paid the full price bid does not estop the corporation's assignee in insolvency from denying such fact in an action to recover the amount of the bid from the purchaser, since the purchaser was not a party to the proceedings in which the property was sold.

4. An execution purchaser of property is not released from liability on his bid by reason of a prior execution sale of the property, since the rule of caveat emptor applies to execution sales.

5. Where an officer who sells property under an execution at a price in excess of the judgment, and fails to bring an action to recover such excess from the purchaser, and surrenders a check given in payment thereof to the purchaser, and is insolvent, and his bond exhausted, the assignee in insolvency of the debtor may bring an action against the purchaser to recover such excess, by pleading such facts and making the officer a party thereto.

6. Under Code Civ. Proc. § 691, requiring an officer selling property under execution to return any surplus to the execution debtor, the purchaser, who gives his check for such surplus to the officer, and afterwards procures the check from the officer and destroys it, is subject to suit by the debtor for the amount thereof, though the latter was never informed of the giving of the check to the officer, since the debtor may be treated as the equitable assignee of the rights of the officer.

7. Such action is not barred by limitations, when brought within four years from the date of the giving of the check.

8. A purchaser at an execution sale cannot resist payment of the excess of his bid over the judgment, in a suit brought by the assignee in insolvency of his debtor, on the ground that the latter does not show that he is able or willing to procure a constable's deed to the property, since an execution purchaser must pay when the certificate of sale is issued.

9. Where a creditor purchases property of his debtor at an execution sale for a price in excess of the amount of the judgment, before he has reduced his claim to judgment, and the debtor takes the benefit of the insolvency act before the purchaser obtains judgment, the latter cannot set off such claim against an action by the assignee in insolvency to recover the excess.

10. Where a creditor who has not reduced his claim to judgment purchases the property of his debtor at an execution sale at a price in excess of the judgment debt, and the debtor then takes the benefit of the insolvency act, the filing of his claim by the creditor without deducting the excess in his possession will estop him from setting up such claim as a set-off in an action by the assignee to recover such excess.

McFarland, Garoutte, and Harrison, JJ., dissenting.

In bank. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

On rehearing. Judgment of trial court affirmed, and judgment in department (56 Pac. 1110) reversed.

BEATTY, C. J. This is an action by the assignee of an insolvent corporation to recover from the defendants the unpaid balance of the sum bid by the defendant Ambrose for certain real property of the corporation which was sold under execution by the defendant Saunders. In the trial court Saunders made default, but Ambrose defended the action, and he now appeals from a judgment for the plaintiff, and from an order denying his motion for a new trial.

The facts involved in several of the points argued by counsel are somewhat complicated, and may be more conveniently stated in detail as the discussion proceeds, but it will be necessary at the outset to indicate the general nature of the case. The defendant Saunders, a constable, in October, 1891, sold under execution certain real property of the California Steamship Company. Defendant Ambrose was the purchaser, and the amount of his bid was \$10,000, of which he paid in cash \$855. For the balance of \$9,145 he gave Saunders his check on Donahue, Kelly & Co., and received from him a certificate of sale, which he thereafter retained. A duplicate certificate was duly recorded by Saunders. After getting his certificate of sale, Ambrose stopped payment of his check, and it was never paid, nor was any attempt ever made by Saunders to enforce payment. Within 20 days after said sale the steamship company was adjudged an insolvent, and in due course the plaintiff was appointed and qualified as assignee. Saunders having accounted for only \$855 of the sum bid at the execution sale, the plaintiff commenced an action against him and the sureties on his official bond, in which he recovered a judgment

against Saunders for the balance of \$9,145, and against his sureties for \$1,000, the full penalty of their bond. That judgment was affirmed by this court, and the opinion there delivered (110 Cal. 463, 42 Pac. 866) states the most important facts involved in the present litigation. On the trial of that action, in June, 1894, the plaintiff learned for the first time of the giving of the check by Ambrose to Saunders for the unpaid balance of his bid, of his subsequent stoppage of payment of the check, and of the redelivery of the check by Saunders to Ambrose, by whom it had been destroyed. On the affirmation of the judgment in *Meherin v. Saunders and His Sureties*, Ambrose paid the \$1,000 due from the sureties, but nothing more has ever been paid on said judgment. The execution against Saunders was returned unsatisfied, and he was then, and has since continued to be, totally insolvent. In the opinion delivered in *Meherin v. Saunders* it was intimated that Saunders had a right of action against Ambrose to recover the balance of his bid at the execution sale, as undoubtedly he had; but he never took any steps to enforce payment, and thereupon the plaintiff commenced this action on September 28, 1895, less than a month prior to the date when an action on the check would have been barred by the statute of limitations. The trial court credited the defendants with \$1,000, the amount paid by Ambrose on the judgment against the sureties of Saunders, and rendered a judgment in favor of the plaintiff for \$8,145, and interest from October 24, 1891, the date of the execution sale and of Ambrose's check. On his appeal from the judgment and order denying a new trial, the defendant Ambrose assails both the findings and the conclusions of the superior court, and also contends that the complaint fails to state a cause of action. As to the findings of fact, we think they were in every material respect fully sustained by the evidence. The finding that plaintiff was not informed that Ambrose had paid only \$855 on his bid prior to the trial of *Meherin v. Saunders* is contrary to the evidence, for it clearly appears that plaintiff received that information immediately after his appointment as assignee. The fact which first came to his knowledge during the trial of *Meherin v. Saunders* was not that Ambrose had failed to pay any more than \$855, but that he had given a check on Donahue, Kelly & Co. for the balance of his bid; that he had stopped payment of that check, and afterwards got it into his possession and destroyed it. As to this matter alone the findings are contrary to the evidence, but the fact found and the actual facts are alike immaterial. In all other particulars there is substantial evidence to support the findings, though as to some matters there is a sharp conflict. The remaining points urged by appellant will be considered in their logical order.

1. He contends that the complaint shows that no sale of the corporation's property was made. The statute, he says, furnishes the exclusive rule for execution sales, and an essential part of the rule is that every such sale must be for cash, whereas this sale was made, at least in part, upon a credit. This, I think, is an objection to the sale which it does not lie in the mouth of the appellant to make, even if it were technically sufficient. But it is not sustained by the allegations of the complaint. They show that the sale was made as such sales are usually made, and in pursuance of the statutory notice. It was, therefore, a sale for cash; and Ambrose, by his bid, agreed to pay cash. There was no fault in the mode of conducting the sale, but merely a failure on the part of the appellant to perform his promise to pay. It is true that under the statute (Code Civ. Proc. § 695) the constable, upon the refusal of appellant to pay the full amount of his bid, might have resold the property, in which case appellant would have been liable for the costs of the resale, and for any deficiency in the price realized, but the officer was induced by the appellant to forego this course. He accepted a check in lieu of cash upon the implied, if not the express, representation of appellant that it was the equivalent of cash. He issued and recorded a regular certificate of the sale. He applied the cash actually received to the satisfaction of the judgment under which the property was sold, and of other judgments, executions upon which he had in his hands. He made his return accordingly, and thereby made himself accountable to the steamship company for the full amount of appellant's bid. *Meherin v. Saunders*, *supra*. Under these circumstances, it is too late for the appellant to say that there was no liability upon his part to pay the sum covered by his check. Besides, his liability is not a mere statutory liability, if there were any merit in that contention, but is a common-law liability arising out of an express promise to pay, based upon a good and valuable consideration.

2. The second proposition of appellant is that the California Steamship Company is concluded by the return of the constable to the effect that the property was sold for the sum of \$10,000. If this proposition were conceded, it is difficult to see what bearing it would have on the present controversy; for the plaintiff, so far from contesting that part of the return, is insisting upon it, and is seeking only to recover the unpaid balance of the price bid. But I suppose the appellant means to claim that the return is conclusive in his favor that he paid the \$10,000 in full. If so, the authorities he cites do not sustain his contention. They are to the effect that the return of an officer upon an execution is—with some important exceptions—conclusive upon the parties until vacated. But appellant was not a party to the action in which the execution issued, and is neither bound by the re-

turn nor protected by it. Whether he paid the bid or not is a question to be decided upon evidence aliunde.

3. The proposition is not distinctly advanced by appellant, but he seems to claim that he incurred no liability by his bid, because without his knowledge the property in question had been previously sold to another purchaser on execution under another judgment against the steamship company. It is true, the property had been sold a few days prior to the sale to appellant, but under a judgment which was a junior lien, so that the appellant by his subsequent purchase obtained the superior title. It would have made no difference, however, if the first sale had been under a prior lien; for the rule of caveat emptor applies to execution sales, and there would still have remained a right of redemption in the steamship company after the first sale. As it was, the purchaser at the first sale got only a right to redeem from the second sale, and this fact may account in some measure for the full price bid by the appellant.

4. It is contended that there is no privity of contract between the judgment debtor and the purchaser at the execution sale, such as is essential to sustain an action by the former to recover from the latter the unpaid surplus of his bid over and above the amount required to satisfy the execution. Upon this point counsel for respondent are challenged by appellant to cite a case in which a judgment debtor has ever recovered such surplus or balance in the absence of an express agreement between the debtor and purchaser. No case exactly in point is cited in response to this challenge, but the principles which support the position of the respondent are unquestionable. The right of the officer who conducts the sale to sue for the unpaid purchase money is not disputed, but it is claimed that he, and he alone, can maintain the action. Ordinarily, no doubt, the officer is the proper party to bring the action; for it is only by collecting the full purchase price that he can fulfill the commands of the writ. He stands in the position of a trustee as to the proceeds of the sale for all parties interested, —for the execution creditors, to the extent of their interest, and for the judgment debtor as to the surplus. He also has an interest in the fund to the extent of his fees and commissions. For these reasons such an action by the sheriff was sustained by the supreme court of Alabama. *Robinson v. Garth*, 6 Ala. 204. But in that case the court said (page 209): "We do not doubt that those for whom the sheriff acts, and who are interested in the money to be recovered, may also maintain the action," etc. The principle of that decision was that the sheriff, being the trustee of an express trust, could and ought to sue for the benefit of his cestués, but that his right to sue did not exclude a similar right in the beneficiaries. In this case the trustee has utterly failed and neglected to sue, and the

right of action was about to be barred by the statute when the beneficiary commenced this suit, making the trustee a party defendant, and alleging all the facts constituting his equitable right. He shows that the trustee is insolvent, that he has surrendered and permitted the destruction of the written instrument upon which the action could be most clearly sustained, that the liability of his sureties is exhausted, and, in short, that, without action on plaintiff's part, a large portion of the price of his insolvent's land will be irrecoverably lost. It cannot be doubted that, if Saunders had sued in his own name and recovered the amount of appellant's check, he would have held the proceeds as trustee for plaintiff, and that every cent of it would have been assigned to the plaintiff by any insolvency court having jurisdiction of Saunders' estate, to the exclusion of his general creditors. It cannot be doubted that, if Saunders had commenced the action in his own name, the interest of plaintiff would have entitled him to intervene and take control of the litigation, upon the ground that he was the real party in interest, and more especially by reason of the insolvency of Saunders. These things being so, I cannot understand why, upon showing the neglect of Saunders to sue, the plaintiff could not commence the action himself, making Saunders a party. The result is that the same parties are before the court that would have been before the court if Saunders had done his duty by commencing the action, and plaintiff had exercised his clear legal right by intervening. All the facts were fully disclosed by the pleadings, and the court was in a position to do full and complete justice in the premises. There is another sufficient answer to the technical objection of want of privity. By section 691 of the Code of Civil Procedure it is made the duty of the officer holding the execution, in the absence of other specific direction of the court, to return to the judgment debtor any excess in the proceeds of the sale over the judgment and accruing costs. In this case there was no specific direction as to the surplus, which was exactly represented by appellant's check. This check was not cash, and the judgment debtor could not have been compelled to take it. But that objection could have been waived, and, if waived, it would have been the duty of Saunders, under the statute, to transfer the check. It is, indeed, true that the plaintiff never formally demanded a transfer of the check (he never knew of its existence until it had been surrendered and destroyed), and he never waived his right to the cash; but his present action is founded upon the obligation arising out of the nonpayment of that check, and he is entitled to be treated as the equitable assignee. Equity deems that to be done which ought to be done. Saunders ought to have sued on the check, or to have assigned it to the plaintiff so that he could sue. Not having sued himself, he will be deemed to

have assigned his right of action to plaintiff. Of this view he cannot complain, and still less can the appellant complain. The necessary privity of contract in this case is worked out by operation of law.

5. It is contended that the plaintiff cannot maintain this action because he does not show that he is willing or able to procure for the appellant the constable's deed. To sustain this proposition, counsel cites *Bohall v. Diller*, 41 Cal. 533, and similar cases. Such cases have no application here. A purchaser at execution sale must pay when the certificate of sale is delivered. He gets his deed in due course upon demand of the officer. Appellant received his certificate of sale at the date of the sale, and the whole amount of his bid was then payable.

6. If we are correct in holding that plaintiff can maintain this action as equitable assignee of plaintiff's check, or as the real party in interest, because of the default of his trustee, the plea of the statute of limitations is disposed of. The action was commenced within four years from the date of the check.

7. At the date of the execution sale the California Steamship Company was indebted to the appellant in about the sum of \$27,000, upon which the appellant had commenced an action and issued attachments, which he had caused to be levied on the property which he afterwards purchased. The subsequent adjudication of the company's insolvency, made within 30 days after the commencement of that suit, dissolved the attachment, and appellant thereupon proved up his claim for the full amount in the insolvency court. This was done subsequent to his purchase at the execution sale, and after he had stopped payment of his check. In proving his claim in the insolvency proceedings he made no deduction on account of the unpaid balance of his bid at the execution sale, but asked and obtained the allowance of the whole of his original claim, undiminished, and when a dividend was declared by the assignee he claimed and received the sum apportionable to the full amount of his original demands. The dividend was only a fraction over 4 per cent. of the company's indebtedness, however, and the amount still due the appellant is largely in excess of the unpaid portion of his bid at the execution sale. Upon these facts the appellant contends that the trial court erred in refusing to set off his claim upon the insolvent company against the present claim of plaintiff. To this assignment of error the respondent makes three answers: First, that Ambrose never had a right to set off his claim against the steamship company; second, that, if such right ever existed, he waived it at the time he should have exercised it; and, third, that he is estopped to claim a right of set-off by his claim and acceptance of the dividend in the insolvency proceeding on the whole amount of the original indebtedness of the steamship company. I think the position

of the respondent must be sustained on every point.

This case presents a question very different from that which arises in the ordinary case of cross demands or mutual credits. The real question is not whether cross demands may be compensated by setting off one against the other, but is, rather, a question whether a creditor of an insolvent can by his unlawful act defeat the clear and undoubted policy of the insolvency laws, and give himself a preference over other creditors; whether, in other words, he can, against the will of the insolvent debtor, and in violation of his legal rights, secure a preference which could not be secured by their voluntary and concurrent action. Under the provisions of section 55 of the insolvency act, it is perfectly clear that if a debtor in contemplation of insolvency should make over to one of his creditors a valuable asset in consideration of the release of his demand,—the creditor having reason to know the debtor's condition,—the transaction would be set aside as a fraud upon the other creditors. And, if this is so,—if the insolvent cannot give a preference, when he desires to do so, by a voluntary transfer of his property,—it certainly must be allowed that the creditor cannot secure the same preference by unlawfully taking or withholding the property and offering to credit its value. This, however, is precisely what Ambrose is seeking to do in this action. The steamship company did not make a voluntary sale of its property on credit to Ambrose, or to any one. The property was seized upon by an officer of the law who was empowered to sell enough of it to satisfy his execution, or to sell the whole of it for cash, and after satisfying the execution to return the surplus to the owner. If this course—the course enjoined by the law—had been pursued, the constable would not have taken Ambrose's check for \$9,145 in lieu of cash, but would have taken the cash itself and paid it over to the company, by whom it would have been turned over to its assignee as a part of the fund for the satisfaction of the claims of its general creditors, including Ambrose. By imposing upon the constable, and violating the right of the steamship company to receive the cash, Ambrose seeks to put himself in the attitude of a debtor of the corporation, with a right to extinguish his indebtedness by a set-off, dollar for dollar, where other creditors must be content with a modest dividend. To sustain him in this position is to allow him to take advantage of his own wrong, and to hold that the policy and plain directions of the law can be defeated by a violation of the law. The doctrine of set-off is pre-eminently an equitable doctrine, and is none the less so by reason of its embodiment in our statutes. Upon a claim of set-off, equity will work out the result that would have followed if that had been done which ought to have been done. If Ambrose had paid the full amount of his bid, as he ought to have done, the plaintiff, as assignee

of the insolvent corporation, would have had \$9,145 to divide evenly between him and the other creditors. The result of this judgment is to bring about exactly that condition, while to allow the claim of set-off which he asserts would be to give him the whole \$9,145, and leave the other creditors no part of it.

But, even if it were conceded that a right of set-off could exist under such circumstances, it is certain that the time to exercise it was when Ambrose proved his claim in the insolvency proceedings. If the cross demands were of such a nature that one compensated the other, he had no valid claim for more than the balance. But he claimed and was allowed the whole of his original demands, undiminished; and this allowance of his claim was, like a similar allowance in probate proceedings, the equivalent of a judgment,—a judgment to be paid in due course of administration. To make this claim and secure its allowance was, therefore, a solemn admission on his part that he had no right to set off the unpaid balance of his bid at the execution sale, but that he must discharge that liability in full, and content himself with the dividend apportionable to the full amount of his original demands. I think it clear that he was well advised in making this admission, and pursuing the course that he did. But, whether well or ill advised in this matter, he certainly went too far to recede when he claimed and accepted a dividend on the whole amount of his original demands. If the right of set-off existed, and the two claims compensated each other, he was entitled to a dividend on a balance of only about \$20,000, but he claimed and accepted a dividend on over \$29,000. That is to say, about one-third of what he received was money to which he had no right, and it was money of which the other creditors were wrongfully deprived. For the purpose of drawing a dividend in the insolvency proceeding he acts upon the theory that there is no set-off, and that the cross demands are uncompensated. Having in this way appropriated to himself money that on his present theory belonged to other creditors, can he be allowed now to shift his ground, and upon a totally inconsistent theory withhold the fund out of which the other creditors would receive a dividend? It is to my mind clear that he cannot. He is estopped.

These views are, I think, amply sustained by authority, and even by the letter of our statutes. A counterclaim capable of being set off in an action must be in itself an existing cause of action. Was appellant's claim against the steamship company an existing cause of action when he sought to avail himself of it as a counterclaim? Section 49 of the insolvency act furnishes the answer to this question: "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the debtor, but shall be deem-

ed to have waived all right of action and suit," etc. The case of *Brown v. Bank*, 6 Bush, 198, is on all fours with this case. I quote the following from the opinion of the court of appeals: "And to the set-off so pleaded the plaintiff filed a reply, setting forth that before he brought this action the defendant had, in the proper proceedings which were pending in bankruptcy, presented and proved and verified for adjudication and allowance against the estate of each of said bankrupts the whole amount of each of said debts, without giving or allowing any credit on either of them for the two hundred dollars and four cents in controversy, and that said debts, having been proved in bankruptcy, were beyond the defendant's control. * * *

In our opinion, proving the entire debts in the proceedings in bankruptcy, without offering to abate the claims by the amount of said deposit, was a waiver of the right to do so, and an election to proceed on said claims alone in the proceedings in bankruptcy, and that the subsequent assertion of part of the same debts by plea of set-off in this action was equivalent to the prosecution of an original suit upon the claims against the prohibition of the bankrupt law." *Russell v. Owen*, 61 Mo. 186, is a case of the same complexion, and this is from the opinion of the court: "The chief question for determination in this case is whether a creditor who, in making proof of his claim before the register in bankruptcy, omits to show that the bankrupt has an unsatisfied claim against him, can, when sued by the assignee for the amount of such unsatisfied and omitted claim, plead as a set-off the amount allowed by the register as a balance due to him. The question must receive a reply in the negative. * * * When a party defendant pleads a set-off, he, in effect, brings an action for the amount of that set-off, but by presenting and proving his claim before the register the creditor is to be deemed as waiving all right of action on suit against the bankrupt. It would be clearly contrary, therefore, to the evident intent of the above-recited section, to allow a creditor to do that indirectly which the law precludes him from doing directly,—to accomplish by way of set-off that which he would be debarred from asserting in a direct action. The same view of this point is taken elsewhere. *Brown v. Bank*, 6 Bush, 198." And see notes to section 21, *James, Bankr. L.*; *Bump, Bankr.* (9th Ed.) 684; *Id.* (11th Ed.) 491.

The superior court did not err in denying the right of set-off. Judgment and order affirmed.

We concur: VAN DYKE, J.; TEMPLE, J.; HENSHAW, J.

McFARLAND, J. I dissent, and think that the judgment should be reversed. Apart from the very close questions of law which arise in the case, by which, of course, it must be

determined, it is proper to remark that it would be a great hardship to compel appellant to pay the large amount of money and interest claimed to be due respondent on the bid at the constable's sale. Appellant had advanced to the California Steamship Company large sums of money, at one time amounting to \$86,000. At the time of the constable's sale the company owed appellant about \$28,000. He paid \$855 on his bid; he also paid \$1,000 on the judgment recovered against the constable and his sureties; he also paid several hundred dollars on a former sale of the same property; and he not only loses all of this, with the exception of a very small percentage coming from the effects of the insolvent corporation, but must now pay in addition the amount of the present judgment, which is for \$11,136.47 and interest. I think that it can be gleaned from the evidence that the bid of \$10,000 was understood by the judgment debtor, by the constable, and by the appellant to be fictitious, except as to the amount necessary to pay off the judgment lien, \$855, which sum appellant paid to the constable, and that the \$10,000 was bid with the consent of all parties merely to enhance the apparent value of the property; appellant supposing that it would be deducted from the large amount of indebtedness from the company to himself. It is alleged in the complaint that the constable never demanded payment of the check given him by appellant for \$9,145. The judgment debtor, before it went into insolvency, never made any objection to the nonpayment of the balance of the bid. Payment of the check was immediately stopped by notice of appellant, no demand was ever made on the bank on which it was drawn for its payment, and the check was destroyed. No proceedings were taken under section 695, Code Civ. Proc., to have the property resold. This action was not commenced until nearly four years after the date of the bid. There is no finding as to the actual value of the property, and no evidence going very directly to that point, but there is evidence tending to show that it had no value approaching the amount of the bid. Under these circumstances, the appellant should not be compelled to pay this large sum of money unless strict law inexorably demands it, and I do not think that there is such a demand.

As to the law governing the case, without considering the many other points made by appellant, I will merely say:

1. That in my opinion there was no privity of contract between the respondent and the appellant as to the alleged cause of action, and therefore respondent cannot maintain this action. There are many authorities supporting this view, but it will be sufficient to notice the cases of *Galpin v. Lamb*, 29 Ohio St. 529, and *Adams v. Adams*, 4 Watts, 160, and the cases referred to in the opinions in those cases. In *Galpin v. Lamb* the syllabus, which is a correct statement of the point de-

cided, is as follows: "A judgment creditor cannot maintain an action against a purchaser of real estate at sheriff's sale to recover damages for the breach of a contract of sale." Of course, a judgment debtor is in the same position touching this point as a judgment creditor. In the opinion the court say: "The contract of purchase is made with the officer, as representing all the interests involved in the suit in which the judgment or decree of sale is rendered. He and the purchaser are the only parties to the contract of purchase, and he alone can maintain an action against the purchaser to recover the purchase money. The parties to the judgment or decree have different interests and stand in different relations to the property; some holding the relation of debtor, and others that of creditor. But, however numerous the parties or diverse their interests, the officer represents them all, and none of the parties stand in such relation to the contract of the purchaser as to enable them to maintain an action on it." In *Adams v. Adams* the syllabus is as follows: "For a breach of contract between a sheriff and his vendee of land no action will lie in the name of any one but the sheriff." In the opinion the court say: "The sheriff, in making the contract of sale with James Adams, was not acting as the agent of the plaintiff, nor yet of any one else. He is considered the principal himself in such cases, and the legal as well as real party making the contract of sale. Although it be true that he acts in the character of a trustee, yet it must be borne in mind that it is as an officer of the law that he does so, and that it is from the law he derives all his power and authority; and, in sales of property made by him as sheriff under this authority, he alone has the right to receive the money arising therefrom, and is responsible for the legal appropriation of it, unless it is brought by him into court for that purpose. It would inevitably produce great confusion and clashing of suits to permit other persons besides the sheriff in their own names to maintain suit against a sheriff's vendee for breaches of their contracts made with him. It would also be inconsistent with every principle of analogy in the law." I have seen no cases where the point was directly involved which are in conflict with the above authorities.

2. Under any view, the action, in my opinion, is barred by the statute of limitations. The alleged action is based upon the bid made by appellant at the sale, and not upon a written instrument, and it cannot be brought within any category of actions not barred in at least three years.

GAROUTTE, J. (dissenting). I concur generally in the views of Mr. Justice McFARLAND, but would add an additional suggestion. Though the concession is opposed to all the authorities, let it be assumed that the constable took this check as agent or trustee of the plaintiff,—an act clearly beyond the

scope of his authority. Upon this concession, the plaintiff then had either one of two courses open to him: He could ratify the constable's act and take the check, or he could repudiate it and hold him liable for the money he should have received at the sale. Here plaintiff elected to follow the latter course, and recovered judgment against the constable for the full amount of the unpaid purchase price. Having done so, he lost all rights he may have had to the check, and forever afterwards it became the property of the constable. Plaintiff had no right to sue the constable for the unpaid purchase price, and also claim title to the check. These two remedies were absolutely inconsistent with each other, and the adoption of one was a bar to the prosecution of the other. If the plaintiff had taken an assignment of the check from the constable in the first instance, he could not thereafter have sued the constable for the unpaid purchase price; and, having first sued the constable for that purchase price, he never thereafter was entitled to an assignment of the check. Conceding that when the first action was brought he did not know that the check was in existence, still that fact is immaterial, for he did know that the purchase price had not been paid. The foregoing views we believe to be supported by the language of the principal opinion, wherein it is said: "This check was not cash, and the judgment debtor could not have been compelled to take it. But that objection could have been waived, and, if waived, it would have been the duty of Saunders, under the statute, to transfer the check. * * * Equity deems that to be done which ought to be done. Saunders ought to have sued on the check, or to have assigned it to the plaintiff so that he could sue. Not having sued himself, he will be deemed to have assigned his right of action to plaintiff. Of this view he cannot complain, and still less can the appellant complain. The necessary privity of contract in this case is worked out by operation of law." Conceding the foregoing quotation to contain a sound exposition of the law, then the plaintiff, after having brought his action against the constable for the full amount of the purchase price and recovered judgment, would never be declared by the law to be the equitable assignee of the check. It was thereafter the property of the constable, and the plaintiff had no right or title in it. This action cannot be maintained for a moment unless upon the theory that it is an action upon the check. The statutes of limitation absolutely forbid it. The check being the property of the constable, the action must fail.

HARRISON, J. (dissenting). The complaint herein is based solely upon the obligation of the appellant to pay the amount of his bid, and upon the right of the plaintiff, as the assignee of the judgment creditor, to recover that amount from him. After setting forth

the facts showing the capacity in which the plaintiff brings the action, and the circumstances attending the bid, and its nonpayment, it is alleged that the plaintiff is the owner of and entitled to recover the whole amount "due to the defendant Saunders, as such constable, from the defendant Ambrose on said bid"; and the court finds, as the fact upon which it rendered judgment against the appellant, that the plaintiff is entitled to have and recover the amount "so due and payable to the defendant Saunders, as such constable, from the defendant Ambrose, on said bid, and now due to this plaintiff, as such assignee in insolvency." The plaintiff's entire cause of action rests, therefore, upon the appellant's refusal to pay the amount of his bid. The complaint is framed upon the theory that the amount bid was due from the appellant to the officer, and that by reason of the officer's neglect and default the plaintiff is entitled to maintain a direct action against the appellant for its recovery. I think it is very clearly shown in the opinion of Mr. Justice McFARLAND that there is no privity between the officer and the judgment creditor, by which the latter is authorized to maintain an action against the purchaser for the amount of his bid; but, if it be conceded that such privity does exist, the creditor can have no greater right of action than could the officer. The plaintiff has no other cause of action against the appellant than such as existed in favor of his assignor, the steamship company; and that company's right of action, if any existed, accrued October 24, 1891, at the time when the appellant purchased the property at the constable's sale. If the plaintiff's right to maintain the action is to be sustained upon the ground that he is the real party in interest, his right of action can be no greater than that of him who conducted the transaction under which he derived his interest, and by virtue of which he claims to be the interested party. If the appellant would not have been liable to Saunders under the facts alleged and found herein, the plaintiff can have no right of recovery against him. It is very evident that Saunders could not have maintained any action against the appellant for the recovery of the amount of his bid unless it was commenced within two years after the date of the bid; and it is equally clear, upon the facts alleged and shown herein, that at the time the present action was commenced Saunders could not have maintained any action against the appellant upon the check. Not only is it alleged in the complaint that he made no demand for the payment of the check, and that he declined to collect it, but it is also shown that when he received it he inclosed it in an envelope and deposited it in the bank "for safe-keeping," and afterwards, and before the commencement of this action, withdrew it and surrendered it to the appellant. He had the same right to surrender the check to the appellant as he would have had to refuse to receive it

at the time of the bid. Having thus voluntarily parted with it, he could not thereafter maintain any action upon it, and his only right of action against the appellant would have been for the recovery of the amount of his bid.

The only reason assigned in the opinion of the Chief Justice for sustaining the action, as against the plea of the statute of limitations, is that the plaintiff is the equitable assignee of the check. No adjudicated case is cited in support of this proposition, nor are any rules applicable to the principles governing equitable assignments invoked in its support. The action herein is not upon the check, and the allegations in the complaint, as well as the evidence offered at the trial, and the findings of the court in reference thereto, do not assert any right in the plaintiff by virtue of the check, but are clearly evidentiary statements of the transaction, inserted merely for the purpose of showing that the appellant had not paid the full amount of his bid. Not only does the complaint fail to set forth any right of action upon the check, but, as if with the intention not to do so, avoids any claim to the check by reason of its having been received by the officer. After alleging that he accepted it "in lieu of the balance of the purchase price" bid by the appellant, the complaint sets forth that the officer deposited it in the bank of Lompoc, "where, as this plaintiff is informed and believes, the said check has ever since been, and is now, deposited and remains." Although it was shown at the trial that the check had been withdrawn from the bank and surrendered to the appellant before the commencement of the present action, the above allegation shows that, although the plaintiff then believed that it still remained in the custody of the bank, he made no effort to get possession of it or to make it the basis of his action, but relies upon the liability of the appellant for the amount of the purchase money, and thus destroys his right to be regarded as the equitable assignee of the check. An officer making a sale has no right to accept anything but money from the bidder, or to give credit to the purchaser. If he does so, however, he acts in his individual capacity, and not as an officer, and is liable in his individual capacity equally as if he had in fact received the money. The judgment creditor may affirm the act of the officer in accepting the check or other obligation of the purchaser, instead of money, and thus be estopped from questioning the sufficiency or correctness of the officer's act, but unless he does so accept it he does not acquire any right or title thereto. To say that because he might have accepted the check it may be assumed that he did accept it, upon the ground that equity deems that to be done which ought to be done,—especially when he makes no claim that he was willing to accept it,—is to apply this rule in a manner

for which I think no authority can be found. The act of the plaintiff in bringing the former action against the officer, in which he charged him with having received the money upon the bid and obtained judgment therefor, is conclusive against any claim that the plaintiff waived the officer's obligation to receive money upon the bid, and that he was willing to accept the check in its stead. His election of remedies at that time precludes him from maintaining the present action, as is shown in the opinion of Mr. Justice GAROUTTE.

If the remedy provided in section 695, Code Civ. Proc., in case the purchaser refuses to pay the amount bid by him, is not exclusive, the officer's right of action is limited to a suit for the recovery of the amount of the bid. Such an action is a pure common-law action, resting upon the common-law liability of the purchaser upon his bid, and presents no room for invoking the principles of equity, and the rights of the creditor derived by virtue of his privity with the officer can be no greater than those of the officer; but whether the obligation of the appellant is by virtue of the statute, or rests upon his common-law liability, is immaterial. His obligation is not "founded" upon an instrument of writing, and any action to enforce such obligation must be commenced within two years after his liability accrued. *Chipman v. Morrill*, 20 Cal. 130; *McCarthy v. Water Co.*, 111 Cal. 328, 43 Pac. 956; *Thomas v. Beach Co.*, 115 Cal. 136, 46 Pac. 899. As the present action was not commenced until more than two years after the right of action accrued, the defendant's plea of the statute of limitations should have been sustained.

MEMORANDUM DECISIONS.

CITY OF OAKLAND v. CENTRAL PAC. R. CO. (S. F. 1,665.)¹ (Supreme Court of California. Dec. 29, 1900.) Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge. Action by the city of Oakland against the Central Pacific Railroad Company. From an order denying a new trial, and from a judgment in favor of defendant, plaintiff appeals. Affirmed. W. A. Dow, for appellant. H. S. Brown, for respondent.

PER CURIAM. This case involves the same questions as in *City of Oakland v. Southern Pac. Co.* (No. 1,664; this day decided) 63 Pac. 371. Upon the authority of that case, for the reasons therein given, the judgment and order are affirmed.

CROSBY v. AHART. SAME v. KIER. (Sac. 593, 598.) (Supreme Court of California. Feb. 25, 1901.) In bank. Appeal from superior court, Placer county; J. E. Prewett, Judge. Separate actions by F. C. Crosby against Peter Ahart and against C. T. Kier. From a judgment in favor of defendants, plaintiff appeals. Affirmed. A. M. Seymour, A. L. Hart, and Pullen & Wallace, for appellant. W. H. Carlin and L. L. Chamberlain, for respondents.

PER CURIAM. The foregoing cases were submitted under stipulation that the judgment in them should follow the determination and judgment in the case of *Crosby v. Clark* (this day decided) 63 Pac. 1022. For the reasons given in *Crosby v. Clark* (Sac. No. 587), the judgments and orders appealed from in the above-entitled cases are hereby affirmed.

FAY v. REED. SAME v. RICH et al. FAY et al. v. REED. (S. F. 1,509-1,511.) (Supreme Court of California. Feb. 25, 1901.) Department 2. Appeals from superior court, Santa Clara county; M. H. Hyland, Judge. Actions by Charles W. Fay against E. P. Reed and against Jacob Rich and others, and by Charles W. Fay and another against E. P. Reed, to foreclose assessments for street improvement. From judgments for plaintiffs, defendants appeal. Reversed. Jackson Hatch, for appellants. C. T. Bird, for respondents.

TEMPLE, J. These are companion cases to *Fay v. Reed* (No. 1,264) 128 Cal. 357, 60 Pac. 927. The resolutions of intention are precisely like the resolution in that case; in fact, it is the same resolution. A petition for a rehearing was filed in that case, and was denied; and we are convinced the conclusion there reached was necessitated by previous rulings of this court. As the judgment here under consideration has the same infirmity found fatal there, and the assessment is made invalid thereby, it would serve no useful purpose to consider other points urged. For the reasons stated in the opinion in the case referred to, the judgments and orders are reversed.

We concur: **McFARLAND, J.; HENSHAW, J.**

¹ Rehearing denied January 29, 1901.

GREENE v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. (GINN et al., Interveners; S. F. 2-382.) (Supreme Court of California. Jan. 16, 1901.) In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge. Action by J. C. Greene against the board of education of the city and county of San Francisco and others; Ginn & Co. and the H. S. Crocker Company intervening. From a judgment in favor of plaintiff, defendants appeal. Reversed. Sheffield S. Sanborn (Wm. B. Bosley, of counsel), for appellants. John H. Dickinson, for respondent J. C. Greene. H. H. Hindry, for respondent H. S. Crocker Co. Franklin K. Lane, for respondent board of education.

PER CURIAM. This case involves the same questions as in *Greene v. Board* (S. F. No. 2-381) 63 Pac. 161. Upon the authority of that case, and for the reasons therein given, the judgment and order herein appealed from are reversed.

In re KRUGER'S ESTATE. (S. F. 758.) (Supreme Court of California. Dec. 11, 1900.) Department 2. Appeal from superior court, Nevada county; F. T. Nilon, Judge. On the settlement of the account of the executors of the estate of W. H. Kruger, deceased, the compensation of the attorney for the estate was fixed, and from the order fixing the amount Ida Gardner and another appeal. Reversed. Fred T. Searls and Geo. T. Wright, for appellants. P. F. Simmonds, for respondent.

PER CURIAM. For the reasons stated in *Re Kruger's Estate* (Sac. 757; this day decided) 63 Pac. 31, the decree appealed from is reversed.

PATTON v. CARPENTER. (L. A. 741.) (Supreme Court of California. Dec. 19, 1900.) Department 1. Appeal from superior court, San Diego county; J. W. Hughes, Judge. Action by J. A. Patton against H. N. Carpenter. From a judgment for plaintiff, defendant appeals. Affirmed. Collier & Collier and D. L. Murdock, for appellant. J. Z. Tucker, for respondent.

PER CURIAM. Action of claim and delivery brought in the justice's court. Defendant by his answer showing that the title to real estate was involved in the litigation, the cause was certified to the superior court. The judgment went for plaintiff, and this appeal is taken. The subject-matter of the litigation consists of a house, and plaintiff's title to the house depends upon his title to the land upon which it rested. During plaintiff's absence defendant removed the house from this particular tract of land. Upon the trial the defendant offered no testimony, and, as far as the evidence shows, was a mere trespasser in removing the building. The court found the plaintiff to be the owner of the property in litigation, and we are entirely satisfied with that finding. It is not necessary to recite the evidence in detail. It appears that the building was located upon land which the plaintiff claimed, upon which he was being taxed, and which he had improved in various ways by fencing, clearing, etc. In addition to this evidence the defendant concedes plaintiff's right of recovery if the evidence justifies the conclusion "that pueblo lot No. 1,196, according to the Poole map, is identical with the same lot according to the Pascoe map." After an examination of the record we deem the evidence substantially discloses that fact. For the foregoing reasons, the judgment and order are affirmed.

WARREN et al. v. FERGUSON. (S. F. 2-404.) (Supreme Court of California. Jan. 10, 1901.) Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge. Action on a street assessment by one Warren and others against one Ferguson. From a judgment in favor of the plaintiffs, the defendant appeals. Reversed. Stafford & Stafford, for appellant. J. C. Bates, for respondents.

PER CURIAM. Action upon a street assessment. The question involved upon this appeal—the sufficiency of the engineer's certificate—was presented in *Obermeyer v. Patterson* (Cal.) 62 Pac. 926, and it was there held that the court erred in admitting the certificate in evidence. Under the authority in that case the court erred herein in admitting the engineer's certificate in evidence, and in rendering judgment in favor of the plaintiffs. See, also, *Warren v. Ferguson*, 108 Cal. 535, 41 Pac. 417. The judgment and order are reversed.

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LOCKE v. MOULTON et al. (Sac. 742.)

(Supreme Court of California. March 9, 1901.)

APPEAL—SUFFICIENCY OF EVIDENCE.

Where the evidence is conflicting, and there is a preponderance in favor of the findings, they will not be reversed on appeal.

Department 1. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Ejectment by George S. Locke against Moulton, McCloud, and others. From a judgment in favor of the defendants, plaintiff appeals. Affirmed.

L. W. Elliott and G. F. Buck, for appellant. Frank H. Smith and Budd & Thompson, for appellees.

VAN DYKE, J. On the 2d day of October, 1885, the defendant Moulton, who was then the owner of and in possession of the real property in controversy, executed and delivered to the plaintiff a certain instrument in writing purporting on its face to be a deed of grant, bargain, and sale. The consideration expressed was \$1,500, and the instrument recited that it was made subject to a deed of trust executed by said defendant Moulton, December 17, 1884, to secure the Stockton Savings & Loan Society in the sum of \$4,240 and interest. This action was brought November 24, 1890, and is in the nature of ejectment. In his answer Moulton denies that the plaintiff is, or ever was, the owner of the land described, or entitled to the possession thereof; and as an affirmative defense alleges that from the 27th day of April, 1870, to the 15th day of July, 1890, he was the owner in fee and in possession of said premises, and that on the latter date, for a valuable consideration, he conveyed said land to the defendant S. M. McCloud, and on that date executed and delivered to him a grant, bargain, and sale deed therefor; that the instrument executed and delivered to the plaintiff by him, said Moulton, on the 2d day of October, 1885, although in form a deed absolute, was in truth and in fact intended to be and was a mortgage to secure the payment of the sum of \$6,127.50, with interest thereon at the rate of 10 per cent.

per annum, which said sum was then and there owing from said defendant Moulton to the plaintiff, and said deed of conveyance was made and delivered only as a mortgage for the purpose of securing the payment to plaintiff of said sum of money, and for no other purpose whatever. The case has been here before on two several occasions. On the first trial, judgment in the court below went for the plaintiff, and this court on the appeal (*Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957) held that the evidence was amply sufficient to justify the conclusion that the instrument in question was intended to be, and was in fact, a mortgage; the court saying: "As the mortgage, though in the form of a deed absolute, does not give the mortgagee the right of possession, it must follow that defendant Moulton, or his grantee, McCloud, being the owner of the legal title, cannot be required to pay the debt for which the security was given, or offer to pay it, to enable him to defeat the action brought by the plaintiff to recover possession;" and reversed the judgment and ordered a new trial. On the second trial the defendants demanded a jury, which was denied, and judgment again entered in favor of the plaintiff. On appeal from this second judgment (*Locke v. Moulton*, 108 Cal. 49, 41 Pac. 28) it was reversed, on the ground, as said: "The affirmative allegations in the answer to the effect that the deed was intended as security for a debt do not constitute an equitable defense in the proper sense of those terms, since they could have been proved under the general denials." On the last trial the court finds, in accordance with the affirmative allegations in the answer of defendant Moulton, that the deed in question was intended to be, and was in fact, a mortgage; that the consideration thereof was the sum of \$1,500, borrowed by Moulton from the plaintiff, and the taking up by the plaintiff of the trust deed previously executed by said defendant in favor of the Stockton Savings & Loan Society, and that the money so paid to the Stockton Savings & Loan Society was a part of the money loaned by the plaintiff to said Moulton; that said Moulton never delivered or surrendered possession of the premises to the plaintiff, but always remained in the open and exclusive possession thereof until the 15th day of July, 1890, when he conveyed the same to the defendant McCloud; and that said McCloud has since been the owner of said property, and was such at the commencement of the action, and in the possession and entitled to the possession thereof. The testimony is substantially the same as it was on the first trial, when this court held it sufficient to establish the contention of the defendant that the deed in question was a mortgage, except that on the last trial the testimony of the plaintiff taken at the second trial was read. But this evidence of the plaintiff is

rendered practically valueless on cross-examination, and is contradicted by accounts kept by plaintiff, wherein he charged interest on the amount forming the consideration of the deed as for money loaned by him to defendant Moulton. His testimony is also contradicted by his own admissions and statements to other parties who were witnesses on the trial. Under the well-settled rule, the findings of the trial court must be allowed to stand where there is a substantial conflict in the evidence. Here, however, there is a preponderance of evidence in support of the findings. Under the circumstances of the case it was not error to refuse plaintiff's offer to prove the value of the land in question, or its productive quality. Judgment and order appealed from affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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HARLOE v. LAMBIE et al. (L. A. 787.)

(Supreme Court of California. March 8, 1901.)

LANDLORD AND TENANT—COVENANTS—NOTICE TO PERFORM—NECESSITY—RECOVERY OF POSSESSION—LEASE—EVIDENCE—ALTERATION—CONTINUANCE.

1. Where a lease provided that defendant lessee would not underlet any portion of the premises without plaintiff's consent, in an action to recover possession for breach of such condition a contention that it would not lie because no notice requiring the performance of the covenant was served on defendant as required by Code Civ. Proc. § 1161, was without merit, since such notice has no application to a covenant that cannot be performed after notice.

2. Where plaintiff had leased premises to defendant under a written lease, in an action to recover the possession for breach of conditions, the verified complaint having alleged the execution of the lease, and its contents, which were not denied in the answer, it was not error to admit a copy of the written lease in evidence.

3. The lease being in defendant's possession, and he having failed to produce it when called on to do so, and not claiming that he had not had reasonable notice to produce it, it was proper to admit a copy of it in evidence, under Code Civ. Proc. § 1938.

4. Where premises were leased under a written lease, in an action to recover the possession, for failure to pay the rent after notice, it was proper to reject parol evidence that the time for the payment of the rent becoming due on the date mentioned in the lease was extended.

5. Where an affidavit for a continuance merely showed that one of defendant's firm of attorneys was sick, but did not give any reason why defendant had not fully advised with the other member of the firm, who tried the case, nor show any defense, it was proper to deny the continuance.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; 'E. P. Unangst, Judge.

Action by Flora Harloe against C. K. Lambie and another. From a judgment in favor of plaintiff, defendant Lambie appeals. Affirmed.

Graves & Graves, for appellant. Wilcoxon & Bouldin, for respondent.

COOPER, C. Action in unlawful detainer. The cause was tried before a jury, and a verdict rendered for plaintiff. Upon this verdict judgment was entered, and defendant Lambie brings this appeal from the judgment, and from an order denying his motion for a new trial.

No point is urged against the judgment. No error is claimed as to the instructions of the court to the jury, but certain alleged errors of law are urged, which we will notice in the order set forth in appellant's brief. The facts are as follows: On November 1, 1897, the plaintiff leased to appellant the real estate described in the complaint, by written lease, for the term of three years from said date, for a rental of \$1,000 per year. For the first year the rent was payable \$350 on April 1, 1898, and \$650 on November 1, 1898. The lease contained a covenant that the appellant would "not underlet any portion of said premises or assign this lease without the written permission of the said party of the first part." The appellant entered into possession under the lease, and has continued, by himself and subtenant, to hold such possession. On May 5, 1898, appellant, without plaintiff's consent, and in violation of the terms of the lease, sublet a portion of said premises to defendant Pierce. Pierce paid to appellant the sum of \$400 for the premises so sublet to him. Appellant has never paid any rent, and, upon demand made in writing, refused to pay or to surrender up possession of the premises. Plaintiff commenced this action May 31, 1898, to recover possession upon the ground of the failure of appellant to pay the rent, and remaining in possession three days after demand made for its payment, and upon the further ground that appellant violated the covenants of said lease by subletting to Pierce.

It is claimed by appellant that the second cause of action set forth in the complaint does not state facts sufficient to constitute a cause of action for forfeiture of the lease for a breach of the covenant not to sublet, because "no notice requiring the performance of the covenant" was served on appellant. The covenant was "not to sublet." Appellant had violated the covenant, and had sublet. It is difficult to imagine any purpose that could have been subserved by plaintiff serving a notice on appellant to perform a covenant "not to sublet," when he had already sublet. If the notice had been served, it would have been impossible for appellant not to do that which he had already done. The notice mentioned in the statute has no application to conditions or covenants that cannot be performed after the notice. Code Civ. Proc. § 1161; Bernero v. Allen, 68 Cal. 505, 9 Pac. 429; Kelly v. Teague, 63 Cal. 68.

Plaintiff offered and read in evidence, under appellant's objection, a copy or duplicate

of the written lease. This is claimed to be error, for the reason that the lease, being in writing, was itself the best evidence. The objection is without merit, for the reason that the facts stated in the complaint in regard to the execution of the lease and its contents were not denied in the answer. These pleadings were verified, and the lease, when proven, did not add anything to the admissions of the pleadings. The lease was in the appellant's possession. When called upon to produce it, he failed to do so, and said that he had given it to Ernest Graves, one of his attorneys. William Graves, who was trying the case for appellant, said that he did "not know where the lease is. If the lease is in the possession of Graves and Graves, it is in the private box of Mr. Ernest Graves, who is now sick in San Francisco." It thus appears that, when called upon, appellant did not produce the lease. He did not place his objection upon the ground that he had not had reasonable notice to produce it. In such case the evidence was admissible. Code Civ. Proc. § 1938; Burke v. Water Co., 12 Cal. 408; Jones v. Jones, 38 Cal. 584.

In appellant's answer he alleged that the time for the payment of the rent that became due on the 1st of April, 1898, was extended to the 18th day of May, 1898. He offered at the trial to prove such agreement by parol, and the court sustained the objection of plaintiff to the offered evidence. The ruling was correct. A contract in writing cannot be altered except by a contract in writing, or by an executed oral agreement. Civ. Code, § 1698; Henehan v. Hart, 127 Cal. 656, 60 Pac. 426. But, aside from this, conceding the answer to be true, the amount became due May 18, 1898, long before the answer was filed, which was September 1, 1898. There is no allegation of tender or payment in the answer. The cause was tried in November, 1898, and there was no proof of any payment or tender at that date. The court properly denied the motion for a continuance. The affidavit entirely failed to show any diligence on the part of appellant. It simply showed that Mr. E. Graves, of the firm of Graves & Graves, was ill in San Francisco, and had been so for over a week. No reason is given in the affidavit why appellant had not fully advised with Mr. William Graves, who tried the case for him, and who was a member of the firm, as to the merits of his defense. The affidavit entirely failed to show that he had any defense of any kind on the merits or otherwise. The appeal in this case is frivolous and entirely devoid of merit. The judgment and order should be affirmed, with \$100 damages to plaintiff.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed, with \$100 damages to plaintiff.

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PEOPLE v. SULLIVAN. (Cr. 622.)

(Supreme Court of California. March 1, 1901.)

JURORS — PEREMPTORY CHALLENGES — NUMBER ALLOWED—MURDER IN SECOND DEGREE.

Under Pen. Code, § 1070, providing that a person on trial for any offense punishable with imprisonment for life shall be entitled to 20 peremptory challenges at his trial, a person on trial for murder in the second degree is entitled to 10 peremptory challenges, since the punishment may be less than imprisonment for life.

Department 1. Appeal from superior court, Alameda county; S. P. Hall, Judge.

C. O. Sullivan was convicted of murder, and he appeals. Affirmed.

T. J. Crowley, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. An information was filed against the defendant charging him with the crime of burglary, and also including a prior conviction of the crime of murder in the second degree. Upon this information he was tried, and, after conviction, sentenced to imprisonment in the state prison for the term of his natural life. At the trial, the defendant, having exercised 10 peremptory challenges, claimed the right to exercise 10 more, which was refused by the court, and he now contends upon this appeal that, inasmuch as in case of his conviction he was liable to be sentenced to imprisonment for the term of his life, he was entitled, under section 1070 of the Penal Code, to 20 peremptory challenges. This question was determined against the contention of the appellant in *People v. Clough*, 59 Cal. 438, and the ruling then made has been followed in several cases. In *People v. Logan*, 123 Cal. 414, 56 Pac. 56, the ruling in *People v. Clough* was affirmed in this department, and a petition for rehearing in bank was denied. The construction thus given to the section was made nearly 20 years ago, and, as the legislature has not seen fit to make a change in the statute, we do not feel authorized to recede from the construction then given. The rulings of the court upon the questions at the trial which have been presented upon the appeal were without error. The judgment is affirmed.

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SOUSA v. PEREIRA. (Sac. 750.)

(Supreme Court of California. Feb. 28, 1901.)

EJECTMENT — TITLE — RECOVERY — PUBLIC LANDS—DECISION IN LAND OFFICE—EFFECT—GRANTS—AID OF RAILROADS—RELINQUISHMENT.

1. Where the land in controversy passed to a railroad company by Act Cong. July 25, 1866, granting lands in aid of such railroad, plaintiff acquired no title by filing on the land as a homestead.

2. Where the question as to whether the government had a title to land which it could pass to a homestead claimant was purely a question of law arising on undisputed facts, the decision of the land department is not binding on the court.

3. Where land filed on as a homestead had previously been granted to a railway company, a relinquishment by the company of lands described as "List 16," selected by the state before the grant to the company, which list did not include the land in controversy, did not relinquish the company's title to the land in controversy, since it could only relinquish its claim where it had never received title, and select in lieu thereof other government lands.

Commissioners' decision. Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Ejectment by Manuel Sousa against Manuel Pereira. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. H. Magoffey, for appellant. L. F. Coburn and O'Neill & Butler, for respondent.

GRAY, C. The action is in ejectment, and was begun September 28, 1897. On the trial before the court without a jury, plaintiff had judgment, from which, and from an order denying him a new trial, the defendant appeals. The plaintiff claims ownership, subject to the paramount title of the government, in the whole of the S. ½ of the N. W. ¼, and lots 2 and 3 of section 33, township 44 N., range 8 W., M. D. M., as designated on the amended plat of said township dated August 9, 1890; and bases said claim upon a homestead application and receiver's receipt dated June 8, 1896. He alleges in his complaint that since June 8, 1896, defendant has been in the wrongful possession of about 30 acres of the northerly part thereof, and prays judgment for the recovery of the possession of said northerly part. In his answer, among other defenses, defendant sets up that the land in controversy is a portion of the land included in the act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon," passed by the congress of the United States and approved July 25, 1866; that the California & Oregon Railroad Company and its successors built, completed, constructed, and operated said railroad in accordance with the terms of said act; that this defendant and his predecessors in interest have been in the actual, adverse, open, and notorious possession of said lands for more than 30 years last past adversely to the whole world, under claim of ownership; and that plaintiff's claim, if any he has, is barred by the provisions of sections 318 and 319 of the Code of Civil Procedure of the State of California. Plaintiff's title is also denied in the answer.

There is no conflict in the evidence as to the controlling facts in the case, and said facts are, in substance, as follows: In 1856 one C. C. Tracy, "a United States deputy surveyor, under a contract with the United States government, surveyed a tract of land in this [Siskiyou] county in township 44 north, range 8 west, M. D. M., described as follows: 'Beginning at the northeast corner

of Sec. 36, Tp. 44 N., R. 9 W., M. D. M.; thence east three miles; thence south one-half mile; thence west three miles; thence north one-half mile to the place of beginning,—the said strip of land being platted and described by the United States land department as the 'N. $\frac{1}{2}$ of Sec. 31, N. $\frac{1}{2}$ of Sec. 32, and N. $\frac{1}{2}$ of Sec. 33, Tp. 44 N., R. 8 W., M. D. M.'; and said survey was approved by the United States government on the 6th day of October, 1856. But the said Tp. 44 N., R. 8 W., as a whole, was not surveyed in the field until 1880, when one W. F. Benson, a United States deputy surveyor, under a contract with the United States government, surveyed the whole of said Tp. 44 N., R. 8 W., by which survey it appeared that the south $\frac{1}{2}$ of northwest $\frac{1}{4}$ and south $\frac{1}{2}$ of northeast $\frac{1}{4}$ of Sec. 32, and the S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of Sec. 33, are wholly south and about one-quarter of a mile west from the land described as such by the Tracy survey, and are wholly separated therefrom by a strip of land varying in width from north to south from about 70 links to 1.20 chains, and which narrow strip of land has been by the United States government segregated and designated on the amended official plat of said Tp. 44 N., R. 8 W., M. D. M., as lots properly numbered; those in section 33, and involved in this case, being numbered 2 and 3. That the tract of land described by the Tracy survey as the N. W. $\frac{1}{4}$ of Sec. 33 is, according to the last approved plat of said township, approximately the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 33, and the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 28. That on the 6th day of January, 1859, the state of California selected the last-described tract of land with other land, which selection was duly approved March 14, 1866, and by mesne conveyances the defendant herein became, and he is now, the owner and in possession thereof." In addition to the foregoing facts, which are quoted from the findings, the evidence without conflict shows that the Benson survey was duly approved in 1881; that the land here in controversy passed to the railroad company by the act of 1866, referred to in the answer, it being part of an odd-numbered section, and within the limits prescribed in that act. The map showing the location of the said railroad (then called the California & Oregon) was filed in the general land office in 1871. The land in controversy is shown to consist of a little upwards of 36 acres, and is all south of the survey made by Tracy in 1856, and none of it is within that survey.

On the foregoing facts we think that the evidence shows that there was no title in the government to the land in controversy when plaintiff filed on it as a homestead, and that, consequently, plaintiff acquired no title by reason of such filing, and the finding that he is the owner and entitled to the

possession is contrary to the undisputed evidence. We are not governed by the decision of the land department on this question, as it is purely a question of law arising upon undisputed evidence. *Wormouth v. Gardner*, 112 Cal. 506, 44 Pac. 806. It seems to be admitted by respondent that the title to the land passed to the railroad company, but it is contended that the railroad company relinquished its title when it made the indemnity selection in place of it. If the railroad company relinquished anything in said section 33, it must have been some part of the land that had passed out of the government of the United States before the railroad title under the grant had attached to it. It had no power to relinquish a good title to one piece of property for the purpose of selecting another from the government. It was empowered only to relinquish its claim where it had never received title, and select in lieu thereof other lands of the government beyond the 20-mile limit, and within 30 miles from the line of the railroad. Indeed, the relinquishment describes the land relinquished as in "list 16, state of California, Mar. 1866," which shows that it must have been included in the Tracy survey, as it was from this survey only that land was listed to the state in March, 1866, as heretofore shown. There was, then, no relinquishment of the railroad title in the land here in controversy, and no intention to relinquish it; for this land, as we have seen, was not included in the Tracy survey, and the title to it, therefore, never passed to the state, but when it passed out of the government it passed into the railroad company. It passed into the railroad company certainly as early as the approval of the survey in 1881, as the map locating the railroad had been duly filed some 10 years prior to that time. *Railroad Co. v. Whitaker*, 109 Cal. 268, 41 Pac. 1083. Hence the government had nothing to convey to a homestead claimant; and as the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's title, it would follow that defendant would be entitled to judgment, leaving it unnecessary to determine the question presented as to whether defendant had acquired a title by adverse possession. The judgment and order appealed from should be reversed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

132 Cal. 40

Ex parte RODLEY. (Cr. 740.)

(Supreme Court of California. Feb. 27, 1901.)
HABEAS CORPUS — FELONY — CONVICTION —
WRIT OF ERROR TO FEDERAL SUPREME
COURT — CUSTODY OF PRISONER PENDING
THE WRIT.

Where a defendant was convicted of a felony, and the judgment was affirmed by the

supreme court, and defendant was granted a writ of error to the federal supreme court, the sheriff has no authority to deliver the defendant to the warden of the state prison pending the decision of the federal court, since the writ of error operated as a supersedeas.

J. Ellis Rodley was convicted of perjury, and the judgment was affirmed (63 Pac. 351), and pending defendant's writ of error to the supreme court of the United States the sheriff undertook to convey defendant to the state prison. Defendant applied for habeas corpus to prevent his delivery to the warden. Ordered that the defendant be retained in custody in the county where he was convicted until final judgment on the writ of error.

Geo. D. Collins, for petitioner. Atty. Gen. Ford, for respondent.

BEATTY, C. J. The petitioner, having been convicted of the crime of perjury in the superior court of Butte county, took an appeal to this court, where the judgment was affirmed. 63 Pac. 351. Pending his appeal he remained in the custody of the sheriff of Butte county, confined in the county jail, in pursuance of the order of the superior judge certifying that there was probable cause for his appeal. After the affirmance of the judgment of the superior court by this court there was a petition for a rehearing, and this was denied on the 28th day of January, 1901, whereby the judgment became final. On the following day—January 29, 1901—a writ of error was allowed by me as chief justice of the supreme court, by which the cause is made reviewable in the supreme court of the United States upon assignments of error involving an alleged conflict between a law of this state and the fourteenth amendment to the constitution of the United States. A proper bond to prosecute the writ was presented, approved, and filed, citation and writ duly issued, and copies filed in the clerk's office on January 30th. On the 31st the citation was served on the defendant in error by delivering a copy to the attorney general. On the 1st day of February the sheriff of Butte county was on his way from the county seat to San Quentin, with the prisoner, for the purpose of delivering him to the custody of the warden of the state prison, in execution of the sentence of the superior court, when he was served with the writ of habeas corpus issued herein, in obedience to which the prisoner was produced before me. The parties not being ready to proceed with the hearing at that time, a provisional order was made, remanding the prisoner to the custody of the sheriff, to be by him confined in the county jail of Butte county until otherwise ordered. Subsequently the matter was fully heard, and the facts above stated were disclosed by the records or stipulated by the parties. Upon these facts, and the law established by the statutes of the United States and the decisions of its courts, I have no doubt that the writ of error operated as a supersedeas from the date of its allowance,

and that the sentence of imprisonment pronounced upon the prisoner is suspended until the decision of the supreme court of the United States upon the matter to be reviewed is regularly certified to the supreme court of this state. Rev. St. U. S. §§ 1000, 1003, 1004, 1007, 1017; *Hudson v. Parker*, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. Ed. 424; *In re Claasen*, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409; *Bryan v. Bates*, 12 Allen, 201. The holding of the prisoner, therefore, in the custody of the sheriff in any other place than the county jail of Butte county, and especially for the purpose of delivering him to the custody of the warden of the state prison in execution of his sentence, is unwarranted and unlawful. He must remain, pending the decision of the supreme court of the United States and its mandate, in the custody of the sheriff, and at the usual place of confinement. It is therefore now ordered that the said J. Ellis Rodley be, and he is hereby, remanded to the custody of the sheriff of the county of Butte, state of California, to be by said sheriff detained in custody until a final judgment upon the writ of error issued by the supreme court of the United States and filed in the supreme court of California in the case of the People of the State of California, Respondent, v. J. Ellis Rodley, Appellant, being case numbered Cr. 643 in the supreme court of California, or until the said J. Ellis Rodley is ordered released on bail, pursuant to the provisions of section 1017 of the Revised Statutes of the United States.

132 Cal. 49

FRANTZ et al. v. PORTER et al.
(S. F. 1,741.)

(Supreme Court of California. Feb. 27, 1901.)

GIFTS—VALIDITY OF CHECK—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE—PRESUMPTION—JURY QUESTION—INSTRUCTIONS.

1. Defendant firm had been acting as banker for plaintiff's testator for 14 years, and K., a member of the firm, had been an intimate friend of testator. Testator wrote K. on the 13th day of January that he was sick, and requested K. to call, which he did; and he continued to visit testator until he died, on the 21st of January. K. testified that on the 14th of January testator requested K. to call a lawyer, as he wished to leave something to K., and that he insisted thereon, and that K. then attempted to get attorneys, but failed, and on the 15th testator told him to draw a check for the amount of testator's deposit, and that he would give it to the children of K., and the latter drew a check for \$25,000 of such deposit, and testator signed it, and K. had the money transferred to his account. The testator was of sound mind, left no relatives in this country, and was worth \$102,000, and devised all his property to his brother, a colonel in the French army. Held sufficient to sustain a judgment for defendant in an action by testator's executors to recover the amount of the check from the firm.

2. The evidence does not raise a presumption that the money was received for the use of the drawer, since there was no relation of trust or confidence existing between the parties.

3. An instruction, as to the validity of a check given as a gift in the last illness of the

drawer, that if he executed and delivered the check to defendant while of sound mind, and without fraud, the gift should not be set aside, is not erroneous, as authorizing the assumption that the execution of the check was sufficient to constitute the gift, in connection with instructions requiring the jury to find that the gift was so intended by deceased, and placing the burden of proving such gift on the defendant.

4. The question whether the facts attending the gift of a check shows such a confidential or fiduciary relation between the drawer and payee as will give rise to a presumption of fraud or undue influence is for the court, in an action by the drawer's executors to contest the validity of the gift.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Fred Frantz and another, executors of the last will of Horace Gasquet, deceased, against George K. Porter and others, to recover an amount alleged to have been deposited with defendants by plaintiffs' intestate. From a judgment in favor of defendants, and an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Philip G. Galpin, for appellants. Rothschild & Ach, for respondents.

PER CURIAM. This is an action to recover \$26,160.92 alleged to have been deposited with defendants by plaintiffs' testate, Horace Gasquet. Defendants answered that they had for two years preceding the death of Mr. Gasquet been acting as his banker, under an agreement "to receive deposits from him, to pay out moneys to him or upon his order, and to allow him interest upon deposits at the rate of four per cent. per annum"; that prior to his death defendants had paid out to him or his order all sums by him deposited or to which he was entitled, except \$1,185.38 (including therein \$24.46 interest), which amount defendants admitted was due the estate of deceased on August 7, 1896, at the time demand was made on them by plaintiffs, and that defendants then tendered to plaintiffs said sum, etc. The cause was tried by a jury, and plaintiffs had a verdict for the amount tendered by defendants, and judgment was entered accordingly. Plaintiffs appeal from the order denying their motion for a new trial.

It appears from the evidence that defendants were partners doing business as Porter, Slessinger & Co., at San Francisco, and had been in business as such for over 20 years; that for some 14 years they had acted as the bankers for deceased, allowing him 4 per cent. interest on balances. During this time deceased resided in Oregon, where he was engaged in merchandising, mining, contracting, and other occupations, and purchased goods from defendants. Defendant Kahn was a married man, residing with his wife and two children at San Francisco. Deceased and Kahn were Frenchmen; the former being unmarried, and without any known relatives in this country. The evi-

dence shows an intimate relation and close friendship, long continued, between deceased and Kahn, and that Kahn had been called upon personally to perform and did perform for deceased various services of a personal and friendly nature. On January 13, 1896, the firm was indebted to deceased in the sum of \$26,160.92. On that date Kahn received a letter from deceased, stating that he was very sick, and requesting him to call at St. Mary's Hospital, San Francisco, where deceased was under medical treatment. Kahn went to him at once, and continued to visit him daily until the 21st, when he died. His attending and consulting physician testified that "he was very weak in body, but his mind was clear,—he was of sound mind,"—until his death. Kahn remained all day with deceased on the 13th, and returned on the 14th. Kahn testified: "On the afternoon of the 14th he said that he wanted to change his will, and wanted me to bring a lawyer to him. Said he made a will in Crescent City, but he wanted to leave me something. I said, 'What for?' He said, 'I want to leave you something.' I tried to talk him out of it, but he said: 'No; I insist upon it;' and I said, 'All right. I will bring you some attorney to-morrow.' He insisted, and I called on Rothschild & Ach, and left a note asking them to go to St. Mary's Hospital to draw a will, and that I would send a carriage for them. I went to the hospital on the 15th, but neither Mr. Rothschild nor Mr. Ach could go. Gasquet said, 'Where are the attorneys?' I said they would come in the afternoon. He said, 'Never mind about the lawyers.' He said, 'You go and write out a check for the money I have at Porter, Slessinger & Co.'s, and I will give it to you for your children.' I talked with him a little while, and he said, 'Just do as I tell you.'" Kahn went back to Porter, Slessinger & Co., and spoke to Mr. Porter about it. He also spoke to the bookkeeper, and told him to look at the account and tell him the balance due deceased, and explained why he wanted to know, and was told by the bookkeeper that the amount was between \$25,000 and \$26,000. Kahn then drew a check at the office of the firm for \$25,000, and showed it to the bookkeeper; and Mr. Porter and witness thinks he showed it to Mr. Slessinger, also. Kahn took it to the hospital on the 15th, and deceased signed it. Kahn testified: "He signed it on the 15th of January, and handed it back to me. He said: 'I give you this for your children. Give them a musical education, or what you like, with it. Let the boy buy all the postage stamps he wants.' I accepted the check at the time." The check is in evidence, and Kahn testified that he took it back to the firm, showed it to Porter and the bookkeeper, "and told the bookkeeper to give him credit on the books for \$25,000 to Joseph Kahn, trustee. I gave him the check." It was indorsed by Kahn, and stamped, "Paid January 15th, 1896," with

the stamp of the firm; and the books of the firm showed a charge against Horace Gasquet for the amount of that date, and a credit to Kahn. Kahn testified that he told his wife that evening about the gift, and also told Levi Strauss. There is evidence that Mr. Gasquet was very ill with cancer of the stomach, and that he said "that he never expected to get up," and Kahn testified that: "When the check was being signed, some one knocked at the door, and I said, 'Come in.' It was the nurse. He did not come in, but excused himself and went away." There was no one present except Kahn when the check was signed and delivered. A large number of letters were introduced, showing the correspondence between Kahn and Gasquet during several years, from which it appears that they were very close and intimate friends; and this is confirmed by the evidence of Gasquet's anxiety to have Kahn near him, and as much of the time as possible, while he was suffering from his mortal illness at the hospital. Deceased left a will that was executed at Crescent City on January 10, 1896, when on his way to San Francisco for medical treatment, in which he made his brother, a colonel in the army of France, his sole devisee, and it appeared that the estate was of the value of \$102,000, including the claim here in question.

Appellants say in their brief that the evidence of plaintiffs in rebuttal was largely circumstantial, but that it tended to show the improbability of such a large and unusual gift; that it was shown that Gasquet had other acquaintances, whose relations with him were equally intimate and less of a business character than his relations with Kahn; that Gasquet was very weak from the day of his arrival, and took little or no nourishment; that Kahn told no one of having received the check, except the members of the firm and the bookkeeper; that there were persons in the hospital who might have been, but were not, called to witness the signing of the check; that the gift was at variance with the desire of Gasquet as expressed in his will. These and some other circumstances of like import are relied on as showing that the evidence was insufficient to justify the verdict. The evidence was that Kahn not only told the members of the firm and the bookkeeper of the gift, but he told his wife, and he also told Levi Strauss; and the circumstance of alleged variance with the expressed purpose of the will is met by the evidence that Gasquet at first desired to change it so as to make provision for Kahn, in lieu of which he finally determined to give him the check. The evidence is uncontradicted, and comes from an entirely disinterested source, that Gasquet was of perfectly sound mind when he gave the check and until his death. There is no evidence of fraud or undue influence, in any way impeaching the action or motives of Kahn. The jury had all the

evidence before it, and with its conclusions we cannot interfere.

Appellants claim that there is a presumption arising, under the proven circumstances, that the check was given for the use of the drawer; citing *White v. Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723. The case cited was that of a husband claiming that the money alleged to have been loaned him by his wife was in fact a gift, and the court said that when the husband introduced evidence of gift "the presumption of law immediately arose that the gift was obtained from the wife by the exercise of undue influence upon his part," and cast the burden on him of disproving the presumption. The decision rested on certain provisions of the Civil Code, and on the advantage gained by the husband in the particular transaction in question. The court said: "It is only in those transactions where one secures an advantage over the other that the confidential relation existing between them may be invoked, and the equitable principles laid down in the chapter of the Code upon trusts be called into operation." But there was nothing in the present case from which a relation of trust and confidence may be said to have existed between Kahn and Gasquet at the time. The relation was neither more nor less than that of warm personal friendship, and there can be no presumption, under the facts in this case, that the check was given to Kahn for the use of the drawer. Besides, there was evidence directly against any such presumption, and sufficient to overcome it if such a presumption arose.

It is claimed by appellants that while the court properly instructed the jury as to the burden of showing that the check was executed by Gasquet, and that the gift was in fact made, as claimed by defendants, nevertheless the court erred in giving another instruction from which the jury could assume that by the mere signing and execution of the check the gift was in fact made. The instruction complained of was as follows: "If you should find that Gasquet executed and delivered to the defendant Kahn the check in question, then you are further instructed that if Gasquet at that time was mentally sound, and that there was no fraud or undue influence exercised by the defendant Kahn in this matter, the gift should not be set aside, although it might be considered highly improvident, and although a mere stranger was the recipient of the donor's bounty." Standing alone, this instruction might perhaps have conveyed the impression that signing and delivering the check completed the gift, which certainly would not have been sufficient, for it might have been delivered for some different purpose. But in the same connection, and immediately preceding this part of the instructions, the court instructed the jury as follows: "The defendant thereupon claiming, as he does, a gift, it became his duty to establish

a gift to your satisfaction, by satisfactory evidence. If, in your opinion, you find that that signature was genuine, that the check was delivered to defendant Kahn, and that the gift was in fact made, then the burden of proof, and the duty of showing that the gift was obtained through fraud or undue influence, rest upon the plaintiff, because the law, unless in cases of confidential relations, which are not here presented, does not presume fraud, and does not presume undue influence. Therefore in such case the party who asserts fraud or the party who asserts undue influence has to prove it." The court in other instructions gave emphasis to the fact that the burden was on defendants to prove that a gift had been made. In an instruction the court said: "The evidence must be clear and satisfactory to your minds that a gift was intended by Horace Gasquet." Again: "You must be satisfied that the alleged gift is clearly established by a preponderance of the evidence, or you must find for the plaintiff." We do not think the jury was left in any doubt as to the meaning of the court that defendants were required not only to prove delivery of the executed check to Kahn, but also to prove that when delivered it was intended as a gift. We do not feel called upon to notice the line of cases cited in which fiduciary and confidential relations were shown to exist, and where the courts have held that the burden of proving independent advice to the donor was cast upon the donee. Here there were no fiduciary or confidential relations proven, and appellants' counsel admit in their brief that the relations of Kahn and Gasquet were "not what are called technical confidential relations; that is, such relations as are declared by law to be confidential." It is also claimed that whether the relations between Kahn and Gasquet were confidential and fiduciary was a question of fact for the jury, and that it was error for the court to instruct, as matter of law, that there were no such relations. It is claimed "that the court should have instructed the jury that, if they believed the relations of the parties were confidential, the burden of rebutting the presumption of fraud and undue influence was upon defendants." Whether the facts showed such a fiduciary relation as would cast the burden of proof upon the donee to overcome a presumption of fraud and undue influence which would arise from such relation was exclusively within the province of the court. The facts given, it was for the court to say whether they made out what in law would constitute a relation of trust and confidence,—such relation, for example, as in *White v. Warren*, supra, warranted the court in saying that when the husband proved a gift, and no more, he "rested too soon"; adding, "Such evidence, standing alone, compassed his defeat, for by reason of that evidence the presumption of undue influence arrayed itself against

him." The question of fraud and undue influence is not directly raised by the pleadings, and there is no evidence addressed to such an issue. The question arises, if at all, by the presumption on which appellants now rely, and from which they seek to cast upon defendants the burden of showing that there was neither fraud nor undue influence. Appellants' position cannot be maintained. The order is affirmed.

(132 Cal. 9)

ROGERS v. RIVERSIDE LAND & IRRIGATING CO. (L. A. 772.)

(Supreme Court of California. Feb. 26, 1901.)

IRRIGATION CANAL—MAINTENANCE AND REPAIR—NECESSARY EXPENSE—INJUNCTION—EVIDENCE—JUDGMENT ROLL—RATABLE ASSESSMENTS—COLLECTION—ATTORNEY'S FEE.

1. Defendant was liable for a part of the necessary expenses of maintaining and keeping an irrigation canal in repair. Plaintiff was tenant in possession, and as part of the expenses charged the defense of defending suits brought to restrain him from making changes in the canal. *Held*, that the judgment rolls in these suits were admissible to show whether or not their defense was necessary, since the matter in issue could not be determined by the complaint alone.

2. Defendant had a right of way through plaintiff's irrigating canal for the passage of a certain amount of water, under an agreement that defendant was to pay that proportion of the necessary expense of repairing and maintaining the canal which the volume of water it was entitled to bore to the entire volume. *Held*, that the expense of defending a suit brought to restrain plaintiff from making changes necessary to prevent the appropriation of water by persons not entitled to it was a necessary expense of maintenance and repair, so as to render defendant liable for his proportion thereof.

3. Where the expense of maintaining and repairing an irrigating canal is to be borne ratably by the parties entitled to convey water through the same in proportion to the amount of water used, the expense of collecting their ratable portion from parties who have refused to pay is a part of the necessary expense of maintenance, since, unless the rate due from such parties is collected, there would be no fund for maintenance and repair.

Department 1. Appeal from superior court, Riverside county; J. W. Ballard, Judge.

Action by I. D. Rogers against the Riverside Land & Irrigating Company. From a judgment in favor of the plaintiff, defendant appeals. Affirmed.

John G. North and Purington & Adair, for appellant. E. W. McGraw, for respondent.

VAN DYKE, J. On the 5th day of February, 1890, the North Riverside Land & Water Company was the owner of the portion of the canal in question here from the source of the same in the Rancho San Bernardino down to the west line of the Rubidoux Rancho, and on that day conveyed the same to the Stearns Ranchos Company. The deed of conveyance contained the following reservation: "Hereby specially reserving, however, the right of way to carry through such canal the 350 inches of water, being the same 350 inches reserved by

first party in its conveyance of other water to second party by indenture, dated May 23, 1888, * * * subject, however, to first party's paying the proportion of the entire expense of maintaining and repairing such canal that 350 inches of water sustains and bears to the entire amount of water from time to time being carried through said canal." The plaintiff is the lessee and tenant in possession of said canal under the said Stearns Ranchos Company. The defendant, by mesne conveyances from the North Riverside Land & Water Company, acquired its said right to a portion of said water to be carried through said canal. The suit is for the portion alleged to be due from the defendant of the expenses of maintaining and repairing such canal or ditch from June 1, 1897, to August 1, 1898. The aggregate expenses for the whole canal were \$4,386.35, defendant's portion thereof being \$358.32, for which amount judgment was rendered in favor of the plaintiff.

The first point made by appellant is that the court erred in overruling defendant's objection to the admission in evidence of the judgment rolls in the cases of *B. R. Smith* against Stearns Ranchos Company, and *Riverside Land & Irrigation Company* against Stearns Ranchos Company. Among the items in the aggregate expenses are \$500 attorney's fees for defending the suits in question. This, together with \$25 attorney's fees in another case, going into the aggregate expenses, are the only items of expenses in reference to which any question is raised. The introduction of the judgment rolls was for the purpose of showing the nature of the actions and the necessity of incurring the expense of attorney's fees in defending the same. The actions in question were brought to restrain the defendants therein from making certain changes and alterations in certain flumes, boxes, pipes, and penstocks. It is maintained by appellant's counsel that, "whether the defense in the two suits named was necessary expense of 'maintenance and repair' was to be determined from the complaint alone; and, if the defendant had defaulted, and the plaintiffs had secured all the relief demanded in the prayers of their complaints, such relief would not in any sense have interfered with the maintenance and repairs of the canal." Appellant's counsel also contends in his brief that it was not necessary to defend those suits, and hence it was not necessary to employ an attorney for that purpose; but the finding of the court on the issue raised by the affirmative matter in the answers would seem to show that the defense of the suits was necessary in order to carry out the improvements,—that is, proper maintenance and repairs of the canal. The answers in said actions set up that there was good cause for making the changes; that the plaintiffs in said actions and others on the canal were habitually using water to which they were not entitled, and which belonged to other per-

sons, thereby depriving the other persons of the water to which they were entitled. The court found that the respondent, *I. D. Rogers*, the lessee and tenant in possession, threatened to remove the outlets, flumes, boxes, pipes, and penstocks mentioned in the complaint, and to replace them with others better adapted to prevent the waste and unauthorized use of water; that the removal of said outlets, flumes, boxes, and penstocks, and the substitution for them of others, was a reasonable exercise of the power of regulation and management of such canal. Appellant's counsel is mistaken in supposing that issues in a cause can be raised only by allegations in the complaint controverted by the answer. Very frequently the most important issues tried in a cause arise outside of the allegations in the complaint. In addition to the denials contained in the answer, it may contain a statement of new matter constituting a defense; and the statement of such new matter in the answer on the trial is deemed controverted by the opposite party, and an issue arises from such new matter in the answer thus controverted by implication of law. Code Civ. Proc. §§ 437, 462, 588, 590. The proper construction of the terms as used in the reservation contained in the deed to the Stearns Ranchos Company would seem to be that the canal or ditch should be kept in such condition as to enable the owners of water who have the right to have the same carried or conveyed through said ditch or canal unobstructed, and with as little loss as possible, and so as to prevent others from using or appropriating the quantity to which they may be entitled; and, whether breaks or obstructions should occur from natural causes, or by trespass or injunction suits, it would be equally the duty of the owner of the canal to prevent or remove the obstructions and repair the breaks; and if it should become necessary to bring suits or defend suits for the purpose of protecting the canal, and keeping it in good repair, the expense of such litigation, including an attorney, would seem to be a part of the necessary expenses of maintenance and repair. Under a contract of lease of a canal by which the lessee agreed to pay to the owner three-eighths of the whole receipts from tolls after deducting expenditures for repairs, it was held that the lessee was entitled to charge a salary for his own supervision of the canal. *Dyer v. Fitch*, 63 Me. 171. See, also, the following cases in reference to what the terms in a covenant or agreement of "maintaining and repairing" will include: *Rhodes v. Mummery*, 48 Ind. 217; *Attorney General v. Union Soc. of Worcester*, 116 Mass. 167; *Foster v. Goddard*, 1 Black, 506, 17 L. Ed. 228; *Reg. v. Heath*, 6 Best & S. 587; *Sevenoaks, M. & T. Ry. Co. v. London, C. & D. Ry. Co.*, 11 Ch. Div. 634. The other attorney's fee of \$25 was incurred in bringing suit for the collection of unpaid assessments from different users of water carrying the same in said canal. The

expense of maintaining and repairing the canal is borne ratably by the parties who are entitled to convey water through the same, and, unless the assessments or rate due from such parties could be collected, there would be no means of keeping the canal in repair. If any of such parties refuse to pay their pro rata of the assessment or expenses for the purpose of maintenance and repairs, it would be necessary to enforce the collection by suit, and it would be clearly in the interest of those who do pay their pro rata to compel the others to contribute their portion also.

Appellant's counsel objects to the language of findings 4 and 20, where it is said, "The defendant was by plaintiff permitted to convey water through said canal;" and also to the language in finding 13, wherein it is said that the only interest which the defendant had in the canal was an easement therein to carry water through the same, "conditioned upon payment therefor as alleged in the complaint." The reservation in the deed of conveyance already set out reserves to the defendant the right of way to carry through such canal its quantity of water, "subject, however, to first party's paying the proportion of the entire expense in maintaining and repairing such canal." If the language of the findings objected to is not precisely that contained in the reservation, no injury to the defendant results therefrom. It sufficiently appears from the findings that the defendant has an easement or right in the canal, subject to or conditioned upon paying its proportion of the expenses for maintenance and repairs.

We concur: HARRISON, J.; GAROUTTE, J.

132 Cal. 68

PALMER et al. v. CONTINENTAL INS. CO.
OF NEW YORK. (Sac. 619.)

(Supreme Court of California. Feb. 27, 1901.)

INSURANCE—POLICY—STIPULATION—NOTE
FOR PREMIUM—PAYMENT.

Under Civ. Code, § 2598, declaring that an acknowledgment in a policy of the receipt of the premium is conclusive evidence of its payment so far as to make the policy binding notwithstanding any stipulation therein that it was not to be binding until the premium is actually paid, an insurance company is liable on a policy reciting that it is issued in consideration of \$12 paid, and providing that there shall be no liability thereon while any promissory note given for premium remains past due and unpaid, notwithstanding the fact that a note for the \$12 mentioned in the policy is due and unpaid.

In bank. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

On rehearing. Judgment of trial court affirmed, and in department (61 Pac. 784) reversed.

Frank H. Gould, for appellant. Louttit & Middlecoff, for respondents.

HARRISON, J. Action upon a policy of fire insurance. The defendant issued its pol-

icy of insurance to the plaintiffs against loss by fire for the term of five years from the 27th day of May, 1897, until the 27th day of May, 1902. The policy was signed by its officers at New York, but contained a provision that it should not be binding until countersigned by its general manager at Chicago. It was so countersigned, bearing date June 7, 1897, and was thereafter delivered to the plaintiffs. It recites that it is executed "in consideration of twelve dollars paid, and the payment of installments when due on an installment note for forty-eight dollars, due as follows: Twelve dollars on the 1st days each of June, 1898, 1899, 1900, 1901." It also contains the following provision: "It is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any promissory note or obligation, or part thereof, given for the premium, remains past due and unpaid." The plaintiffs had made their application for the insurance to an agent of the defendant in California, on May 27th, and in consideration for such insurance, and the policy therefor, executed on that day their promissory note to the defendant for the sum of \$12.65, payable on or before the 1st day of October, 1897, and also the note for \$48 recited in the policy. The note which was payable October 1, 1897, recited that it was the "first payment for policy of insurance based on application made this day to the Continental Insurance Company of New York." Each of the notes contained a recital that, in case of its nonpayment at maturity, the company should not be liable for loss during such default, and that the policy for which the note was given should lapse until payment was made. A portion of the insured property was destroyed by fire, October 11, 1897, and at that time the note which was payable on October 1st had not been paid. A tender of its amount was made by the plaintiffs October 15th, and was refused by the defendant. The present action was brought upon the policy to recover the amount of the loss sustained by the fire. Judgment was rendered in favor of the plaintiffs, and the defendant has appealed.

By the recital in the policy that it was made "in consideration of twelve dollars paid," the defendant is estopped from showing, for the purpose of disputing the validity or binding effect of the policy, that such payment had not been made. Section 2598, Civ. Code, declares: "An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid." Such recital would not conclude the insurer in an action upon the note from showing that it had not been paid, but this provision of the Code makes the recital conclusive evidence of its payment, "so far as to make the policy binding," notwithstanding any stipulation in the

policy to the contrary. Its effect is of the same character as the vendor's acknowledgment in a conveyance of land of the receipt of the purchase price. He is not thereby estopped from collecting the money from the vendee in case it is not in fact paid, but the transfer of title is not defeated by showing such nonpayment.

The policy herein acknowledges the receipt of the \$12, which, so far as the payment of premium is concerned, rendered the contract of insurance binding until the 1st day of June, 1898, and it is immaterial whether the plaintiffs made the payment in money or by giving their note therefor. The binding effect of the policy caused by this acknowledgment continued until another year's premium should fall due, unless in the meantime there should be some breach of condition by the insured, other than the payment of the first year's premium. The provision for forfeiture contained in the stipulation in the policy is limited to the nonpayment of the promissory note referred to therein as thereafter to mature, and cannot apply to the nonpayment of the note given for the premium, whose payment is acknowledged. If the defendant had given an indefinite credit to the plaintiffs,—that is, a credit generally, without specifying the time at which the premium should be paid,—its acknowledgment in the policy that it had been received would be conclusive against it in an action upon the policy. It is none the less conclusive because the time of credit is limited to 60 days, or for the reason that the agreement for credit is evidenced by a note. There is no statement in the policy that the \$12 was paid by a note, or that the plaintiffs had given their note therefor, and the conclusive effect created by the statute cannot be set aside by showing that a note was given. It was competent for the defendant to accept the note of the insured as payment of the premium, and it can no more dispute the binding effect of the policy by showing that the payment was made by a note which has not been paid than it could if it had accepted their personal credit in lieu of money.

The condition as to forfeiture which is contained in the note in case it should not be paid at maturity is not available to avoid the policy by showing such nonpayment. *Joyce, Ins.* § 1211. This provision in the note is for the benefit of the insurer, and it is not at liberty to retain the note after its maturity as a binding obligation against the insured, with the right to collect it if no loss should occur during the life of the policy, or refuse to pay the loss if it should occur before the payment of the note. The insurer in such a case is bound to demand payment at the maturity of the note, and, if not then paid, can exercise its option to declare the policy forfeited, or to continue it in effect.

It is contended by the defendant that the note and policy are to be considered as parts

of the same transaction, and are to be construed together, and that the proviso in the note is operative to defeat its liability upon the policy, notwithstanding the provisions of section 2598. Without determining whether the two instruments can be considered as parts of the same transaction,—the note having been made May 27th, and the policy not issued until after June 7th,—if it should be so conceded the same conclusion would follow. If the two are construed as parts of the same instrument, the result would be that the policy would acknowledge the receipt of payment of the first year's premium, and would contain a stipulation in two places, one in the note and one in the agreement for insurance, that the failure to pay the note should forfeit the policy. Section 2598 is sufficiently comprehensive to include as many stipulations therein referred to, and as many different forms of such stipulation, as the insurer may express in its policy. By inserting in the section the phrase, "notwithstanding any stipulation therein," the legislature intended to prevent the insurer in any action upon the policy from disputing its acknowledgment that it had received the payment. The section is not limited to a policy which contains a provision in specific language that it shall not be binding unless the premium has been "actually paid," but extends to any stipulation which is intended to have that effect. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.; McFARLAND, J.; TEMPLE, J.

132 Cal. 56

WRIGHT v. KILLIAN et al. (L. A. 946.)
(Supreme Court of California. Feb. 27, 1901.)

MINES AND MINING—MINING CLAIMS—ABANDONMENT—ASSESSMENT WORK—EVIDENCE—SUFFICIENCY—DEFECTIVE PLEADINGS.

1. An admission in defendant's pleading, in an action to quiet title to a mining claim, that plaintiff was the owner of the claim during certain years, is an admission that he did the requisite amount of assessment work during such years.

2. Rev. St. U. S. § 2324, permits the miners in each mining district to make regulations as to the amount of assessment work necessary to retain possession, but requires the work in each year to be of the value of \$100. Plaintiff, who owned four claims, employed G. to perform the assessment work for a certain year, and paid him \$400 therefor, and he constructed a shaft on each of the claims larger than that required by the local regulation. G. and other witnesses testified that such work was worth \$100 a claim. Defendant's evidence was to the effect that the expenses for help and necessary supplies, etc., could not have reached \$100 a claim, but no bad faith was shown on the part of plaintiff, and the remoteness of the mines entailed additional expense. *Held* sufficient to support a finding that an assessment work of the value of \$100 had been performed.

3. Under Rev. St. U. S. § 2324, authorizing the miners of any district to establish regulations as to the amount of assessment work necessary to hold possession of a claim, but requiring the work to be of the value of \$100 a year,

and providing that a failure to do such work shall work an abandonment, compliance with a local regulation providing that an improvement of a certain description shall be sufficient will not prevent an abandonment, when the value of the work is less than \$100.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; Frank F. Oster, Judge.

Action by Lewis Wright against F. G. Killian and others to quiet title to certain mining claims. From a judgment in favor of the plaintiff, and from an order denying a motion for a new trial, the defendants appeal. Affirmed.

Rolfe & Rolfe and Frank B. Daley, for appellants. Leonard & Morris, for respondent.

CHIPMAN, C. Action to quiet title to certain four mining claims and for an injunction. Plaintiff had judgment. The appeal is from an order denying defendants' motion for a new trial.

The verified complaint alleged ownership and right of possession of the mining locations in question for more than five years prior thereto; that defendants entered upon the property on January 1, 1899, and thereafter extracted and are now extracting ore therefrom; and that they claim some interest in and to the said mining locations. Defendants answered, denying the ownership of plaintiff "at the commencement of the action or at any time on or after the 1st day of January, 1899"; alleged that plaintiff failed to do work on each of said locations of the value of \$100 during the year 1898, and that he therefore forfeited any interest he might have had therein; that for more than three years prior to January 1, 1899, defendants "had known of the mining claims mentioned in said complaint, and of the gold-bearing veins or lodes thereon"; that, knowing plaintiff had forfeited his rights by failure to do the requisite assessment work, they "entered upon the premises * * * on said 1st day of January, 1899, * * * for the purposes of locating and in good faith working and developing the ores," etc., and erected substantial monuments and posted notices, and within 20 days thereafter recorded the same in the county recorder's office. The court found that "each and all of the averments of the complaint are true"; that plaintiff, during the year 1898, "performed, and caused to be performed, upon each of said mining claims, * * * not less than one hundred dollars' worth of work and labor in the development and improvement of each of said claims." The court found, in detail, the acts and things done by defendants constituting their location of the property, setting forth copies of their notices, but the court found that said notices made no reference to any natural objects or permanent monuments in existence, sufficient to identify any of said locations, and that the monument erected by defendants on each of said claims was not erect-

ed at any point of discovery thereon, nor upon any gold-bearing ledge, vein, or lode of rock in place bearing any mineral deposits or precious metals. As conclusions of law, the court found that plaintiff is the owner, and that defendants had no right in or to any of the claims, and that defendants be perpetually enjoined from working the mines. Judgment was accordingly entered.

1. It is contended that the evidence does not support the finding that plaintiff performed, or caused to be performed, \$100 worth of work on each claim during the year 1898. This is the principal question in the case. The answer, by its form of denial, admits that on December 31, 1898, and for five years prior thereto, plaintiff was the owner of the mining claims in question, but it is alleged in the answer that plaintiff forfeited his interest by failure to do the requisite assessment work for 1898. An admission of ownership would imply that plaintiff had done whatever was necessary to constitute ownership, including assessment work. The parties, however, seem to have treated this admission (which was also made in open court when the trial began) as simply establishing a prima facie case for plaintiff, and as casting the burden on defendants of proving the alleged forfeiture, and they at once assumed the burden, and put in their evidence on that issue.

The provisions of section 2324, Rev. St. U. S., which relate to questions involved in the pleadings, including that relating to the labor required, are as follows: "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the names of the locators, the date of the location, and such description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, * * * their representatives, have not resumed work upon the claim after failure and before such location."

It appears without conflict that one Greenleaf was employed by plaintiff to do the requisite assessment work on each of the four claims, and that he was paid \$400 by plain-

tiff therefor. The claims are about 50 miles from any railroad station, and 120 miles from San Bernardino, whence Greenleaf went with a team and five men to do the proposed work. He testified that he thought it necessary to take men from San Bernardino, because he was not sure of finding them near the mine. All these men, together with Greenleaf, worked more or less days, and excavated a shaft on each claim of dimensions, as Greenleaf testified, of about $4\frac{1}{2}$ feet by 6 feet, and about 12 feet deep. The character of the ground through which they ran the several shafts varied somewhat in the different claims, but it required blasting, and was what would be called hard ground to work, and Greenleaf testified that the work performed by him on each claim was reasonably worth \$100 and more. In this estimate he was corroborated by several witnesses who were qualified to judge of the value of the work, and who examined the shafts and the ground, and also by two of the men who helped do the work. The evidence was that Greenleaf fitted out the party with tools, forge, powder, fuse, and other supplies and a team; that he supervised the work, as well as did some part of it with his own hands; that he was familiar with the value of that class of work, and had done much similar work in that mining district. Defendants offered in evidence the recorded affidavit of one Phelps, who had helped do the work and made the proof of labor on behalf of plaintiff, and this affidavit stated that at least \$100 worth of labor and improvements was performed and made on each of the claims. It was in evidence, without objection, that the miners in that mining district had adopted and caused to be recorded in the office of the county recorder the rules and by-laws of the district. Among those who organized the district were two of the present defendants, and among the rules adopted was article 6, "that a shaft 4 ft. in width, 6 ft. in length, and 10 ft. deep, or its equivalent in cubic feet, shall be excavated in each claim, and this shall constitute the regular assessment work of the district."

It appears, however, that the wages in the district generally was \$3 per day for a man where he boarded himself, or \$2 when board was furnished, the employer to furnish tools, powder, etc., in both cases; that the shaft dug on each claim could be done by one man in 15 to 18 days, and the wages actually paid by Greenleaf to his men did not exceed these figures. Estimates by witnesses for the defense showed that the supplies, tools, team used, and other items of expense, added to the cost for wages, could not have reasonably amounted to \$100 for each location. It is claimed that there is, in no true sense, any conflict in the evidence, because it clearly appears that the witnesses who estimated the value at \$100 could not give in detail the items aggregating so great a sum for the work actually done. There is no question

but that plaintiff paid Greenleaf in good faith the full amount of \$400. It is fair to infer from the evidence that Greenleaf did work which he believed sufficiently complied with the law, and was of the value of \$100. There is nothing in the evidence justifying the inference that there was any intention to evade the law or come short of its requirements by plaintiff or by the men whom he employed to do the work. Considering all the circumstances under which he undertook the work; the remoteness of the mines from any place where labor could be relied on as available; the extra cost of supplies; the inconvenience in procuring wood and water, requiring a team to be kept there; the lack of facilities for cooking and other like circumstances,—it may be doubted whether there was any profit to Greenleaf, notwithstanding all that appears as to the cost of the various items of expense. But, even if he made some profit, there is evidence substantial, direct, and credible that the labor performed on each claim was worth \$100, and we cannot take from the trial court, in such a case as appeared here, the right to determine from all the evidence the ultimate fact of the value of the work performed, nor can we say there was no substantial conflict in the evidence. The facts brought out by defendants tended strongly to weaken the evidence adduced by plaintiff, but it did not destroy it utterly, and leave the facts without conflict. The good faith of plaintiff was further shown, in this: That he had sold the mines conditionally, and the deeds were in escrow, and he had employed Greenleaf to go with the representatives of the proposed purchasers and examine the property after the assessment work was done. They went, and some of them were there on December 31st, taking samples of ore, and returned the next day (Sunday), January 1st, to continue their examination and development work, and then found that during the intervening night, at the hour of 12 o'clock and 10 minutes, defendants had "jumped" the claims, and had tied the tools together that they found at one of the claims, and attached a notice thereto, "saying 'Remove Tools,' signed by Jack Killian," one of defendants. They thereupon left the mines, being unwilling to purchase a lawsuit, and shortly after plaintiff brought this action.

It is no doubt true, as appellants contend, that the provision of the law as to assessment work is often evaded, and that, as this court has said, "the conditions imposed by the act of congress are wise and salutary, and are by no means onerous" (*Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643), and must be complied with (*Id.*); but there is disclosed here no effort or intention to avoid the provisions of the law. The trial judge had the witnesses before him, and all the peculiar circumstances surrounding the parties must have received consideration. The by-law above referred to could not dispense with the requirements of the statute, but it tended to

show how miners regarded the general character of the mining ground in that district, and what amount of work in their judgment would be worth \$100; and it also tended in some degree to rebut any inference of bad faith in stopping the work in a shaft after it had been sunk 12 feet of the required dimensions, even though it cost less than \$100. We think there was sufficient evidence to support the finding.

2. The fourth finding, as to the want of knowledge of defendants concerning the presence of gold-bearing veins, is not material. Conceding that the proceedings taken by them to relocate the claims were all regular, they could confer no right, inasmuch as plaintiff had not forfeited his right. The same may be said as to finding 7, that defendants' notices did not refer to any natural objects or permanent monuments sufficient to identify their locations, and that the locations were not distinctly marked on the ground so that their boundaries could be readily traced. Findings upon these matters, and as to whether defendants complied with the act of 1897 (since repealed, but then in force), become immaterial, and, if not supported by evidence, were without injury.

3. Numerous exceptions to rulings of the court in admitting and rejecting testimony were taken by defendants, but few of which, however, are referred to in their brief. We have examined the record at the points indicated, and, while we think in one or two instances the rulings should have been the other way, they were not prejudicial to defendants. The essential facts came out quite fully on both sides, and we can discover no instance where evidence was admitted or excluded over defendants' objection, to their injury. It is advised that the order be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

132 Cal. 30

PEOPLE v. GRIMES. (Cr. 675.)

(Supreme Court of California. Feb. 26, 1901.)

HOMICIDE—CONVICTION—EVIDENCE TO SUPPORT—KILLING TO PREVENT FELONY—TO PREVENT MISDEMEANOR—INSTRUCTIONS—WEIGHT OF EVIDENCE—HABIT OF CARRYING WEAPONS—EVIDENCE—ADMISSIBILITY.

1. Defendant and deceased were playing cards in a room adjoining a saloon, and deceased claimed that defendant had cheated, and took some money won by defendant. Defendant followed deceased into the saloon, and demanded a return of the money, which deceased refused. Defendant declined to drink with deceased, and, after the latter returned to the card room, bought a drink for himself, and remarked to the bartender that it might be the last he would ever drink, and then, drawing his pistol, went towards the door, and said to deceased, "Give me back my money, or I'll shoot you," and deceased replied, "Shoot," whereupon defendant shot the deceased as the latter stood with his hand near his hip pocket.

Held to support a verdict of murder in the second degree.

2. Where deceased took money defendant had won at a game of cards, and refused to return it, and defendant, after leaving the card room, returned with a drawn pistol, and shot deceased as he stood with his hand near his hip pocket, it was proper to charge that, if defendant was not a wrongdoer in seeking to get back his money, and deceased met his death by such a demonstration as justified defendant in believing the deceased was about to inflict great bodily harm on him, and the assault was sudden, and the danger apparently great, the defendant was justified in standing his ground, and in slaying the deceased to win his own safety.

3. It was proper to charge that, if defendant killed deceased having reasonable grounds to believe that, if he did not do so, deceased would then and there do defendant some great bodily harm, then defendant's act was neither murder nor manslaughter, but justifiable self-defense.

4. The court charged that defendant had the legal right to prevent the attempted commission of a felony, even to the extent of inflicting death on the one so attempting; or, if the deceased was endeavoring to escape with the proceeds of the felony, defendant also had the right to prevent such escape, even by inflicting death; but, if the attempt or commission would amount only to a misdemeanor, then defendant had no such right. Held, that the charge was not prejudicial to defendant as informing the jury that, if the threatened assault on defendant by deceased was a misdemeanor, the right to kill deceased in self-defense did not exist, since the instruction referred to the right to kill deceased to prevent him from keeping defendant's money.

5. Where deceased kept money which had been won from him by defendant at a game of cards, and refused to return it, and in an ensuing quarrel defendant shot deceased, and contended that he did so to prevent the deceased from committing a felony in taking the money, it was proper to charge that a homicide committed in endeavoring to restrain the commission of a mere misdemeanor was not justifiable.

6. It is not error to refuse a requested instruction where the substance of it was covered by instructions already given.

7. An instruction as to the weight of certain evidence was properly refused, as the matter was a question for the jury.

8. Where it appeared that the deceased was standing with his hand near his hip pocket when he was shot by defendant, and that defendant had worked with deceased, and was familiar with his habits, the fact that the court allowed the state to introduce evidence in chief to show that the deceased had a marked peculiarity in habitually standing with his hand near his hip pocket did not justify a reversal of conviction, since the evidence was clearly admissible in rebuttal of defendant's claim of self-defense.

9. Where a defendant charged with homicide introduced evidence that deceased had been seen on several occasions with a pistol, it was proper to allow the state to show in rebuttal that an intimate acquaintance, who had lived in the same house with deceased for a considerable time, had never seen deceased with a pistol.

In bank. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Thomas F. Grimes was convicted of murder, and he appeals. Affirmed.

F. P. Tuttle, for appellant. Tirey L. Ford, Atty. Gen., for the People.

McFARLAND, J. Defendant was charged with the murder of one Charles McLaughlin,

and was convicted of murder in the second degree, and appeals from the judgment and from an order denying his motion for a new trial.

The principal features of the case are these: At about 6:30 o'clock of the morning of December 26, 1899, the appellant, the deceased, and one Gleason were engaged in playing poker in a card room adjoining the main saloon of Fred Lutz in the town of Ophir, Placer county. They had been so engaged through most of the previous night. When the last hand was being played, the deceased "called" the appellant, and upon the latter naming his hand deceased said, "That is good," and threw his hand over to Gleason, who was to deal next. Appellant pulled the money which had been bet partly towards his own pile, when deceased demanded to again see the hand. Gleason, who had taken up appellant's hand preparatory to shuffling for another deal, took appellant's hand from the top of the deck, and spread it upon the table, when it appeared that there were six cards in it. Gleason testified that there were only five cards in appellant's original hand, but that in taking it off the deck he had accidentally taken another card with it. The deceased immediately charged appellant with having six cards in his hand, and, reaching over the table, he took the money, which was lying some little distance from appellant's pile, and put it in his pocket. Appellant demanded the money back, and deceased refused to give it to him, and thereupon the game ceased. The parties then went into the main saloon, where appellant several times demanded the money of the deceased, who refused to give it to him, and threatened to strike defendant if he did not let him alone. Deceased asked all present to drink, but appellant refused. The deceased, after he had taken his drink, went back into the card room, and was heard walking to and fro across the room. Appellant then took a drink by himself, saying to the barkeeper, "This will probably be the last drink I will ever take." He then drew his pistol, and started towards the opening in the partition which led into the card room. When a few feet from the opening he was heard to say to the deceased, "Give me back my money, you ———, or I will shoot you," and the deceased was heard to say, "Shoot, you coward, you darsn't." Thereupon appellant shot the deceased, who retreated, and appellant shot at him several times afterwards. Deceased died within half an hour from the wounds inflicted by appellant.

There is no foundation for the contention that there was not sufficient evidence to support the verdict. That defendant killed deceased is beyond question. There are two defenses set up: First, that the homicide was committed in justifiable self-defense, because, as asserted by appellant, when he approached the deceased the latter had his

hand in his hip pocket, and appellant had, therefore, reasonable ground for believing that he was about to be shot by deceased; and, second, that appellant had the right to kill deceased in order to prevent the latter from committing a felony, to wit, robbery,—appellant contending that the taking of the money by the deceased at the card table constituted robbery. But the jury was justified in holding that neither of these defenses was established.

We do not think that there was any prejudicial error of law which warrants a reversal. Upon the general matters of law applicable to the case the court instructed the jury correctly, and certainly not unfavorably to appellant. As to the instructions touching the claim of self-defense, "appearances," etc., the appellant has no just cause of complaint. Upon these points the court, among other instructions, gave the following: "If you believe that the defendant was not a wrongdoer in seeking to get back his money, and the deceased met his death by such a demonstration as justified the defendant in believing the deceased was about to inflict great bodily harm upon him, and the assault is sudden, and the danger apparently great, then I charge you the defendant was justified in standing his ground, and in pursuing and slaying the deceased to win his own safety." And: "The jury are instructed that if they believe that Grimes killed McLaughlin, having reasonable grounds to believe that if he did not do so McLaughlin would then and there do him some great bodily harm, then his act was not either murder or manslaughter, but justifiable self-defense." Appellant contends that there was error in giving instructions 8 and 9, which are as follows: "(8) The defendant had the legal right to prevent the attempted commission of a felony, even to the extent of inflicting death upon the one so attempting; or, if the one so attempting endeavored to escape with the proceeds of the felony, he also had the legal right to prevent such escape by any and all means, even to inflicting death; but, if the attempt or commission would only amount to a misdemeanor, then the defendant had no such right. (9) A homicide committed in endeavoring to restrain the commission of a mere misdemeanor is not justifiable under the law." Appellant seems to assume that these instructions refer to the right of self-defense as against an assault or threatened assault on the person of the defendant by the deceased, and that they state the law to be that, if such assault would be only a misdemeanor, then the right to kill would not exist. But clearly the instructions do not refer to the right of a party to kill another in order to prevent an assault upon his person, on which subject the court had already fully and correctly instructed. They refer to the other defense made by appellant, namely, that he had the right to kill the deceased in order to prevent him from keeping the mon-

ey taken from the card table, which appellant contends amounted to robbery; and it is apparent that the jury could not have otherwise understood them. There was no error in refusing instruction 13, asked by appellant. The substance of it was given elsewhere. Appellant's instruction 15 was properly refused for the reason given by the trial judge. Instruction 17 was also properly refused, because it was as to the weight of certain evidence, which was a question for the jury. The foregoing includes all the points made as to instructions.

It appeared in the course of the introduction of the main evidence of the prosecution as to the facts of the homicide that about or just prior to the shooting the deceased had his hand in or near his hip pocket. In connection with this evidence, the prosecution, having proved that the appellant, for a considerable length of time, had worked with the deceased in the same mine, had slept with him in the same room, and had been on terms of great intimacy with him, was allowed, over appellant's objections, to prove, as part of its case in chief, that the deceased was noted for a marked peculiarity, which consisted in resting his hand on his hip or in his hip pocket while walking or standing. Considering that it had already appeared that the deceased had his hand near his hip pocket about the time of the shooting, it is not entirely clear that the evidence here in question was not proper as part of the prosecution's case in chief; but, conceding that it was irregular as part of the case in chief, still, if it was proper in rebuttal, the fact that it was introduced out of order would not warrant a reversal. *People v. Arrighini*, 122 Cal. 124, 54 Pac. 591. Indeed, its introduction in chief was apparently an advantage to appellant; and, as appellant afterwards testified that the fact of deceased having his hand at his hip was a reason why he anticipated danger, the evidence here in question was clearly admissible as rebuttal. The jury had the right to consider this evidence in determining—First, whether there was any real danger; and, second, whether appellant had a reasonable apprehension of danger from the appearances. Neither do we think that there was error in allowing the witness Smith, who was an intimate acquaintance of the deceased, and had lived with him in the same house for a considerable length of time, to testify that he had never seen deceased with a pistol in his possession. This was in rebuttal of the testimony of two or three of appellant's witnesses that they had seen deceased on certain occasions with a pistol. The testimony of appellant's witnesses was of value only as tending to show the habit of deceased as to going armed, and as to this subject the testimony in rebuttal was as proper as that introduced in chief.

We have noticed all the points made, and

we see no grounds for a reversal of the judgment. The deceased may have treated the appellant unfairly and unjustly in the matter of the game of cards, but that treatment gave appellant no legal excuse or justification for taking his life. The judgment and order appealed from are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.; TEMPLE, J.; HARRISON, J.; HENSHAW, J.

(132 Cal. 85)

McGREW v. MUTUAL LIFE INS. CO. OF NEW YORK. (S. F. 1,230.)¹

(Supreme Court of California. Feb. 23, 1901.)

FOREIGN COURTS—CONSTRUCTION OF STATUTES—EFFECT—FOREIGN JUDGMENT—DIVORCE—ADULTERY OF WIFE—DOMICILE—EFFECT ON PERSONALTY—LIFE INSURANCE—ACTIONS—PAYMENT TO WRONG PARTY—EFFECT.

1. Where the guardian of an insane man in Hawaii obtained a divorce for him, the judgment will not be invalid in California on the ground that, as there was no express statute permitting a divorce action by the husband's guardian, he could not do so under the general provision that the guardian of an insane person shall appear for and represent his ward in all legal suits and proceedings, since, as the courts of Hawaii have held otherwise, their construction of their statutes cannot be assailed.

2. Where a divorce had been granted in Hawaii, in a subsequent action involving the conclusiveness of the judgment, a contention that it was not final, because exceptions taken by defendant therein had not been disposed of as required by a Hawaiian statute, was not well taken; the supreme court of Hawaii having held that the judgment had become absolute, and there being no express finding on the subject in the court below.

3. Plaintiff was served with process in a divorce action in Hawaii, brought by her husband's guardian, on the ground of adultery, and appeared therein by attorney, but before judgment removed to California to make it her permanent home. The judgment was merely a decree for divorce, and did not deal with property rights; but a statute of Hawaii provided that, when a divorce was decreed for the adultery of the wife, the husband should hold her personal estate forever. *Held*, in an action in California on a policy of insurance on her husband's life, payable to plaintiff, that she was entitled to recover, since, as she was domiciled in California at the time of the judgment for divorce, the statute of Hawaii had no operation on her or her personal property.

4. It was not error to exclude evidence of the fact that defendant had satisfied a judgment on the policy recovered by the husband's administrator in an action to which plaintiff was not a party, since the fact that defendant paid the policy to the wrong party would be no defense to an action brought by the right party.

In bank. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by Alphonsine McGrew against the Mutual Life Insurance Company of New York. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Chickering, Thomas & Gregory (Edward Lyman Short, of counsel), for appellant. Platt & Bayne, for respondent.

McFARLAND, J. Action on a life insurance policy. Judgment was for plaintiff in the court below, and from the judgment defendant appealed. The respondent is a resident of California, where this action was commenced, and the appellant is a resident of the state of New York. The defense is rather a remarkable one. It rests upon a decree of divorce rendered by a court of the republic of Hawaii in an action brought there against the present respondent by the guardian of her husband,—a decree which could not have been obtained here, and upon a Hawaiian statute which has no force here except by comity. The material facts in the case are these:

On September 14, 1892, the respondent was the wife of one Henri G. McGrew, and she and her husband were then residing and domiciled in Honolulu, Hawaiian Islands. On that day the policy of insurance sued on was executed, by which defendant promised to pay \$5,000 to the respondent herein, Alphonsine McGrew, upon the death of her husband, Henri, provided that she should be living at the time of such death. Henri died on the 22d day of October, 1894, leaving the respondent, his wife, surviving him. In 1893 Henri and respondent made a trip to California for the benefit of the health of the former, and in the latter part of December, 1893, they returned to Honolulu; he being then in a very feeble mental condition from softening of the brain. When they landed at Honolulu they were met by one Carter, who assumed control over them, and ordered them not to go to the home in which they had been living, but to go to a hotel. It appears that soon afterwards Carter was the legally appointed guardian of the person and estate of Henri, who had then been judicially declared to be non compos mentis; but it does not appear when he became such guardian. A few days after respondent and her husband went to the hotel, Henri was removed by Carter from the hotel to a hospital. Respondent wanted to go back to the home where they had formerly lived, but Carter, who had the key and control of the house, would not let her, and he sold all the furniture in it, except a piano, which plaintiff claimed as her own. Carter would not furnish her a home or any money, and Henri was an imbecile, incapable of understanding the situation. On February 8, 1894, Carter, as guardian of Henri, brought an action on behalf of the latter to obtain a divorce from respondent, alleging adultery as the ground of divorce. Service of process was served on respondent in Honolulu, and she appeared in the action by an attorney, and filed a demurrer, and afterwards an answer denying the charge. On April 5, 1894, respondent left the Hawaiian Islands, with the intention of not returning there again, but intending to come to California and make her home here. She obtained the funds to pay the expense of the journey by the sale

of her piano. She said that she came to California to make her home here, and also through fear that "they" would take her infant child away from her. She arrived here in the same month,—April, 1894,—and has since then constantly resided in California, intending it as her place of residence. On August 25, 1894, the Hawaiian court entered a decree of divorce in the said action brought by Carter, dissolving the bonds of matrimony between this respondent and the said Henri (and it is not improper to say that the evidence in the case was conflicting). There was nothing in the pleadings in said case about property, and the decree was simply one of divorce, without any disposition of any other matter whatever; but there is, and at that time was, a statute of Hawaii which declares that, "when a divorce is decreed for the adultery or other offense amounting thereto of the wife, the husband shall hold her personal estate forever."

Respondent contends that the judgment in the divorce suit should be held invalid because, in the absence of an express statute on the subject, an action for a divorce cannot be maintained by a guardian, and there is no such statute in Hawaii; the only one relied on being the general provision that the guardian of an insane person "shall appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose." But, admitting these legal propositions to be correct, the courts of Hawaii have held otherwise, and their construction of the statutes of their own country cannot be here assailed. *McGrew v. McGrew*, 9 Haw. 475. Full effect must therefore be given to the judgment in the divorce suit.

It is also contended by respondent that the judgment in the divorce suit was never absolute and final, because certain exceptions taken by defendant's attorney therein have never been disposed of, and it is provided by the Hawaiian statutes that "no order or decree for a divorce shall be made absolute until such exceptions shall have been disposed of." The transcript contains many things about the law of Hawaii touching the taking of exceptions in a trial court, and having them certified up to the appellate court, which are somewhat difficult to understand; but, as the supreme court of that country seems to have held that the judgment in *McGrew v. McGrew* had become absolute (*Carter v. Insurance Co.*, 10 Haw. 117), and as there is no express finding on the subject in the case at bar, we are compelled to hold that the said judgment was final and conclusive as to the matter therein adjudicated.

Under our views of the case, it is not necessary to determine the points made by respondent that the Hawaiian statute has no force here on the ground of comity, because it is penal, works a forfeiture, and is contrary to the public policy of this state,

etc. As the plaintiff herein was served in Hawaii with process in the divorce suit, and appeared therein by attorney, the court there had jurisdiction, and the judgment therein rendered concludes her as to the one thing adjudicated therein. But the judgment is merely a decree of divorce. It does not deal with any property rights; and if, as claimed by appellant, all the personal property of respondent, including the policy sued on, passed to her husband, that result must have flowed from the said Hawaiian statute providing for the forfeiture of the wife's property, and not from anything decreed in the judgment. It was not a case where the adjudication by final judgment of property rights asserted in the pleadings relates back to the commencement of the action; for in that case there were no property rights averred, or considered, or adjudicated. The respondent's right to her property was not affected by the mere pendency of the suit for divorce, and the statute had no applicability until the entry of the judgment. The question, therefore, is, what was the right of respondent to the property involved at the time when the said statute could be invoked? And it is clear that, if at that time she was domiciled in California, the Hawaiian statute had no operation upon her or her personal property here; for the law which governs personal property is the law of the domicile. See *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636, and authorities there cited.

In our opinion the respondent, at the time when the Hawaiian statute took effect, was domiciled in California. This is clearly so, unless we must ignore her actual residence on account of the maxim (or "fiction," as it is sometimes called) that "the domicile of the husband is the domicile of the wife." We think that the reason of the rule, and, of course, the rule itself, ceases when the husband discards his wife by instituting proceedings for the dissolution of the bonds of matrimony. The theoretical unity of husband and wife dissolves in the presence of a legal proceeding, the direct and only purpose of which is to destroy that unity. This is admitted to be so where the wife brings the suit for divorce; but the reason of the rule applies to her, whether she be plaintiff or defendant. Her interests and rights as defendant are frequently more serious than any she could have as plaintiff. It is not the law that a husband who is a plaintiff in a divorce suit can—as in the case at bar—actually put his wife out of his home, and at the same time successfully claim that by operation of law she is still in it. We think that the correct principle is stated in the decisions hereinafter noticed. In some of them it was held that the divorce itself was invalid outside of the state in which it was granted, because founded upon the theory that the domicile of the husband was the domicile of the wife, contrary to the

actual fact; but the principle applies much more strongly to the case at bar, where the question is not as to the validity of the divorce, but as to the operation of a foreign statute upon her and her personal property at a time when she and the property were in this state.

In *Irby v. Wilson*, 21 N. C. 568, the parties had married in South Carolina, where they were then domiciled, had afterwards removed to and established a residence in Tennessee, and then, after a separation, the wife had gone to North Carolina and permanently resided in the latter state, and afterwards the husband had obtained a decree of divorce in Tennessee. The opinion of the court contains interesting discussions of the doctrine of the extraterritorial force of laws and judgments, but the decision turned on the single point that the domicile of the wife at the time of the divorce was in North Carolina, and not in Tennessee, where the domicile of the husband was. The court, among other things, say: "The aphorism that the husband and wife are but one person has been alluded to as founding the argument that his domicile is necessarily hers. * * * But it is a mere fiction, which is never allowed, even in the common law, to obscure, much less defeat, justice. They are two persons to make a marriage contract. They must also necessarily be two persons to litigate between themselves upon any subject, and, above all, upon the obligation, continuance, or dissolution of that contract. They are not, therefore, so identified that they cannot have opposing interests,—that they cannot have separate existences and separate residences and homes. If the argument of the counsel were well founded, it would prove that the husband might sue his wife for a divorce, enter her appearance, and in her name confess his own allegation." In *Mellen v. Mellen*, 10 Abb. N. C. 329, the court declares the law—we quote for brevity from the syllabus—as follows: "Although, *prima facie*, the domicile of the wife is the same as that of the husband, the law recognizes an exception to the rule when the husband begins an action to dissolve the marriage contract. In such case, the theoretical identity of person and interest ceases to exist, the legal fiction of one domicile no longer operates, and the jurisdiction of the court to entertain the action depends upon the actual existing facts." In *Colvin v. Reed*, 55 Pa. St. 375, the question involved was that of the domicile of parties to a divorce suit, and the court said: "But the unity of person created by the marriage is a legal fiction, to be followed for all useful and just purposes, and not to be used to destroy the rights of either, contrary to the principles of natural justice, in proceedings which from their nature make them opposite parties. It required their mutual consent to establish the relation from which the unity arises, and the same law of right demands them to be viewed in their

separate natural condition when either proceeds against the other to destroy this relation. It is the necessary effect of their being opposite parties in the same proceeding." See, also, *Derby v. Derby*, 14 Ill. App. 647; *Hews v. Hews* (Sup.) 16 N. Y. Supp. 119.

The principle declared in the above cases is recognized and restated in section 129 of the Civil Code of this state, as follows: "In actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife does not apply. After separation each may have a separate domicile, depending for proof upon actual residence and not upon legal presumptions." There is no reason for limiting this broad provision to cases where the wife is plaintiff. In the case of *In re Wickes' Estate* (Cal.) 60 Pac. 867, 49 L. R. A. 138, cited by appellant, there was no question as to the law of domicile, as between husband and wife, when they are hostile parties to a suit for divorce. There had been no divorce, nor action for divorce, in that case, and no question touching any phase of the subject of divorce was before the court. There a married woman had been living, at the time of her death, in a county different from the one in which her husband was living, and in which she formerly lived with him; and it was merely held that under those circumstances the jurisdiction of the administration of her estate was in the county where her husband resided. Our conclusion is that at the date of the decree of divorce the respondent was domiciled in California, and had been since she came here in April, 1894, and that therefore the Hawaiian statute under which the forfeiture of her personal property is claimed had no effect upon her or her property in California.

It is not necessary, therefore, to consider the point made by respondent that, even if her domicile continued to be that of her husband until the date of the decree, yet upon the entry of the decree her actual residence instantly became her legal residence, and that if the decree, the legal change of residence, and the taking effect of the statute were simultaneous, the court, under the rule that a forfeiture will always be defeated if possible, will give precedence to the change of domicile.

The court did not err in excluding evidence of the fact that appellant had satisfied a judgment recovered against it by the administrator of *Henri G. McGrew* on the policy here sued on, in an action to which the respondent here was not a party. The fact that appellant paid the policy to the wrong party would be no defense to an action brought by the right party.

Under the views which we have taken of the case, the other exceptions argued by appellant are of no importance. The judgment appealed from is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.; HENSHAW, J.

131 Cal. 455

HEDGE et al. v. WILLIAMS. (Sac. 724.)
(Supreme Court of California. March 2, 1901.)
In bank. On rehearing. Denied.
For opinion in department, see 63 Pac. 721.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. The conclusion that Fountaine was the servant of independent contractors is fully sustained by the record, but it does not dispose of the case. Respondents charged negligence in the selection of a person to do this work who was unacquainted with the properties of distillate and its gases. Their contention is that, in any operation involving the use of dangerous means or the handling of dangerous explosives, the employer of an independent contractor is bound to exercise care in the selection of a person who knows the danger and how to guard against it. They cite a number of authorities to sustain this proposition,—cases in which the employer has been held liable for injuries caused by blasting, etc., by incompetent contractors. In view of the evidence in this record, which shows that both Schultz and Fountaine were entirely ignorant of the danger involved in lowering a lighted lantern into a large tank recently filled with distillate, and still containing about a gallon of that substance in liquid form, and therefore necessarily surcharged with its vapors or gas, it is manifest that the question of negligence is not disposed of by merely holding that the work was being done by independent contractors, if it is true that the employer in such cases is liable for want of care in selecting a proper person to do the work. I think, therefore, that the cause should not be remanded for a new trial, leaving this question open. Its decision is necessarily involved in the ultimate determination of the controversy, and, in my opinion, is necessarily involved in the disposition of this appeal.

6 Cal. Unrep. 647

BRUNNINGS v. TOWNSEND. (S. F. 2,502.)
(Supreme Court of California. March 1, 1901.)
APPEAL—TIME IN WHICH TO FILE TRANSCRIPT—GROUND FOR DISMISSAL—DISCRETION.

1. An appeal was taken, and the appellant also brought a mandamus as to the same controversy; and the appellant was granted 40 days after the decision of the mandamus proceeding in which to prepare, serve, and file the printed transcript in the appeal case. The mandamus proceeding was in bank, and determined adversely to the appellant, but he presented no petition for a rehearing. *Held*, that the time to prepare and file the transcript commenced to run on the determination of the mandamus proceeding, instead of after the expiration of 30 days thereafter in which a rehearing could be granted.

2. Where a printed transcript is not filed within the time granted by the supreme court,

but such failure is due to a mistake as to when such time expired, and is filed shortly thereafter, and no material delay is occasioned, and no costs are caused to respondent, the appeal will not be dismissed therefor.

Department 2. Appeal from superior court, city and county of San Francisco; F. M. Angellotti, Judge.

Action by Mary Brunnings, an insane person, by her guardian, E. Myron Wolf, against Hulda R. Townsend. From a judgment in favor of plaintiff, defendant appeals. Motion to dismiss appeal denied.

Foshay Walker, for appellant. W. L. Pierce, for respondent.

BEATTY, C. J. In this case the superior court made an order for the payment of an attorney's fee out of the estate of the plaintiff. After payment by the guardian, the appellant, Townsend, made a motion to vacate the order allowing the attorney's fee, and requiring its repayment by the attorney, with interest. In due time the superior court made an order which expressly vacated the previous order allowing the attorney's fee, but was not explicit upon the point of repayment. The appellant, acting upon the theory that the effect of the second order was to deny that part of her motion relating to repayment, took this appeal from such denial. But apprehending that it might be held that there had been no decision upon that part of the motion, and in order to be safe, she at the same time commenced an original mandamus proceeding in this court to compel a decision. On the 7th of August, 1900, that case was decided here; the court in bank holding that the motion had been fully decided and that the legal effect of the order was to deny that part of the motion relating to repayment. *Townsend v. Angellotti*, 129 Cal. 466, 62 Pac. 59. The result of that decision was to vindicate the propriety and necessity of this appeal as the proper and only remedy of the appellant for any wrong she may have suffered in consequence of the action of the superior court. Pending the decision of the mandamus case, on the 6th day of June, 1900, this court made an order in the present case granting the appellant "until and including forty days after final decision of this court in the mandate proceeding * * * within which to prepare, serve, and file her printed transcript on appeal herein." The printed transcript herein was served on respondent September 26, 1900,—more than 40 days after our decision in the mandate proceeding was filed,—with a request that he stipulate its correctness. On October 1st respondent returned the transcript, declining to stipulate. After some delay, and after making numerous corrections, the county clerk certified the transcript; and on October 15th it, with the requisite number of copies similarly corrected, was filed in this court. In the meantime, on October 12th, respondent had served

notice of this motion to dismiss the appeal for failure to file the record within the time prescribed by the rule of court and the order extending time. The decision of this motion to dismiss requires a construction of the order extending time as to the date when the 40 days began to run. Respondent contends that the time began to run on the 8th of August, when our decision was filed, while appellant contends that it did not begin to run until the expiration of the 30 days during which the remittitur is ordinarily retained in appeal cases, and during which a rehearing may be ordered. We do not think appellant's construction of the order extending time can be upheld. In case of an appeal decided in department, where, in the absence of a special order for an earlier issuance of the remittitur, the judgment is not final until the lapse of 30 days, his argument would have some force; but this was an original proceeding, decided in bank, and in the sense of the order the decision was final when filed. Besides, there was no petition for a rehearing or motion for a new trial by this appellant in that case, and it was certain the respondent therein, the prevailing party, would not so move or petition; and we think the appellant should have construed the order as we do,—to give her 40 days, commencing with the filing of the decision on the 8th of August, within which to file her transcript.

But, although there has been a failure on the part of appellant to comply with the rule and orders of the court as to the time of filing her transcript, we are not inclined, in view of all the circumstances of the case, to deny her a hearing on the merits of her appeal. We are satisfied that her counsel has acted in good faith upon his mistaken construction of the order extending time. The transcript was actually served on respondent within 10 days after the time allowed by the order, strictly construed. No material delay will be occasioned in the hearing of the appeal, and respondent has been put to no costs or other inconvenience; and, since the enforcement of the rule is within our discretion, we shall deny the motion. It is so ordered.

We concur: TEMPLE, J.; HENSHAW, J.

(132 Cal. 37)

PEOPLE v. SEXTON. (Cr. 651.)¹

(Supreme Court of California. Feb. 26, 1901.)

EXTORTION—INDICTMENT—REVERSAL—PRELIMINARY EXAMINATION—EVIDENCE.

1. An indictment for extortion, charging threats by defendant to accuse another of a violation of the laws of the United States in sale of cigars, is not demurrable because charging a violation of a federal and not of a state statute.

2. Pen. Code, § 1008, providing for resubmission to the grand jury where a previous indictment has been held defective, and reciting that defendant "may be examined before a magis-

¹ Rehearing denied March 28, 1901.

trate," does not compel a previous preliminary examination.

3. A stenographer may testify as to evidence given by accused before the grand jury, where the evidence in no sense amounts to confession.

4. Under Code Civ. Proc. § 2047, a stenographer may read from her notes of the evidence in order to refresh her memory.

Department 1. Appeal from superior court, Eldorado county; M. P. Bennett, Judge.

John E. Sexton was convicted of extortion, and appeals. Affirmed.

F. Adams, Jas. W. Keyes, and Clarke Howard, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant has been convicted of the crime of extortion, and appeals to this court. By the indictment it was alleged that defendant obtained \$30 from one Greenwald under fear induced by threats upon the part of defendant to accuse him (Greenwald) of the "crime of having, in violation of the laws of the United States of America, sold and delivered cigars in a form other than in a new box not before used for the purposes of packing cigars therein." In substance, it may be said that defendant threatened to accuse Greenwald of violating the United States revenue laws, and, under fear induced by such threat, secured from Greenwald the aforesaid sum of \$30. It is insisted that the facts alleged do not constitute an offense against the laws of the state of California, but, upon the contrary, constitute a crime exclusively within the jurisdiction of the federal court. We find nothing in this contention. The defendant is charged with the crime of extortion,—an offense directly within the jurisdiction of the state courts. He is not charged with a violation of a federal statute, but with a violation of a state statute. He threatened to accuse a man with the commission of a crime. It makes no difference if that crime be one solely triable in the federal courts, for defendant is not being tried for that crime. If he had threatened to have Greenwald arrested upon the charge of counterfeiting the money of this country, and was charged with the crime of extortion for that reason, clearly his offense would be one against the laws of this state. It would be extortion as defined by the Penal Code of this state, and this court would not be concerned as to whether or not defendant's crime was also punishable under federal laws. The court finds no substantial defect in the indictment, and the demurrer thereto is not well taken.

A demurrer to a previous indictment laid against defendant was sustained, and the case referred to a second grand jury, which grand jury returned the indictment now before the court. It is insisted that defendant's second prosecution should have been based upon a preliminary examination, and an information filed thereon. There is no merit in this position. When section 1008 of the Penal Code says that after such order

of re-submission the defendant "may be examined before a magistrate," the word "may" takes its usual, ordinary meaning, and is not to be construed as "must."

The stenographer who was present and took the testimony before the grand jury was sworn as a witness, and testified as to certain evidence given by defendant before that body. This evidence in no sense amounted to a confession, and hence no question of duress or menace upon the part of defendant at the time he gave his testimony is involved herein. Under such circumstances, defendant's statements, whether made in the grand-jury room, at the trial, or extrajudicial, may be used against him, and we see no error in their admission here. The stenographer had the right to read from her notes of his evidence taken at the time, if she was so inclined. The statute contemplates that she may thus refresh her recollection. Section 2047, Code Civ. Proc.; *Burbank v. Dennis*, 101 Cal. 104, 35 Pac. 444.

We find nothing further in the record demanding consideration. While the evidence tending to support the verdict in this case is very weak, we are not prepared to say it is insufficient. Owing to the peculiar circumstances of the case, and the character of the evidence relied upon to support the verdict, we think the law would have been well satisfied with a judgment finding the defendant guilty of a misdemeanor. But that is a matter beyond review by this court. For the foregoing reasons, the judgment and orders are affirmed.

We concur: **VAN DYKE, J.; HARRISON, J.**

6 Cal. Unrep. 649

TAUSSIG et al. v. BODE & HASLETT.

(S. F. 1,572.)

(Supreme Court of California. March 1, 1901.)
WAREHOUSEMEN—LOSS BY LEAKAGE—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Barrels of spirits were in apparently good condition when received at defendant's warehouse for storage. Six weeks later defendant discovered they were leaking, and immediately notified plaintiff, who found excessive loss by leakage. The evidence showed that the leakage was caused by defective cooperage, but there was no evidence that the barrels were improperly piled, or that the warehouse was improperly constructed, or subject to improper drafts by winds or otherwise, or that it was defendant's duty to continuously inspect them, or that there was any such usage among warehousemen. *Held* insufficient to support a verdict that the loss was due to defendant's negligence.

In bank. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by Rudolph J. Taussig and others against Bode & Haslett, a corporation. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Reversed.

Geo. T. Wright, for appellant. Reinstein & Eisner, for respondents.

PER CURIAM. Action to recover damages for loss from 64 barrels of spirits deposited in defendant's warehouse. The case was tried before a jury. Plaintiffs recovered a verdict. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order denying the defendant's said motion. It is claimed by defendant, and we think correctly, that the evidence is insufficient to justify the verdict. The defendant is and was at all the times mentioned in the complaint engaged in the business of keeping a bonded warehouse. It is alleged in the complaint that about the 20th day of January, 1896, the defendant, for hire, received on storage from plaintiffs 64 barrels of spirits, for the purpose of safely storing and keeping, and returning the same upon demand; that "defendant did not well or safely or properly store, handle, keep, or return said barrels or packages, and said spirits contained therein, but, on the contrary, said defendant improperly, carelessly, and negligently stored, handled, and kept said barrels or packages and said spirits, and in consequence of said carelessness and negligence, and of said improper handling and storage of said barrels or packages, * * * a large quantity of said spirits was permitted to leak out of said barrels, and to become lost and destroyed."

The plaintiffs having alleged damage by reason of the negligence of defendant, the burden was upon them to prove such negligence affirmatively. Shear & R. Neg. (5th Ed.) § 57; Schouler, Bailm. & Carr. (3d Ed.) § 23; Jackson v. Railroad Co., 23 Cal. 269.

The evidence is substantially without conflict, and shows that on the 20th day of January, 1896, the spirits arrived at defendant's warehouse, and, upon notification being made to them, plaintiffs sent their agent to inspect the goods. After such inspection the agent reported to defendant that the lot was in proper condition to be piled, and the barrels were at once piled by defendant in the usual method followed by it. The method of handling the barrels and of piling them was shown to be proper. They were stored two tiers in height, and dunnage, or strips of wood, placed between the first bilge hoop and the second bilge hoop for the barrels to rest upon. On March 4, 1896, the defendant for the first time discovered that some of the barrels were leaking, and immediately telephoned to plaintiffs. Plaintiffs went to the defendant's warehouse, and upon receiving the 64 barrels found that 8 of them showed excessive loss by leakage. One barrel was practically empty, three or four leaking pretty badly, and the others leaking to some extent. The total amount of leakage over and above the ordinary allowance for evaporation was 181½ running gallons, or 225½ proof gallons, of the value of \$434.50. The plaintiffs immediately

sent Nyland and Herbert, two competent parties, to examine the barrels, to determine as to whether or not the cooperage was defective. The witness Nyland testified: "I took the head out of the barrels, and found they didn't have as much glue in as other barrels had. * * * I found four or five of the joints that were caulked with a kind of string, something like a lamp wick, the same as they use around distilleries and warehouses, and around places where there are leaky joints. * * * The glue in the barrel stuck in most places, in what I call the most defective places. From my knowledge as an expert, the fact that the gluing did not stick in some places would account to a great extent for the leakage from that barrel." The witness Herbert testified: "The packages I saw needed driving very much. They were shrunk. I could tell from my examination whether the wood from which they were made was or was not properly seasoned. It was not well seasoned. A barrel that was made of such wood as that would be dangerous, and likely to shrink and cause leakage. I did not make any examination of the inside of those barrels at that time, but about that time I examined the inside of four of them that had the heads out. I found that they were not properly glued." The evidence further shows that defendant, during the two years prior to the trial, had on storage in the same warehouse over 18,000 packages, and, except the leakage complained of in this action, there was no other leakage in excess of the government allowance, which is known as the "Carlisle" allowance.

The above evidence not only fails to show any act of negligence on the part of defendant, but shows that the leakage was the result of the defective cooperage of the barrels from which the leakage occurred. It is claimed that the fact that defendant did not inspect the barrels and endeavor to discover leakage is evidence of negligence. The evidence shows that the barrels were in apparently good condition when received by defendant and placed in its warehouse, and that they remained there only about six weeks. It further shows that in such case there should be ordinarily no leakage. There is no evidence tending to show that it was the duty of defendant to continuously watch and inspect the barrels, or that there is any such usage among warehousemen. The defendant was required to use ordinary care. It was required to use such care and diligence as prudent persons in the same class of business are wont to exercise towards such property or in the management of their own property under like circumstances.

It is further claimed that the two rows of barrels were piled chine to chine, with not sufficient space between them to admit any one going in between the rows to inspect the ends of the barrels. It does not appear that it is the usage or custom for

warehousemen to pile barrels with space sufficient to go between the rows. In fact, the witness Robin testified that he was familiar with the custom of storage of spirits in the bonded warehouses in San Francisco, and that in some of the warehouses they packed the barrels chine to chine. There is no evidence that the warehouse was improperly constructed, or subject to improper drafts by north winds or otherwise. The rule invoked by plaintiffs that a prima facie case is made out against a warehouseman who refuses to deliver property stored with him upon proof of demand and refusal to deliver, and that the burden is then shifted upon the warehouseman to account for the property, does not apply to the facts of this case. Here there was no refusal to deliver the identical barrels that had been stored. The plaintiffs received the barrels. The leakage had occurred while they were on storage. The question was as to whether the leakage was caused by defendant's want of ordinary care. We cannot say as a matter of law that it was want of ordinary care in defendant not to inspect the separate barrels for six weeks. It would seem to us that if the barrels were properly made, for the purposes for which they were used,—the holding of spirits,—and were in good condition on the 20th day of January, 1896, and properly stored in the warehouse, the presumption would be that they would not leak out their contents by the 4th of March, 1896. All the above facts are shown to be true by the record, except that the barrels were properly made. It appears that they were not properly made, and the defective cooperage must have been the cause of the leakage. It is unnecessary to discuss the other questions raised in the record. The judgment and order are reversed.

(132 Cal. 73)

NEWMAN v. OVERLAND PAC. RY. CO.
(S. F. 1,465).¹

(Supreme Court of California. Feb. 28, 1901.)
NEW TRIAL—GROUNDS—INSUFFICIENCY OF EVIDENCE—ORDER—PRESUMPTION—APPEAL.

1. Where one of the grounds of a motion for a new trial was the insufficiency of the evidence, an order granting the motion which does not exclude that as one of the grounds on which it was granted will be affirmed on appeal, since it will be assumed that it was one of the grounds.

2. The rule that if an order in general terms grants a new trial, and can be sustained on any of the grounds presented therefor, it will be assumed on appeal that it was made on such ground, is not affected by the fact that the court filed an opinion wherein it discussed one or more grounds presented, since the order entered is the only record of the court's actions.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Jerome Newman against the Overland Pacific Railway Company. From

an order granting a new trial, plaintiff appeals. Affirmed.

A. Morganthal, for appellant. Henley & Costello, for appellee.

HARRISON, J. The above cause was tried by the court without a jury, and, upon the findings of fact made by it, judgment was rendered in favor of the plaintiff. The defendant afterwards moved for and obtained an order granting a new trial. From this order the plaintiff has appealed.

In its notice of motion it designated, as the grounds upon which the motion would be made, "insufficiency of the evidence to justify the decision," and "errors of law occurring at the trial." Specifications of particulars wherein it was claimed that the evidence was insufficient, and of various errors of law upon which the defendant relied, were made in the statement of the case which was afterwards filed, and upon which the motion was heard. After hearing the motion the court made the following order: "In this action, the motion for a new trial herein having been heretofore submitted to the court for consideration and decision, and now the court having fully considered the same, it is ordered by the court that the said motion be, and the same is hereby, granted." In the minutes of the court the clerk added, immediately after the above order, the words, "Opinion filed." On the same day the following opinion was filed: "In view of the rule laid down in *Pauly v. Pauly*, 107 Cal. 18, 40 Pac. 29, and in *Golinsky v. Allison*, 114 Cal. 461, 46 Pac. 295, it would seem that Hunt had no power to bind the corporation defendant by executing the notes in question, and on the authority of those cases the motion for new trial is granted."

The rule is firmly established that the superior court is not only authorized, but that it is its duty, to grant a new trial whenever, in its opinion, the evidence upon which the former decision was made was insufficient to justify that decision. Its action in granting a new trial upon this ground is so far a matter within its discretion that, if there is any appreciable conflict in the evidence, it is not open to review in this court (*Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; *Domico v. Casassa*, 101 Cal. 411, 35 Pac. 1024; *Harrison v. Railway Co.*, 116 Cal. 156, 47 Pac. 1019); and when this is made one of the grounds of the motion, although other grounds are also presented, if the order does not by direct language exclude this from the grounds upon which the motion is granted, it will be assumed that it was one of the grounds for making the order, and the order will accordingly be affirmed. This rule rests upon the proposition that error is to be affirmatively shown, and will not be presumed; that if the order is in general terms, and can be sustained upon any of the grounds presented therefor, it will be assumed here in its support that it was made upon

¹ Rehearing denied March 29, 1901.

that ground. This rule of procedure is not affected by the fact that at the time of making the order the court files an opinion in support of its action, wherein it discusses one or more of the grounds presented. The order which is entered in the minutes is the only record of the court's actions, and is to be measured by its terms, and not by the reasons which the court may give for it. In the present case, the order, being that "the motion be, and the same is hereby, granted," is unqualified in its terms, and we cannot indulge in conjecture as to the grounds upon which it was made. If the court had intended to limit the grounds for making the order to the principles of law given in the cases cited in its opinion, it should have expressed this intention in its order. There is nothing in the terms of the order to indicate that it may not have been made upon the consideration that the evidence was insufficient under these cases to establish the authority of Hunt. One of the questions controverted at the trial was whether Hunt, at the time he incurred the liability for which he gave the notes set forth in the complaint, was acting in behalf of the defendant, or of another corporation of which he was president; and it may be that the court, upon a review of the entire evidence in reference thereto, was of the opinion that it had erred. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

132 Cal. 102

PEOPLE ex rel. ROBERTS v. RUSS et al.
(S. F. 1,840.)

(Supreme Court of California. March 2, 1901.)
NEW TRIAL—GROUNDS—FINDINGS—MATERIAL
FACTS—FAILURE TO MAKE.

Defendants, who owned land bordering on a river, certain tributaries of which, called sloughs, penetrated their land, erected dams across these sloughs for the purpose of reclaiming the land, thus preventing the water of the river from ebbing and flowing therein. In an action for the abatement of such dams as a nuisance, it was alleged that they materially affected the navigability of the river; and much evidence was offered on the issue. *Held* that, no finding of fact having been made on such issue, though demanded, a new trial will be granted, since, if the dams obstructed a navigable stream, they constituted a public nuisance.

In bank. Appeal from superior court, Humboldt county; E. W. Wilson, Judge.

Action by the people, on the relation of Robert W. Roberts, against W. N. Russ and another, for abatement of a public nuisance. From an order denying a new trial, plaintiff appeals. Reversed.

Atty. Gen. Fitzgerald, L. F. Puter, and C. M. Wheeler, for appellant. J. H. G. Weaver and W. F. Clybourne, for respondents.

GAROUTTE, J. Defendant was the owner of a certain tract of marsh and tide land under patents from the state of California.

Cal.Rep. 63-65 P.—23

A navigable stream, known as "Salt River," bordered this land upon one side. Certain tributaries of this river, designated as "sloughs," penetrated these lands of defendant in various directions. The water in these sloughs came from the ocean by way of Salt river, and rose and fell with the tides. For the purpose of reclaiming its lands, defendant erected dams across these sloughs, thus preventing the waters of Salt river from ebbing and flowing therein. The state, upon the relation of one Roberts, brought the present action to abate these dams, claiming them to be public nuisances. This claim is based upon two grounds: First, it is alleged that these various sloughs are navigable streams, and for that reason dams erected therein constitute a public nuisance; second, it is alleged that by the erection of these dams the tidal area of Salt river is decreased, that the amount of water ebbing and flowing therein is likewise decreased, and that the daily action of these tidal waters, flowing in the aforesaid sloughs and river, kept the channel of said river and of Eel river bar, its outlet, deep and navigable, and prevented the filling up of said river and Eel river bar with debris and sediment. It is then alleged that these dams, by reason of said causes, obstructed the free passage, use, and navigation in the customary manner of Salt river and Eel river bar. Issue was joined upon both of these theories of the complaint, and, after the testimony of many witnesses had been given, the court made its findings of fact. The pivotal questions in the case rest upon a few of these findings, and, the present appeal being from an order denying a motion for a new trial, the sufficiency of the evidence to support them is one of the matters directly confronting us. It is found as a fact (1) that these certain sloughs, tributaries of Salt river, are not navigable streams. It is also found (2) "that the reclamation of the said land and the damming of said Jacks slough and said sloughs A, B, and C, as hereinbefore found, lessens the tidal area of said Salt river and Eel river; but, other than the reclamation of such land and the damming of said sloughs, the said defendants have not, nor have either thereof, in any manner or at all, obstructed or interfered with the free or any passage or use of said Salt river or Eel river bar." It is also found (3) "that said defendants have not, nor have either thereof, unlawfully or otherwise, obstructed the free or other passage or use, in the customary or any manner, of a navigable river or stream or any public highway." Upon these findings of fact judgment was entered for defendant.

The court has had some trouble in arriving at a proper understanding of findings here numbered 2 and 3. Upon first inspection these two findings appear to be inconsistent, for the first declares that defendants have not obstructed or interfered with the

free use of Salt river or Eel river bar, other than by the erection of the aforesaid dams, while the other finding declares that defendants have not obstructed the free passage and use of any navigable river or stream. But upon careful consideration we are satisfied the inconsistency in these findings is not real. The court, having first found that these sloughs were not navigable streams in fact, then made the finding that the dams were not obstructions to navigable streams; and when it referred to "streams" it had in mind the aforesaid sloughs. This is made entirely plain when we read the carefully considered opinion of the trial court, found in the briefs; for it is there said: "It will be seen from the reading of this section that before the people are entitled to a judgment in their favor it must be shown, among other things, not only that the alleged obstruction was an unlawful one, but also that the sloughs in question were in fact navigable sloughs." And again the court says: "If the sloughs in question be nonnavigable, there is no doubt but that the people could not recover in the action." And again the court says: "The elimination from the case of this element makes it quite certain that the only matters, if any, of which the state could complain, would be the damming of the sloughs in question, and the title to the bed of which is seen and has been found to be in the defendants." It will thus be observed that the trial court held the pivotal point in the case to be the one of navigability or nonnavigability of the sloughs tributary to Salt river; yet this was only one of the pivotal points in the case. There was another equally important to the plaintiffs, namely, did these dams materially affect the navigability of Salt river and Eel river bar? It was so alleged in the complaint and was denied in the answer. It may be said that the evidence was sufficient to support the finding of fact as to the nonnavigable character of these sloughs. But we find no finding of fact in the record directly responsive to the allegation that these dams substantially interfered with the navigability of Salt river and Eel river bar. A great mass of evidence was offered upon that issue, and an express finding of fact upon it was demanded. Finding 2 indirectly declares that these dams had a deleterious effect upon Salt river and Eel river bar, but the character and extent of the effect are not found.

The trial court has intimated in its opinion that defendant, having the right to reclaim its lands, was entitled to carry out its system of reclamation, even though its acts resulted in serious detriment to navigable streams. We find it using this language: "The act of reclamation was therefore undoubtedly authorized by federal and state governments, and the owners of these lands cannot be held to have violated any law simply because the tidal areas of navigable streams were thus reduced, and by

reason thereof less water was thereby caused to flow in or out of such streams near at hand." If this intimation of the trial judge goes to the extent of declaring that the owners of swamp and tide lands have rights in the reclamation of those lands superior to and above the rights of the public to the use of navigable streams, the proposition cannot be maintained in law; for, if a tributary of a navigable stream be necessary to its navigability, then the owner of the land upon which this tributary is situated has no right to dam it, in order to effect the reclamation of his land. The swamp and overflowed act does not purport to give the owner any such right, even conceding such a power in the state; and the right of the public in the use of a stream as a public highway is paramount to any right which the owner of the land has to reclaim his land from overflow. There is no practical difference as to results, if the owner of the land should place his dam upon the navigable stream itself, and not upon its tributary. Neither do we see any difference in the legal aspect of the two cases. The mere fact that an owner has title absolute to the bed of the tributary, and not title absolute to the bed of the navigable stream, does not mark a substantial difference in the eyes of the law. A man may not create a public nuisance upon his own land. In the somewhat celebrated case of *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 Pac. 1152, it was held that the acts of defendant in casting debris into a tributary of the Sacramento river, 50 miles or more distant from the river, constituted a public nuisance, as obstructing the free use of the Sacramento river as a navigable stream. It is the result—the effect of the act of a party—that determines its character as a nuisance. The particular point of location where the act is done is not material in determining the character of the act. Directly diverting waters in material quantities from a navigable stream may be enjoined as a public nuisance. Neither may the waters of a navigable stream be diverted in substantial quantities by drawing from its tributaries. If those tributaries form the source of the stream, no private ownership in their beds justifies a damming of them to the result of an obstruction to navigation in the stream below.

In this case the same principle is directly presented. If the dams upon these sloughs result in the obstruction of Salt river as a navigable stream, they constitute a public nuisance. The fact that these sloughs carry tide waters which ebb and flow presents no different case from one where the tributaries so dammed flowed fresh water. It is the result of the act which characterizes the nuisance, and the methods and instruments used leading to that result are immaterial. In other words, no man may use his own property whereby that use creates

a public nuisance. While the state is pleased to see its swamp and overflowed lands reclaimed, and thereby become productive, yet the constitution of the state declares that no owner of tide lands of any harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to destroy or obstruct the free navigation of such water. Section 2, art. 15.

In view of what has been said, it is plainly apparent that an express finding of fact as to the effect of these dams, placed in the sloughs tributary to Salt river, upon the navigability of that river, is a material and vital question in the case, and for that reason a direct and specific finding should be made upon it. For the foregoing reasons, the order is reversed and the cause is remanded.

We concur: VAN DYKE, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

(132 Cal. 99)

In re LIVERMORE'S ESTATE. (S. F. 2,339.)¹
(Supreme Court of California. March 2, 1901.)

GUARDIAN AND WARD—DEATH OF WARD—
REAL ESTATE OF WARD—SUBSE-
QUENT SALE—VALIDITY.

A guardian after the death of his ward filed his account, and the probate court decreed that the ward's estate was indebted to the guardian. *Held*, that an order authorizing the guardian to sell the real estate of the ward for such debt was invalid, since on the death of the ward the authority of the guardian expired.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Application by the guardian of Delfina Livermore, deceased, for an order to sell deceased's real estate. Appeal from an order authorizing the sale. Reversed.

Metcalf & Metcalf (Johnson & Shaw, of counsel), for appellant. W. R. Davis and G. W. Langan, for respondent.

GAROUTTE, J. This appeal is taken from an order allowing a guardian to sell the real estate which formerly belonged to the ward. Prior to the application for the order the ward had died, being at the time over the age of majority. After her death the guardian filed her accounts, and upon the settlement thereof it was found and decreed by the court that the estate of the ward was indebted to her in a considerable sum of money. Thereupon this application for a sale of the real estate of the late ward was made by the guardian, and ordered granted by the court.

The foregoing proceeding is unique in this state, and the order made by the trial court cannot find support in the law. The title furnished to a purchaser at the sale by the deed of the guardian would not be worth a dollar. The proceedings here taken for the sale were taken under the Code provisions

pertaining to guardianship matters, and, as to a sale of real estate, those proceedings only contemplate a case where there is a living ward,—a living ward not only when the proceedings are inaugurated, but up to and including the moment the deed is made. When the guardian executes the deed, he executes it for and in the place and stead of his ward, and the moment that ward is dead his power to execute the deed is gone. He has no more power to execute a deed under these circumstances than would an attorney in fact after the death of his principal. It is unnecessary to consider here what a court of equity might do under the circumstances presented by the facts of this case, in aid of the probate jurisdiction of the superior court; for here the statutory procedure laid down in the Code in guardianship proceedings alone has been followed, and the sale is asked under that procedure. The guardian, as such, is attempting to make the sale, and the court is well assured it cannot be done. In *Alford v. Halbert*, 74 Tex. 354, 12 S. W. 76,—a case similar in principle to the one at bar,—the court said, in speaking of the efforts of a guardian to recover from the ward's estate the amount found due him by the probate court, "We think the only course left her was to administer in the proper court upon the estate of the deceased ward." For the foregoing reasons, the order is reversed and the cause remanded.

We concur: VAN DYKE, J.; HARRISON, J.

(132 Cal. 115)

STANDARD QUICKSILVER CO. v. HABISHAW et al. (S. F. 1,626.)

(Supreme Court of California. March 6, 1901.)

PUBLIC LANDS—MINING CLAIM—HOMESTEAD—LAND SUBJECT TO HOMESTEAD—DETERMINATION OF LAND DEPARTMENT—ADVERSE POSSESSION—PAYMENT OF TAXES—APPEAL.

1. A homestead title to land containing minerals is good, as against a subsequent mining claim located thereon, though Rev. St. U. S. § 2318, reserves all mineral lands from sale, as the action of the land department in issuing the patent was conclusive as to the character of the land, in the absence of fraud, mistake, or imposition.

2. The question whether a certain tract of land was properly allowed to be homesteaded cannot be raised by the defendant in an action by the homesteader against one who subsequently located a mining claim thereon, unless the patent is void.

3. Where a patent to a homesteader is absolutely void, as issued without authority, or to reserved land, or where prohibited by statute, such facts may be set up as a defense to an action by the homesteader to quiet title against a subsequent mining claim thereon.

4. A shaft had been sunk on certain lands which developed a streak of cinnabar ore. There was no testimony that it was worth working, but the mine might have been worth prospecting. It was afterwards abandoned, and the land was homesteaded. *Held* not sufficient, in an action by the homesteader to quiet title against a subsequent mining claim, to show a known mine at the time of the execution of

¹ Rehearing denied April 1, 1901.

the patent to the homesteader, which would render such patent void.

5. Under Code Civ. Proc. § 322, requiring a person claiming title by adverse possession to found his claim on an instrument of writing, a person claiming by adverse possession under notice of the location of a mining claim must have taken the possession thereunder, and the notice must purport to convey the property.

6. Under Code Civ. Proc. § 325, requiring a person claiming title to land by adverse possession to have paid the taxes thereon, the payment of taxes shown by the tax receipts to have been on property in a different section is insufficient, though the person in possession supposed that he was paying on the land in question.

7. The payment of taxes by one not in possession of real estate excludes the presumption that they were assessed to or paid by an adverse claimant in possession of the property.

8. A specification that the evidence is insufficient to support the findings of the trial court, and which states the findings objected to, and that they are not supported by the evidence, is sufficient, when the statement recites that it contains all the evidence in the case.

9. Where certain defendants propose amendments to the statement, and the record does not show that they were not adopted, the failure to give notice to them of the time and place of the settlement of the statement on motion for a new trial is harmless error.

Department 1. Appeal from superior court, Lake county; R. W. Crump, Judge.

Action to quiet title by the Standard Quicksilver Company, a corporation, against Annie Habishaw and others. From a judgment in favor of defendants, and from an order denying a motion for new trial, plaintiff appeals. Reversed.

A. H. Ricketts, for appellant. W. T. Baggett, Dan Jones, T. J. Sheridan, Denson & De Haven, and R. J. Hudson, for respondents.

PER CURIAM. Action to quiet title. The case was tried before the court, findings filed, and judgment entered for defendants. Plaintiff made a motion for a new trial, and this appeal is from the order denying the motion.

The complaint alleges that the plaintiff is the owner, and seised in fee and entitled to the possession, of lots numbered 1 and 2, the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of section 23, township 10 N., range 7 W., M. D. M., in Lake county; that defendants are in possession thereof and claim some interest therein adverse to plaintiff. The answer disclaims any interest in or to any portion of the premises except that part known as the "Bullion Quicksilver Mining Claim," which claim is described in the answer by metes and bounds. The answer denies that plaintiff is the owner or entitled to the possession of the said Bullion quicksilver mining claim, or any part thereof, and admits that defendants are in possession thereof under claim of title. The answer further alleges that the cause of action, as to the mining claim, is barred by the provisions of sections 318 and 319 of the Code of Civil Procedure, and that defendants have procured title thereto by continuous adverse possession for more than nine years prior to

the commencement of the action. The court found that the plaintiff was not at the time of the commencement of the action, nor at any other time, the owner or in the possession, or entitled to the possession, of the lands claimed in the answer, and that the defendants are, and were at all times named therein, the owners and entitled to the possession thereof. It further found that as to the lands claimed by defendants the plaintiff's cause of action was and is barred by the statute of limitations, and that defendants have procured title by adverse possession, as set forth in their answer. These findings are challenged as being without support in the evidence.

It appears from the evidence that on the 10th day of February, 1881, under the provisions of the act of congress of May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the United States issued to one Edward J. Bradford its patent for the lands described in the complaint; that the title to said premises passed by mesne conveyances from said Bradford to plaintiff. It is conceded by defendants that the record title apparently passed out of the government to the plaintiff, but it is claimed that the land described in the answer was and is mineral land, and chiefly valuable for its minerals, and that for this reason the land department had no right to dispose of it, and that no title passed out of the government by the patent. It is provided in the Revised Statutes of the United States that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." Rev. St. U. S. § 2318. There is no provision of law for disposing of lands chiefly valuable for minerals to homestead settlers. But the question as to whether the land was mining land, or valuable for minerals, within the meaning of the terms, was one of fact, and which it was the peculiar province of the land department of the United States to determine before the patent was issued. As said by this court in *Wormouth v. Gardner*, 112 Cal. 510, 44 Pac. 807: "It is an established rule of law that upon the issuance of a patent by the United States the decision of the land department upon all the facts necessary to the issuance of such patent is, in the absence of fraud, mistake, or imposition, conclusive." It was said in *Cowell v. Lammers* (C. C.) 21 Fed. 206: "There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent." The rule has been thoroughly discussed and adopted by this court in bank, after a full review of the authorities, in *Gale v. Best*, 78 Cal. 235, 20 Pac. 550, in which it is said: "The rule is well settled by numerous decisions of the supreme court of the United States that, when a law of congress provides

for the disposal and patenting of certain public lands upon the ascertainment of certain facts, the proper officers of the land department of the general government have jurisdiction to inquire into and determine those facts, that the issuance of a patent is an official declaration that such facts have been found in favor of the patentee, and that in such a case the patent is conclusive in a court of law, and cannot be attacked collaterally.

* * * Our opinion is that where a patent issues for public land, under a law which provides for its disposal as agricultural land, either to a railroad company or to pre-emption or homestead claimants, and there is no reservation in the law, except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural; and afterwards, in an action in a court of law, it is not competent to reopen the question of the character of the land. The opposite view would render the titles to a large region of California now rapidly filling up with agricultural settlers unstable, insecure, and almost worthless. It would affect, also, those holding through patents under the pre-emption and homestead laws, for mineral lands are exempted from the provisions of those laws. The theory of that view is that, if the land previously patented as agricultural can at any time be shown to be in fact mineral, then the title to it never passed from the United States, but it always remained a part of the public domain. * * * Such, in our opinion, is not the law." That case has been approved and followed in *Dreyfus v. Badger*, 108 Cal. 66, 41 Pac. 279, and in *Klauber v. Higgins*, 117 Cal. 458, 49 Pac. 466. Those cases follow the rule laid down by the supreme court of the United States in numerous cases, among which are *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039; *Davis v. Wiebold*, 139 U. S. 529, 11 Sup. Ct. 628, 35 L. Ed. 238; *Burfenning v. Railroad Co.*, 163 U. S. 323, 16 Sup. Ct. 1018, 41 L. Ed. 175.

In this case the defendants have not attempted to connect themselves with the paramount source of title. They had no rights that could in any way be affected at the time the patent was issued, and it was therefore no concern of theirs as to whether or not the land was properly disposed of by the agents of the United States. The rule is well established that in such case a patent cannot be collaterally attacked. *Doll v. Meador*, 16 Cal. 325; *Durfee v. Plaisted*, 38 Cal. 83; *Refining Co. v. Kemp*, 104 U. S. 647, 26 L. Ed. 875; *Sparks v. Pierce*, 115 U. S. 413, 6 Sup. Ct. 102, 29 L. Ed. 428. In the latter case the rule is thus stated: "To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee,—such as in law should have been respected by the officers of the land de-

partment, and, being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of erroneous rulings of those officers on the facts existing, it was denied to him." While the rule is that a patent of the United States cannot be collaterally impeached, there runs through the decisions a well-known exception,—that if the department had no jurisdiction to dispose of the lands (that is, if a patent be absolutely void upon its face, or were issued without authority, or were prohibited by statute, or if the lands had been reserved from sale or dedicated to special purposes) the patent may be collaterally impeached; that is, it may be shown by any one to be void. It is claimed by defendants that the lands described in the patent in this case contained "known mines," and that the patent was, therefore, as to such mines, void, so that they can attack it collaterally. We have examined the cases cited, and do not think they support the contention of defendants. Among the principal cases relied upon is *Burfenning v. Railway Co.*, 163 U. S. 322, 16 Sup. Ct. 1018, 41 L. Ed. 175. That case turned upon the point that the lands patented under the homestead laws to claimant were within the limits of the incorporated city of Minneapolis, and, as the patent to such lands was expressly forbidden by statute, the patent was void. The decision is not in conflict with the rule we have stated. On the contrary, the court says: "It has undoubtedly been affirmed over and over again that, in the administration of the public-land system of the United States, questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, mineral land or not, presents a question of fact not resting on record, dependent upon oral testimony; and it cannot be doubted that the decision of the land department one way or the other in reference to these questions is conclusive, and not open to re-litigation in the courts, except in those cases of fraud which permit any determination to be re-examined." In *Reynolds v. Mining Co.*, 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774, plaintiff relied upon a patent for a placer mine; and the contested vein was within the lines of its superficial area, extended perpendicularly. The statute on which the patent was issued declared that it should not confer any right to veins known to exist within it at the time the grant was made, unless it was included in the application for a patent. The opinion proceeded on the theory that the patentees obtained the patent with the knowledge on their part of the lode or vein, and with the intention of procuring title thereto in violation of the statute. The other cases cited are easily distinguished from the one at bar. Conceding the law to

be that, if an applicant for a patent under the homestead laws knew at the date of his application and patent of valuable minerals in the land, his patent would convey no title to such mineral lands, the evidence in this case does not show such facts. The rule is that the mine must not only be known, but known to be valuable, at the date of the patent. *Richards v. Dower*, 81 Cal. 51, 22 Pac. 304; *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423. It is said in *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 327, 8 Sup. Ct. 131, 31 L. Ed. 182, that no lands have been held to be "known mines" unless at the time the rights of the purchaser accrued there was upon the ground an actual and opened mine, which had been worked or was capable of being worked; and in the opinion it is said: "We hold, therefore, that, to constitute the exemption contemplated by the pre-emption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine under the conditions existing at the time than for merely agricultural purposes." The court, in finding 4, found the facts to be such as to bring this case within the rule of the above cases, except it is not found that the patentee of the lands knew of any such mines. The finding is that at the time of the issuance of the patent, and prior thereto, the lands "were known to be valuable mineral lands, and were known to be valuable for mining purposes, and were known to contain valuable cinnabar ledges, and were known to be more valuable for mining than for agricultural purposes, and that upon said land there existed known mines of value, and were profitably held, possessed, worked, and mined as such." This finding is not supported by the evidence. The appellant has pointed out all the particular portions of the evidence bearing upon the finding, and it is not necessary to examine it in detail here. It shows that from 1874 to 1881 a prospect hole or shaft was sunk to a depth of about 70 feet,—an average of about 10 feet a year; that an open cut and tunnel about 100 feet in length, with its end or face some 15 or 10 feet in depth from the surface, were run, and a small cut, 10 or 15 feet in length and about 5 or 6 feet wide, was run, and a small shaft or hole was sunk to a depth of about 10 feet to the end of this cut; that this work was done as annual assessment work, and was easily done and at no great expense; that the 70-foot shaft developed a streak of cinnabar ore varying in width, according to the statement of different witnesses, from 2 inches to 3 feet wide, of an average value of $2\frac{1}{2}$ to 5 per cent. The evidence entirely fails to show that the mine was valuable or that it would pay for working it. There were some two or three of these mining claims,—one called the "Kingston," and one the "Cliff Arch," and one the "Great Eastern." It does not appear that

these defendants, or either of them, were in any way connected with said attempted mining; neither does it appear that the parties then connected with the mining operations continued them, or conveyed their interests in any way to defendants. We may presume that they abandoned operations. Defendants' counsel have attempted to point out evidence to sustain the finding, but it is not sufficient. The witness Dunham testified: "I believe that it would be profitable to mine. I can go that far, and that is as far as I can go, because I cannot go inside of the mountain, any more than anybody else." The witness Nickerson testified that when he knew the mine or shaft "there was mineral in sight and in the croppings. It was in the croppings, but there was no body of ore exposed,—no large body." This witness further said that he had a conversation with Bradford, the patentee, after he had entered the land, and that in the conversation Bradford said "he considered the land more valuable for agricultural than mineral; * * * that the company had not developed any large body of mineral." The witness Smith testified "that he saw quicksilver in the shaft. It was a stratum of ore a foot or two wide, which could be traced from the top to the bottom of the shaft. They were taking out ore and throwing it on the dump there, and waste rock." The witness Rocca testified: "I saw cinnabar on the northwest corner of the shaft. * * * There was only that streak, you know; and that streak would vary from two or three inches to a foot from the top down to the bottom, as far as I went. * * * For mining, I should think it worth prospecting, and I think it is worth something."

We have thus noticed all the evidence pointed out by defendants in support of their claim of "known mines." No evidence was adduced showing the production of any cinnabar of commercial value in any amount sufficient to make the mines valuable, or showing the product per ton. It is not enough that shafts were sunk in the ground, and signs of mineral found. Neither is it sufficient that there may have been some indications by outcroppings on the surface. The mineral must be clearly found, and be in such quantities and of such value as to show that the land was valuable for mining purposes at the date of the patent. *Richards v. Dower*, 81 Cal. 54, 22 Pac. 204; *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 404, 12 Sup. Ct. 543, 36 L. Ed. 201. In the language of Judge Field in the *Eureka Case*, 4 Sawy. 320, Fed. Cas. No. 4,548: "A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences."

It is claimed by defendants that they have procured title to the lands described in their

answer by adverse possession; and the court so found, but the evidence does not sustain the finding. It is not necessary to decide as to whether or not a notice of location of a mine made by defendants as trespassers upon the lands of plaintiff, and filed for record by them in the recorder's office, is a written instrument, within the meaning of Code Civ. Proc. § 322. The language of the Code is, "entered into the possession of the property under claim of title * * * founding such claim upon a written instrument, as being a conveyance of the property in question." To comply with the above provision, the defendants must have entered into possession under the "notice of location," and the notice must have purported, at least, to be a conveyance of the property. But the claim of adverse possession must fail, for the reason that defendants have not proven that they, or their predecessors and grantors, have paid all the taxes which have been levied or assessed upon the land. *Id.* § 325. The complaint describes the lands as being in section 23, township 10 N., range 7 W. The assessments and receipts offered in evidence by defendants are to the "Bullion Quicksilver Mining Co.," and of the "Bullion Quicksilver Mining Claim. Sec. 22, Twp. 10 N., R. 7 W." The receipts do not describe any land, and they clearly show that the payments and assessments were on a claim in section 22. It is not sufficient that defendants thought or supposed they were paying taxes on lands in section 23. *Reynolds v. Williard*, 80 Cal. 608, 22 Pac. 262. The evidence further shows that the lands described in the complaint were assessed to plaintiff by correct description, and the taxes paid, for each of the years during the time defendants claim to have been in adverse possession. *Carpenter v. Lewis*, 119 Cal. 18, 50 Pac. 925. While the payment of the taxes by the plaintiff added nothing to its title, it excludes any presumption that the taxes were assessed to or paid by defendants. *Baldwin v. Temple*, 101 Cal. 402, 35 Pac. 1008.

The specifications as to the insufficiency of the evidence to sustain the findings were sufficient. The particular findings objected to are pointed out, and attention is called by the plaintiff to its claim that neither of these findings is supported by the evidence. The purpose of the statute in requiring such specifications is, as has been frequently said, that the opposing party may propose amendments to the statement, and thus cause it to contain all the evidence in support of the decision which he may deem pertinent or relevant thereto; but where, as in the present case, the statement recites that it "contains all the testimony which was offered by either party and admitted in the case," the respondent has no ground for saying that, if the particulars had been more specifically pointed out, he might have caused it to appear that there was additional evidence in support of the decision. The object of requiring any

specification is to give notice to the opposing party of the grounds relied on for setting aside the decision; but if, under the notice which is given, the respondent has accomplished all which could have been accomplished under any notice, he is not in a position to object to any defect in the notice.

The claim that defendants Hudson and Parsons had no notice of the time and place of settlement of the statement on motion for a new trial is not without merit. They proposed amendments to the proposed statement, and the record fails to show that the said amendments were not all adopted. If so, no harm could have resulted from want of notice. It further appears that they had notice, for they appeared and filed objections to the statement being settled and signed by the judge, for the reason that plaintiff had not used diligence in "presenting, obtaining the settlement of, engrossing, or filing the said statement." These objections were heard and argued in court on the 11th day of May, 1898, and the statement was not settled and allowed until the 24th of May, 1898. If defendants had any valid objections to the settlement of the statement, they should have presented them all at the same time. The order is reversed.

132 Cal. 75

GRADE et al. v. MARIPOSA COUNTY.
(S. F. 2,413.)

(Supreme Court of California. Feb. 28, 1901.)
TAXATION—NEGLECT TO FILE STATEMENT—
ARBITRARY ASSESSMENT.

In an action to recover taxes paid by plaintiff under protest, findings that plaintiff forwarded its statement of taxes to the assessor by mail, properly addressed, but that the assessor never received the statement so forwarded, show that plaintiff "neglected" to furnish to the assessor the statement of property subject to taxation, under Pol. Code, § 3629, providing for an arbitrary assessment where taxpayer "neglects or refuses" to furnish such statement; the prima facie presumption that a letter mailed was received, under Code Civ. Proc. § 1963, being overcome by direct evidence of the assessor that he never received it.

Department 1. Appeal from superior court, Mariposa county; John M. Corcoran, Judge.

Action by W. A. Grade and others against the county of Mariposa. Judgment for plaintiffs, and defendant appeals. Reversed.

J. J. Trabucco, Dist. Atty., for appellants.
J. B. Curtin, for respondents.

GAROUTTE, J. This action was brought to recover taxes paid by plaintiffs under protest. The county of Mariposa appeals from the judgment rendered. These taxes were paid upon an arbitrary assessment made by the assessor, and it is conceded by plaintiffs that the only point involved in this appeal rests upon the fact as to whether or not they neglected or refused to furnish the assessor the statement of real and personal property provided for by section 3629, Pol. Code. The

findings of fact made by the trial court upon the point involved are directly in line with the evidence, and are to the effect that plaintiffs, by their attorney, who lived in an adjoining county, forwarded the statement to the assessor of Mariposa county by United States mail, properly addressed, with postage paid, but that said assessor never received the statement so forwarded. Upon these facts we are clear that plaintiffs neglected to furnish to the assessor the statement required by law. While section 1963 of the Code of Civil Procedure declares the presumption to be "that a letter duly directed and mailed was received in the regular course of the mail," still that presumption is one of fact, and not conclusive, but disputable. When the statement was forwarded, as indicated by the finding, a prima facie case of compliance with the law was made out. But it was only prima facie, and was completely overthrown by the evidence of the assessor to the effect that he never received it. Plaintiffs' acts, coupled with the presumption of fact declared by the law, in the absence of other evidence, would justify a finding in their favor. But here the court cannot indulge in the presumption that the statement was received, for the finding is directly to the contrary. If the assessor did not receive the statement, then plaintiffs neglected to furnish it. It necessarily follows from these views that plaintiffs neglected to furnish the statement demanded by the statute, and for that reason it was the duty of the assessor, under the law, to enter an arbitrary assessment against them. For the foregoing reasons, the judgment is reversed, and the cause remanded.

We concur: VAN DYKE, J.; HARRISON, J.

(132 Cal. 81)

SISKIYOU COUNTY BANK v. HOYT et al.
(Sac. 865.)¹

(Supreme Court of California. Feb. 28, 1901.)
ACTIONS—FAILURE TO PROSECUTE—DISMISSAL—APPEARANCE—SUFFICIENCY—ORAL STATEMENTS.

1. Code Civ. Proc. § 581, subd. 7, as amended in 1897, declares that an action shall be dismissed unless the summons be served within three years from the commencement of the action, but that all actions may be prosecuted if appearance be made by defendant within three years, the same as if summons had been served; and section 1014 declares that a defendant appears when he answers, demurs, or gives written notice of his appearance. *Held*, that where a summons was not served within three years from the commencement of the action, but before the expiration of the three years defendant had stated plaintiff need not serve any papers, as it could take judgment in the case at any time, the action was properly dismissed; the statements of defendant not amounting to an appearance, nor to a power of attorney to confess judgment.

2. Code Civ. Proc. § 581, subd. 7, as amended in 1897, declares that an action shall be dismissed unless the summons be served within three years from the commencement of the ac-

tion, but that an appearance within three years shall waive the failure to serve the summons. *Held*, that where, in a suit to foreclose a mortgage, there was no service of summons nor appearance by the mortgagor for three years, the fact that a junior mortgagee appeared by demurring to the complaint within the three years did not prevent the dismissal of the action; the mortgagee not being prejudiced by the dismissal of the action as to said defendant, and not complaining.

Commissioners' decision. Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Suit by the Siskiyou County Bank against Perry Hoyt and others. From a judgment dismissing the action, and from an order denying plaintiff's motion to vacate the judgment of dismissal, plaintiff appeals. Affirmed.

Gillis & Tapscott, for appellant. Warren & Taylor and Wm. B. Haskell, for respondents.

HAYNES, C. Appeal from an order and judgment dismissing the action, and from an order denying appellant's motion to vacate the judgment of dismissal. Appellant, the Siskiyou County Bank, commenced an action against Perry Hoyt and Elizabeth Hoyt on October 5, 1895, to foreclose a mortgage executed by them to the bank on October 6, 1891. A summons was issued one day before the expiration of a year after the filing of the complaint, but the summons not having been served within three years after the commencement of the action, and no appearance having been made, Elizabeth Hoyt, one of the defendants, moved the court to dismiss the action. After the notice of motion to dismiss was served, but before it was heard, the summons was served on respondent, the service being made on April 26, 1900. The motion was heard April 28th, and judgment dismissing the action was entered May 4, 1900. Appellant filed a very long affidavit in opposition to the motion, showing the origin of the debt, and most unusual indulgence to respondents; that the delay and failure to serve the summons was at their earnest solicitation; that before the expiration of the time limited by the statute for the service of the summons the propriety of serving it was suggested by the bank, but at the solicitation of respondents it was not served, "as they then stated that the bank need not serve any further papers upon them; that it could at any time take judgment in said case."

Subdivision 7, § 581, Code Civ. Proc., as amended in 1897, is as follows: "(7) And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year; and all such actions shall be in like manner dismissed, un-

¹ Rehearing denied March 29, 1901.

less the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted if appearance has been made by the defendant or defendants within said three years, in the same manner as if summons had been issued and served." St. 1897, p. 98. This subdivision, as originally enacted in 1889, was substantially the same. St. 1889, p. 398.

The verbal authority to enter judgment, above recited, was not an appearance in the action, nor a power of attorney to confess judgment. It could not take the place of an answer upon the judgment roll, so as to dispense with the summons and return as part thereof. Section 406, Code Civ. Proc., provides that, "at any time within the year after complaint is filed, the defendant may, in writing, or by appearing and answering, waive the issuing of summons"; and section 1014 provides that "a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." *Cooper v. Gordon*, 125 Cal. 296, 57 Pac. 1006, cited by appellant, does not sustain its contention. In that case there were repeated stipulations in writing that the plaintiff could have judgment entered at any time for a sum stated. This was held to be an appearance to the action, and, when filed, became an answer admitting the cause of action alleged. It should also be noticed that in that case the first stipulation was made the next day after suit was commenced. In *Modoc Land & Live-Stock Co. v. Superior Court of Modoc Co.*, 128 Cal. 255, 60 Pac. 848, the summons was issued in due time, and served by the sheriff within the time limited by section 581, Code Civ. Proc., and with his return indorsed thereon was delivered to plaintiff's counsel before the expiration of three years after the commencement of the action, but it was not delivered to the clerk or filed until a few days after the expiration of the time limited by the statute for the service and return. It was held that the court below had no jurisdiction to proceed with the cause, and a peremptory writ of prohibition was granted. In *White v. Superior Court*, 126 Cal. 245, 58 Pac. 450, the superior court was prohibited from issuing an alias summons. This case also furnishes a reply to appellant's contention that respondents are estopped by their promises and urgent solicitations from asking a dismissal of the action. "From a moral point of view," the court said, speaking of petitioner's conduct, "it is wholly indefensible. * * * But it remains true that he is only claiming what the law commands, and his case is no worse than that of any debtor who pleads the statute of limitations against a just demand." The action of the court in this case in dismissal of the action is also conclusively sustained by *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 Pac. 470, and *Peck v. Agnew*, 126 Cal.

607, 59 Pac. 125. It appears from the record that before the dismissal of the action one of the several other defendants, namely, the Bank of Sonoma County, filed a demurrer to the complaint, and thereby entered an appearance. The only allegation of the complaint as to the Bank of Sonoma County is that it has or claims some interest in the mortgaged premises, but that it is subsequent and inferior to plaintiff's lien. While an action ought not to be dismissed as against a defendant who has appeared, and would be prejudiced by a dismissal (*Peck v. Agnew*, 126 Cal. 607, 59 Pac. 125), appellant is not prejudiced by the dismissal of the action as to said defendant, and it is not complaining. The judgment and order appealed from should be affirmed.

We concur: CHIPMAN, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(132 Cal. 131)

CORTELYOU et al. v. JONES et al.
(L. A. 677.)

(Supreme Court of California. March 6, 1901.)
MORTGAGES—ASSIGNMENT—SUIT BY ASSIGNEE
—OBJECTION—WAIVER—ATTORNEY'S FEES.

1. A mortgagee assigned the notes and mortgage, and authorized the assignees to collect the mortgage debt, and provided that they should hold the proceeds in trust. Held, that it was not necessary for the assignees to set up in their complaint to foreclose the mortgage the facts creating the trust in order to sue in their own names.

2. Where defendant went to trial without objecting that the complaint did not present the issue of plaintiff's right to recover attorney's fees, the complaint, though inartificially drawn in that respect, must be considered sufficient, after verdict, to present the issue.

3. Where a mortgage stipulated that on default the mortgagee might foreclose, and include in said foreclosure a reasonable counsel fee, it was error to include the amount recovered as attorney's fees in the mortgage lien, since as to them plaintiff was only entitled to a personal judgment.

In bank. Reversed.

For opinion in department, see 61 Pac. 918.

HARRISON, J. Action for the foreclosure of a mortgage. The appellants executed a mortgage upon certain real property to secure the payment of certain promissory notes, which were set forth therein, and thereafter the mortgagee executed to the plaintiffs herein an instrument by which he assigned to them "those certain mortgages and credits more particularly described as follows, to wit: * * * Also a mortgage from O. H. Jones, dated October 24, 1892, there being now due thereunder about \$630 and interest from that date till the present time at the rate of ten per cent. per annum; also all other moneys now due to me from any source whatever,—said mortgages and debts or cred-

its to be collected, and the proceeds to be held in trust" (naming the purposes of the trust, and giving directions to the trustees). Judgment was rendered herein in favor of the plaintiffs for the amount due upon the promissory note, and a foreclosure and sale of the mortgaged lands. The defendants have appealed therefrom and from an order denying their motion for a new trial.

The appellants urge in support of their appeal that as, under the assignment, the plaintiffs are made the trustees of an express trust, they could bring the action only in their representative capacity, and should have set up in their complaint the facts creating the trust, and were not entitled to a judgment in favor of themselves individually. Their contention in this respect cannot, however, be sustained. By the terms of the assignment the mortgages and debts were transferred to the plaintiffs, "to be collected, and the proceeds to be held in trust." The legal title thereto was, therefore, vested in the plaintiffs, and the beneficiaries under the trust had no interest except in the proceeds of the collection. A payment by the defendants to the plaintiffs without suit would have exonerated them from all liability to the beneficiaries, and they will be equally exonerated by a satisfaction of the judgment herein. "A trustee to whom a chose in action has been transferred for collection is, in contemplation of law, so far the owner that he may sue on it in his own name." *Toby v. Railroad Co.*, 98 Cal. 497, 33 Pac. 550. Where the legal title to the property is vested in the trustee, it is unnecessary to state in his complaint the facts by which he acquired it. *Dambmann v. White*, 48 Cal. 439; *Giselman v. Starr*, 106 Cal. 651, 40 Pac. 8; *Bliss*, Code Pl. § 262; *Pom. Code Rem.* § 132. The evidence was sufficient to justify the finding of the court that the note and mortgage had been assigned to the plaintiffs, and that the payment of the note was secured by the mortgage.

The court erred, however, in holding that the payment of the attorney's fees allowed for the foreclosure is secured by the mortgage. The clause in the mortgage relating thereto is identical with that presented in *Klokke v. Escaiblier*, 124 Cal. 297, 56 Pac. 1113, wherein it was held that under this clause the mortgage secured only the payments therein specified, and did not extend to the attorney's fees. The complaint, as amended, sufficiently presented an issue upon the right of the plaintiff to recover attorney's fees, and the amount thereof, although it is somewhat inartificial, and, if demurred to, might have been subjected to amendment; but, as the parties have tried the cause without any objection of this nature, it must be held, "after verdict," that the issue was sufficiently presented. The court should, however, have limited their recovery to a personal judgment against the appellants. For this error the cause is remanded to the superior

court, with directions to modify its judgment by excluding from the amount for the payment of which the mortgaged lands shall be sold the sum allowed for attorney's fees, and including that sum in the amount for which a personal judgment shall be entered against the defendants, and, as so modified, the judgment and the order denying a new trial will stand affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.; HENSHAW, J.

(132 Cal. 125)

AYRES v. BURR, Sheriff, et al. (L. A. 788.)¹
(Supreme Court of California. March 6, 1901.)
SHERIFFS AND CONSTABLES—LIABILITY FOR FAILURE TO EXECUTE WRIT OF ATTACHMENT—BOND TO FORMER SHERIFF—JUSTIFICATION—STATUTES.

In 1894 plaintiff secured an attachment, and delivered it to the sheriff to levy, but the sheriff accepted a bond from the debtor, and did not make the levy. In 1897, while the action was pending, after an appeal and reversal, wherein an appeal bond had been filed, plaintiff secured another writ, and delivered it to the defendant, who was then the sheriff, but defendant refused to make the levy. The debtor became insolvent before rendition of judgment, and plaintiff was unable to collect the entire amount of his claim on the attachment bond given to the former sheriff. Code Civ. Proc. § 671, provides that a judgment or lien by attachment ceases on the execution of an appeal bond on appeal from the judgment. *Held*, in an action for failure to levy the second writ, that the debtor's bond given to prevent levy under the first writ was not superseded or destroyed by the execution of the appeal bond, and hence the defendant was justified in refusing to make the levy, under Code Civ. Proc. § 540, requiring the sheriff to attach property under a writ unless the debtor gave him security in an amount equal to the value of the property to be attached.

Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by E. S. Ayers against John Burr, sheriff, and others. From a judgment in favor of the plaintiff, defendants appeal. Reversed.

D. P. Hatch, for appellants. J. L. Murphy (N. C. Burch, of counsel), for appellee.

PER CURIAM. Action by plaintiff against the sheriff of Los Angeles county and his official bondsmen for neglect of duty in refusing to serve a writ of attachment in an action by the present plaintiff against one Thomas. Plaintiff had judgment, from which defendants appeal.

In the action (*Ayres v. Thomas*, 47 Pac. 1013), which was commenced October 24, 1894, a writ of attachment was duly issued by the clerk on proper affidavit. To prevent the service of the writ, Thomas gave a bond on October 25, 1894, with two sureties, as provided in section 540, Code Civ. Proc. This bond was in the usual form, reciting the pendency of the action, issuance of a writ of attachment, etc., and provided that the undersigned, "in consideration of the premises,

¹ Rehearing denied April 4, 1901.

and to prevent the levy of said attachment, do hereby jointly and severally undertake * * * and promise to the effect that, if the plaintiff shall recover judgment in said action, we will pay to the plaintiff upon demand the amount of said judgment," etc.; and the court found that the sheriff "accepted said undertaking, and returned said writ of attachment unserved, except by the taking of said undertaking, and that he proceeded no further." It was further found that thereafter Ayres obtained judgment against Thomas, who appealed to this court, giving the statutory stay bond; the judgment was reversed here, and the cause remanded for a new trial; that thereafter, and while the action was pending in the lower court, and before its determination, to wit, on September 7, 1897, plaintiff moved the court to require defendant Thomas to give a new undertaking in place of the former bond given to prevent an attachment, on the ground that the sureties on the former bond were insufficient, and on September 14, 1897, the court denied the motion "upon the ground that there was no provision of law authorizing the giving of new sureties or a new bond in such a case"; that on September 15, 1897, plaintiff filed an affidavit for an attachment and an undertaking with the clerk of the court in due form, who thereupon "duly and regularly issued a writ of attachment in said cause, * * * and delivered the same to the defendant John Burr," the then sheriff, "and that said sheriff was directed by said writ to attach and safely keep all the property of said Thomas"; that defendant Thomas then had sufficient property on which levy could have been made; "that the sheriff refused to serve the writ, and returned the same unserved, * * * and in said return assigned as the reason for his failure to attach and safely keep the property of said defendant that said defendant had given to John C. Cline, his predecessor in the office of the sheriff of said county, an undertaking to prevent attachment." The court also found that on September 15, 1897, and prior thereto, one of the sureties on said last-mentioned bond had become insolvent, and the other surety had but \$1,000, which could be reached by execution, but said sureties were solvent when the bond was given; that plaintiff obtained judgment against Thomas November 5, 1897, from which no appeal was taken; and that at that time Thomas had become insolvent, and plaintiff was unable to enforce his judgment against either Thomas or the said sureties except as to the \$1,000 enforceable against one of said sureties, and except as to \$50 collected from Thomas. As conclusions of law the court found that the writ of attachment delivered to the sheriff September 15, 1897, was good and valid, and that it was the duty of the sheriff, Burr, to serve the same, and that he and his bondsmen are liable for the failure of Sheriff Burr to execute the said writ.

There is a finding, numbered 13, to the effect that when the second writ was placed in the hands of the sheriff he did not know of the insolvency of the sureties on the bond given to prevent attachment, and also that no application was ever made to the court for the second writ, issued September 15. This finding was made and filed June 2, 1899, and the findings in the case were signed by the court, and judgment entered thereon May 27, 1899. This finding cannot be considered. *Los Angeles Co. v. Lankershim*, 100 Cal. 525, 35 Pac. 153, 556. The stipulation is not sufficient to warrant our holding that both parties agreed that it should be treated as part of the findings in the case. The stipulation merely amounts to an agreement that the court made the finding, and that it forms part of the record. We have found no statutory provision expressly governing the case in hand. Nowhere is there any express provision as to the effect of the appeal and the giving of a stay bond on the bond given to prevent the service of the attachment. Section 671, Code Civ. Proc., speaking of the lien of the judgment, provides, among other things: "The lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this Code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases." Section 942, Code Civ. Proc., provides for the giving of a stay bond, the condition of which is that, "if the judgment * * * be affirmed, * * * the appellant will pay the amount directed to be paid by the judgment," etc. Appellants' contention is that the stay bond had no effect whatever on the bond given to prevent attachment; that this latter bond is an express contract to pay any judgment that may be recovered by Ayres against Thomas, provided Ayres will not take Thomas' property under writ of attachment; that the judgment referred to in the section is the final judgment in the case, regardless of any appeal that may be taken in the course of the litigation. As to section 671, appellants' position is that there never was any lien by attachment. A bond was given to prevent attachment, and this, of course, means that the bond was given before any levy was made, and therefore there was no lien, and the section does not apply. It is urged that the just and consistent position is that the bond given to prevent attachment is not destroyed by the appeal; that the statute (section 671) cannot be extended beyond its terms, which do not include the bond in question.

Appellants' second proposition is that the sheriff had a right to refuse to execute the second writ, because in his office was record evidence of the fact that a bond had been given, as required by statute, to prevent an attachment, and that, so far as he knew, the bond was good, and in full force. Respond-

ent contends that it is immaterial whether or not the stay bond on appeal had the effect to destroy the bond given to prevent attachment. His position is that the second writ, as it came to the sheriff, was regular on its face; that plaintiff had a right to have it issue, and, if not, the sheriff could not question plaintiff's right to it; that, admitting there was in his office the bond given to his predecessor, it was the latter's personal property, and did not protect his successor in office. Respondent relies on section 4187, Pol. Code, which provides as follows: "A sheriff or other ministerial officer is justified in the execution of, and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceeding upon which they were issued." We think that the bond given to prevent the attachment was not destroyed or affected by the appeal. This bond was not given alone as personal protection to the sheriff, but was given for the benefit of the parties to the action,—as to the defendant Thomas, to protect his property from attachment; and as to the plaintiff as security for the payment of the judgment that might be finally rendered in the case. Pending the appeal it could not be enforced; but we cannot see that, because the statute provides that execution is stayed on the judgment, and that certain mentioned liens existing at the time the appeal is taken cease, it must follow that the bond given to prevent attachment should be disturbed. Certainly, the statute does not so provide, and we cannot add to its terms. It is true that the sheriff is required to serve all writs and other process coming to him which are regular on their face, as claimed by respondent, and he would ordinarily find complete justification for making service in the section of the Political Code above cited. But, if it be conceded that the clerk had authority to issue the second writ of attachment, the sheriff cannot be held liable for refusing to execute it if he was justified under the attachment law in doing so. Section 537, Code Civ. Proc., provides that "the plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this chapter provided." Section 538, Code Civ. Proc., provides that "the clerk of the court must issue the writ of attachment, upon receiving an affidavit" setting forth certain facts. Section 540, Code Civ. Proc., provides that "the writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach property * * * unless the defendant give him security sufficient to satisfy such demand, beside costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case to take such under-

taking." The purpose of the bond is to prevent any attachment of defendant's property, and that object would be entirely thwarted if the sheriff were bound under the section of the Political Code to execute either the original writ or any other writ which the clerk might assume to issue at the instance of plaintiff. We do not see how plaintiff could have made the requisite affidavit when he took out the second writ, inasmuch as he had security by the bond given the sheriff. But, waiving that matter, the statute seems plainly to provide that the plaintiff may have the defendants' property attached "unless the defendant give security to pay such judgment," which means that he cannot have the property attached if the security be given. The bond to prevent the attachment was the required security. The statute may be defective in not providing for such a situation as we have here, but the remedy is with the legislature, and not with the courts. Proceedings by attachment are of statutory creation purely, and the statute is to be strictly construed. In our opinion, the sheriff was justified in refusing to execute the writ, and hence neither is he nor are his bondsmen liable in this action. The judgment is reversed, with directions to dismiss the action.

132 Cal. 95

MILLS v. BOYLE MINING CO.

(S. F. 1,601.)

(Supreme Court of California. March 1, 1901.)
CORPORATIONS — NOTES — RECORDS — AUTHORITY OF DIRECTORS — PRESUMPTION — EVIDENCE—RETAINING CONSIDERATION.

1. Where a note of a corporation is signed by the proper officers and sealed with the seal of the corporation, it is prima facie evidence of the authority of the officers, and of its due execution by them.

2. Where, in a suit on a note of a corporation, defendant claimed that it was not properly executed, because one of the directors was not notified and was not present at the meeting at which it was authorized, but the resolution of the board of directors showing the nature of the transaction in which the note was given, authorizing the same, was in evidence, and recited the absence of the director, in the absence of evidence to the contrary it would be presumed that proper notice was given.

3. In a suit on the note of a corporation, defendant claimed the same not to have been properly executed, in that at the meeting at which it was authorized one of the directors was not present, and was not notified thereof. It appeared from the record of the meeting that the director was absent, and one of the directors testified that on the day of the meeting the payee had agreed to loan a sum to the defendant, and that the meeting took place thereafter. Another witness testified that no opportunity was given the payee to notify any director, but it appeared that the absent director had a desk in the room adjoining where the meeting was held, and the parties had been engaged in negotiating the matter for four or five days. *Held*, that the evidence was not sufficient to overcome the presumption that the absent director was notified; there being no testimony on the part of the president or the absent director.

4. Under Civ. Code, § 2307, declaring that au-

thority may be conferred by a subsequent ratification, a corporation retaining the consideration for a note is liable thereon, though at the meeting at which it was authorized a director was not present or notified; it appearing that he and the other directors owned all the stock, and that he must have subsequently had notice of the transaction.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Edwin J. Mills against the Boyle Mining Company. There was judgment in favor of plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

Naphtaly, Freidernich & Ackerman, for appellant. T. M. Osmont and F. J. French, for respondent.

SMITH, C. The suit was brought by the plaintiff, as assignee of Gonsales, to recover the sum of \$14,066.91 and interest, alleged to be due on a promissory note made to the latter by the defendant. The answer denies the execution of the note, and also alleges a lack or failure of consideration to the extent of \$4,000. The judgment was in favor of the plaintiff for the balance due on the note, after a rebate of something less than \$4,000 allowed by the court. The appeal is from an order denying the defendant's motion for a new trial. The ground of the motion was alleged insufficiency of the evidence to justify the finding that the note was duly executed; the specific objection being that one of the directors was not present at the meeting at which the note was authorized, or notified of the meeting. The finding on this point was, I think, justified by the evidence. The note, signed by the proper officers, and with the seal of the corporation attached, was itself prima facie evidence of the authority of the officers, and of its due execution by them. *Underhill v. Improvement Co.*, 93 Cal. 314, 28 Pac. 1049; *Burnett v. Lyford*, 93 Cal. 117, 28 Pac. 855; *Lighter Co. v. Simpson*, 77 Cal. 290, 19 Pac. 426; *Schallard v. Navigation Co.*, 70 Cal. 146, 11 Pac. 590. The resolution of the board of directors, showing the nature of the transaction and authorizing the execution of the note, was also in evidence. In this, indeed, the absence of one of the directors (Mr. Barney) is recited; but, in the absence of evidence to the contrary, it will be presumed that proper notice was given. *Investment Co. v. Woodworth*, 124 Cal. 172, 56 Pac. 891, and cases cited. The evidence introduced by the defendant to overcome this presumption was by no means conclusive. Boyle, one of the directors, testified that on the day of the meeting Gonsales had agreed to loan \$4,000 to the defendant, and that the meeting took place immediately thereafter, only a few minutes intervening. And Osborne, Jr., testified to the same effect, and also that "no opportunity was given to Mr. Gonsales to notify any director." But non constat that Barney, who had a desk in the president's room, which adjoined the

room where the meeting was held, was not then notified by the president, or that previous notice had not been given either by the president or Gonsales. Boyle's testimony would, indeed, seem to imply that the meeting was determined on only upon the agreement of Gonsales to make the loan. But the parties had been engaged in negotiating this and other matters for four or five days, and the meeting during all this period was in contemplation; for on another occasion, at which Osborne, Sr., the president, was present, Gonsales agreed to loan the money, and Osborne said he would call a meeting. The testimony of Boyle and Osborne, Jr., does not negative the presumption of notice; and in the absence of testimony from Osborne, Sr., and from Barney himself, who of all men was most competent to speak on the subject, the court was right in disregarding it, or at least we cannot say it was wrong.

There are other grounds, also, on which the decision of the court must be upheld. The consideration for the note, including the \$4,000 borrowed at the time, was received by the defendant. The directors conducting the business were the owners of all the stock of the corporation, except possibly one share transferred to Barney to qualify him as director. Under these circumstances, the point is made that his presence was unnecessary, and that his absence did not affect the validity of the action of the board. But, without passing on this question, it is to be presumed, from the fact that the transaction appears fully in the books of the corporation, that Barney subsequently acquired notice of it. The case is then presented of a corporation receiving and retaining the consideration of a contract, with full knowledge on the part of all interested, which must operate as a ratification of the authority of its agents. *Civ. Code*, § 2307; *Phillips v. Lumber Co. (Cal.)* 62 Pac. 749. The order appealed from should therefore be affirmed.

We concur: HAYNES, C; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(132 Cal 113)

In re CARTER'S ESTATE. (S. F. 2,080.)¹
(Supreme Court of California. March 5, 1901.)
CO-EXECUTORS — COMMISSIONS — DIVISION — FINAL SETTLEMENT—SCOPE OF INQUIRY—JURISDICTION—APPROPRIATION BY EXECUTOR—LIABILITY FOR INTEREST.

1. Appellant, one of two executors, claimed that it was agreed between the executors that appellant should receive all of the commissions in consideration of his doing all the work. *Held*, that the question whether such a contract existed, and the rights of the parties under it, could not be determined on the final settlement of the executors' accounts.

2. Where, before final settlement of his accounts, an executor appropriated money of the estate as commissions, it was proper to charge

¹ For opinion in bank, see 64 Pac. 434.

him interest on the amount from the time of its appropriation to his final settlement, since prior to such settlement he had no right to commissions.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Final settlement of the accounts of James Taylor Rogers and one Hardin as executors of the estate of J. W. Carter, deceased. From an order dividing the commissions equally between the executors, James Taylor Rogers appeals. Affirmed.

Thomas Rutledge, for appellant. Schlotterback & Lea, for respondent.

GAROUTTE, J. This appeal is taken by the executor from an order settling his account. He was a joint executor with one Hardin, and upon the settlement of their final account he was allowed one-half of the commissions to which executors are entitled by the law. He now claims that he did nearly all of the work in the administration of the estate, and for that reason was entitled to a greater share of commissions than his co-executor. Some four years prior to the settlement of the final account he appropriated about \$1,000 of the money of the estate, claiming it to be his commissions as executor. Upon the settlement of his accounts the trial court charged him interest upon this amount. This action of the trial court is also alleged to be error.

The appellant's first claim is to the effect that he had a contract with his co-executor and the devisees whereby he was to receive all the commissions allowed to the executors. There is some evidence upon both sides of this claim, but the court holds the matter to be one of no importance. What particular contracts may have been entered into between these parties as to the apportionment of the executors' commissions is a matter which should be heard in another forum. The hearing of a final account by the probate department of the court is not the place to settle disputes of this character. These parties are not entitled to litigate a question of that kind upon the hearing of the settlement of a final account. The existence of that character of contract, or its validity after being made, are matters of no interest to the estate, and must be heard and determined at some other time, and in some other proceeding. While the commissions of the co-executors need not necessarily be equal (*Hope v. Jones*, 24 Cal. 89), still it would only be in exceptional cases that this court would disturb the decision of the probate court in matters of this character. The law declares the commissions should be apportioned to each executor in proportion to the labor he has performed, and in the present case this apportionment is based upon an implied finding of fact which the court will not disturb. The apportionment made inferentially declares as a fact that there was no substan-

tial difference in the amount of services performed by each of these two executors, and the evidence is fairly conflicting upon that point.

The executor was properly charged with interest upon the sum he appropriated as his commissions. He was not entitled to his commissions until the settlement of his final account. In *re Rose's Estate*, 80 Cal. 180, 22 Pac. 86. This money belonging to the estate was appropriated by him to his own use, and under these circumstances he was properly charged with interest upon the amount. For the foregoing reasons the order and decree are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

132 Cal. 35

MEYER v. CITY OF SAN DIEGO et al.
(L. A. 904.)

(Supreme Court of California. Feb. 26, 1901.)

COSTS—REPORTER'S FEES—ORDER OF COURT
—VERIFIED MEMORANDUM—PRESUMPTION.

1. Where an item is included in the verified memorandum of costs, properly filed, it is *prima facie* correct, and the burden is upon one disputing its correctness to show that it was improper.

2. Where an item of costs was included in the verified memorandum of costs filed by interveners, and defendants moved to strike it out on the ground that it was for transcribing the evidence for the use of interveners, and that no order was ever made authorizing the same, and on appeal from an order denying the motion it appeared that only one copy of the evidence was ordered, and it did not appear from the record that the item was not for such copy, and there was nothing to show that the charge was for testimony for interveners without an order, the presumption that the order, being included in the verified memorandum, was correct, was not overcome.

3. Where costs for transcribing the evidence were incurred under an order of the court, the fact that it afterwards appeared that the judge was not qualified to try the cause did not render the costs an improper charge.

In bank. Appeal from superior court, Orange county; J. W. Ballard, Judge.

Action by Albert Meyer against the city of San Diego and others, R. Nicholls and others intervening. From an order denying a motion to strike a certain sum from an item of interveners' memorandum of costs, defendants appeal. Affirmed.

See 53 Pac. 434, 1128; 62 Pac. 211.

H. E. Doolittle, for appellants. Works & Works, for appellee.

PER CURIAM. In the memorandum of costs filed by interveners is the item, "To reporter's fees, \$114.87." Defendants made a motion to strike from this item \$92.37 upon the ground that the amount was for reporter's fees for transcribing the evidence for the use of interveners, and that no order was ever made by the court authorizing the evidence to be transcribed. The court made an order denying the motion, and this appeal is

from the order. It is conceded that, if the transcript was ordered by the court, the item was a proper charge. Being included in the verified memorandum of costs, properly filed, it is *prima facie* correct; and the burden is upon the moving party to show that the charge is not a legal and proper one. In support of their motion, appellants offered the affidavit of their attorney, which stated that the amount was paid the "reporter for transcribing the evidence taken in the said case upon the trial thereof * * * for the use of said interveners." In the bill of exceptions it appears that the attorneys all desired the evidence transcribed by the reporter, and, after some conversation as to how the costs should be apportioned, the judge of the court remarked, "Yes, the testimony will have to be transcribed." Thereupon the attorney for appellants, addressing the court, said, "If the court please, I would like to know for my own satisfaction exactly what is going to be included in this item of costs." The judge answered, "The reporter's fees and the transcript." The attorney for appellants said, "And the transcript of the evidence?" The judge answered: "Yes, sir. I will order one transcript. The court must have a transcript of this evidence." The above is all that appears to have been said by the judge of the court as to ordering the evidence transcribed. It appears from the conversation of counsel at the time the order was made that it was understood that only one copy was ordered by the judge. It does not clearly appear from the record that only one copy was ordered, but, conceding that the order was for one copy only, it does not appear that the item was not for such copy. There is not a word in the affidavit or the bill of exceptions to show or tending to show that the charge was for testimony transcribed for interveners without any order of court. If such was the case, the appellants should have made it clearly appear. The presumption in the lower court was in favor of the memorandum as filed. The presumption here is in favor of the order of the lower court. It is urged by appellants that the order for transcribing the notes was made by Judge Torrance, and that this court afterwards held that he was not qualified to try the case, and hence the order was void, and the item thereof not a proper charge. If this were a valid reason for rejecting the item, appellants could have availed themselves of it as to the reporter's per diem witness fees and other items in the cost bill. If costs are incurred in good faith, they are none the less a proper charge because the judge is afterwards found to be disqualified. The party who recovers is not to lose costs that he necessarily incurred because they were incurred under a void order. The judge at the time thought he was qualified to try the case. It was contended by appellants that he was qualified, and only after a trial and appeal to this court was it determined as a

matter of law that he was disqualified. Costs are often incurred in the trial of cases where the jury disagrees, or in which a new trial is granted, or the verdict set aside as being void for some reason; in all of which cases the prevailing party recovers his costs finally. Witnesses are often procured at heavy expense, and their testimony, for some reason, is not needed, or becomes immaterial, yet the party who is put to the expense, and incurs it in good faith, may recover it as part of his costs. The order is affirmed.

(132 Cal. 107)

LLOYD v. KEHL et al. (S. F. 1,704.)¹

(Supreme Court of California. March 4, 1901.)
VENDOR AND PURCHASER—WATER POWER—
SALE—REPRESENTATION—OPINION.

1. The vendor of a water power stated to the purchaser that by putting in new appliances a certain horse power could be developed, but he said nothing as to the amount of water in the stream. Plaintiff contended that, the amount of water in the stream being less than the amount which, by mathematical calculation, would give the horse power stated by defendant, he had misrepresented the amount of water. *Held*, that defendant referred not to the theoretical horse power, but to the efficient, the amount of which depends on the apparatus employed, and hence there was no misrepresentation.

2. Where the vendor of a water power stated that a certain horse power could be developed from the stream, and the amount of water was in fact less than that given by a mathematical calculation based on the horse power stated by defendant, and the purchaser sued to cancel notes given in the purchase on the ground that defendant had misrepresented the amount of water, a nonsuit was proper, since plaintiff should have made his own calculation, it not appearing that defendant pretended to be an hydraulic expert.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Charles R. Lloyd against Peter Kehl and others. From a judgment in favor of defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

W. S. Goodfellow and Myrick & Deering, for appellant. Page, McCutchen, Harding & Knight, for respondents.

McFARLAND, J. This action was brought to recover judgment for the cancellation of certain promissory notes made by plaintiff to defendant Kehl, and for the delivery by said defendant to plaintiff of certain shares of stock given to secure said notes, and for damages for certain alleged wrongs. The action is founded on alleged false representations made to plaintiff by defendant Kehl as to certain water rights sold to the latter by the former, the sale being the consideration of the notes. The answer denies the material averments of the complaint, and in a cross complaint Kehl prays judgment against plaintiff for the amount due on the notes. The court below granted a nonsuit, and instructed the jury to find a verdict for de-

¹ Rehearing denied April 3, 1901.

fendant for the amount of the notes, and judgment was entered accordingly. Plaintiff appeals from the judgment and from an order of the court denying a new trial. The above rulings were upon the ground that the misrepresentations relied on were of mere matters of opinion, and not of facts; were mere speculations as to what might be developed in the future, as to which the means of knowledge were open to the plaintiff. If the court was right in these views, the nonsuit and the instruction to find for the defendant were both correct; and the question thus presented is the only one discussed by counsel, and the only one that need be considered.

The main features of the case are these: On and long prior to September 2, 1892, respondent Kehl was and has been the owner of the right to the use of the water of a natural stream called "Warm Creek," which he had used through a ditch to operate a flour mill. On that day Kehl entered into a written agreement with the plaintiff, Lloyd, and one Cartwright, in which it was recited that the parties were desirous of incorporating an electric company for the purpose of furnishing electricity to the city of San Bernardino, and that Lloyd and Cartwright were desirous of purchasing the said water rights (together with certain other property) for the purposes of the said electric company; and it was covenanted that Kehl should sell to Lloyd and Cartwright all of the water rights for \$20,000; \$5,000 to be taken in stock of said company, and three payments of \$5,000 each, to be made in one, two, and three years. It is averred in the complaint that at the time this contract was made Kehl represented that power could be furnished by said water to the extent of 65 effective horse power; that, after the electric works had been partly constructed, it was discovered that said representation was false, and that not more than 45 horse power could be supplied; that plaintiff then refused to pay any part of said \$15,000 to be paid in money, and Kehl brought suit to recover the first payment; that a compromise was then effected, and a new contract was made on March 3, 1894, between Kehl, party of the first part, Lloyd, party of the second part, and the electric company, which had been incorporated, as contemplated, as party of the third part; Cartwright having dropped out of the business. By this contract the former contract of September 2, 1892, was modified in several particulars, the most important one being that Kehl should take his pay for the water rights in a certain amount of the stock of the electric company, and a certain note or bond of a corporation called the Riverside Water Company. It is averred that the plaintiff was induced to enter into this contract by a false representation of Kehl that there was a certain amount of water in said stream. It was also averred that afterwards, on April 18, 1895, another contract was made between

Kehl and appellant by which Kehl surrendered his stock in the electric company, and appellant gave him, instead thereof, his four promissory notes, which are the subjects of this action. It is averred in the complaint that plaintiff was induced to make each of these contracts by false representations of respondent Kehl as to the water rights; so that between September 2, 1892, and April 19, 1895, appellant, according to his claim, was decoyed three times into purchasing rights by false representations concerning them made by respondent Kehl. There is no evidence, and no contention by appellant, that Kehl made any false representations as to the amount of water flowing in Warm creek. In his opening brief, appellant says: "There was no evidence to sustain the allegations of the complaint that defendant had represented the quantity of water in Warm creek to be twenty-five hundred miners' inches, or any other measured quantity. The representations proven were as to the amount of horse power." The representations relied on can be fairly presented by a few quotations from the testimony of appellant's three main witnesses, Porter, Cartwright, and appellant himself. Before the making of the first contract of September 2, 1892, Porter went from San Bernardino to San Francisco at the instance, as he says, of Kehl, and made to Lloyd and Cartwright the representations which he says Kehl had made to him. These representations were, in the language of Porter, as follows: "Mr. Kehl told me that there was a forty-five horse power there developed, and by deepening the tail-race and the wheel pit there would be sixty-five horse power; and by building a flume and taking up all the horse power there was there, there would be 180 or 185 horse power. * * * These representations, which Mr. Kehl made to me, I made to Mr. Lloyd." Having stated that Lloyd and Cartwright agreed to go downtown and talk with Mr. Kehl about the matter, he says as follows: "These gentlemen did go to San Bernardino, and see Mr. Kehl. I think it was in the month of August, 1892. I was present in the conversations between Mr. Kehl and Mr. Lloyd in regard to this horse power, a number of times. My recollection is that Mr. Kehl made the same representations in regard to the water power to Mr. Lloyd that were made to me,—that they were reiterated in the conversations between himself and Mr. Lloyd." The witness further testified, referring to Lloyd's visit to San Bernardino in August, 1892, "I know that Mr. Lloyd saw the property down there,—the mill, the water, and the dam." Cartwright testified, as to the representations about the water power, as follows: "Mr. Porter represented that this power was capable of being developed to something like 175 horse power. That, as it stood at that time, it developed some 45 horse power, and could be increased to 65 horse power by some changes which he specified,

and which I recollect were gone into before in the testimony given here." He also said: "I do not think the amount of water was discussed at any time. The whole proposition turned on the horse power. I was not familiar with measuring water at all, and I don't remember that it was talked of." The following extracts from the testimony of the appellant, Lloyd, fairly show what his testimony was as to the misrepresentations. "Mr. Porter did make representations to me as to the quantity of water power that was there, and as to the quantity of horse power that could be developed by the water that was there. He told me that there was at that time 45 horse power, and that we could probably make that out to run the city lights, which would be about 60 lights, in case that we got the contract; and that, if it was not enough, by digging a tail race, and lowering the turbine wheel, which Mr. Kehl had, we could get 65 horse power. I asked him if Mr. Kehl had told him so, and he said 'Yes.'" The witness also said: "Mr. Porter also said that if we wanted to increase the business by building a flume, at an expense, I think, of about \$8,000 or \$10,000, 180 or 185 horse power could be developed; anyway from 175 to 185 horse power. Mr. Kehl corroborated the statements to Mr. Porter. He said that there was a 45 horse power running there at that time. It was the same 45 horse power that I had myself used about 12 years ago. That by deepening the tail race and lowering the wheel pit, it could be made into a 65 horse power. It was part of the whole scheme to build this flume to increase the elevation of the water by building this flume to increase the fall of it, and to save the amount of water that went into the ground by seepage and evaporation. We were to build a cement ditch and a flume at a cost of probably \$10,000. Mr. Kehl then said that the building of this ditch and flume would develop 175 horse power." He also said: "My chief cause of complaint against Mr. Kehl is that he misrepresented the amount of power that could be developed by that flume and the new wheel." Again, he says: "In these conversations had between Mr. Porter, Cartwright, Mr. Kehl, and myself, it was represented by Mr. Kehl that 175 horse power could be developed from the stream as it then stood by means of the flume and the new water wheel." He then testified that with the new flume, the new wheel, and other new appliances, not more than from 90 to 100 horse power was developed.

There is a great deal of other testimony relied on by respondent, to the effect that appellant had leased all of Kehl's water rights in the creek several years before the contract was made, and knew their character and extent; that he was perfectly familiar with the property before he entered into the first contract of 1892; and that before the making of the last contract of 1895 he had been informed by his agent at San Bernar-

dino that the amount of horse power represented by Kehl could not be developed. There was also other evidence in the case, upon which the respondent makes other points, which we do not deem necessary to consider. The questions arising out of the distinction between representations of matters of opinion and representations of matters of fact have been very fully and learnedly argued by counsel on both sides. There is not much difficulty as to the general principles of law which govern these questions, and, instead of entering into a discussion as to these principles, we have thought it best to simply state the representations which were made in the case at bar, and to determine whether or not they are sufficient to sustain this action; and we are of the opinion that these representations are of mere matters of opinion, upon which appellant should not have relied, and that they do not sustain his present action. It is clear that there was no misrepresentation as to the amount of water running in the stream. The situation was simply this: Kehl, by means of a certain ditch, had been for years diverting to his mill the water of a certain stream with which both parties were familiar; and he said to appellant that, by building a new flume and ditch, and using a new wheel, and certain other new appliances, and thus increasing the fall, etc., there could be developed from the water in the stream—about the quantity of which there was no misrepresentation or misunderstanding—a certain amount of horse power. This was a mere speculative opinion, not actionable under the most extreme authorities to be found on this subject. Appellant introduced the expert witnesses, Cartwright and Bowie, who testified that, the quantity of water in the stream and its fall being given, the number of horse power which it will furnish can be calculated, and that, going backward, the horse power being given, the amount of water in the stream can be calculated; and upon this statement appellant seeks to base the colorable theory that, when Kehl mentioned the horse power that could be developed, he must be held to have stated with certainty the amount of water in the stream, and that the amount of water shown by such calculation was largely in excess of the actual water in the stream; ergo, he misrepresented the amount of water. Now, in the first place, the calculation of the experts was only of the theoretical horse power, not the efficient horse power. The "efficient" horse power was what Kehl was speaking of, and, to quote, for brevity, from respondent's brief, "the effective horse power depends upon the friction of the flume or of the pipe, its grade, the loss by seepage or evaporation, the efficiency of the water wheel, the way in which it is placed, the character of the discharge, and, as Mr. Cartwright himself said, 'a hundred and one other different things.'" In the second place, if this was a matter of pure

mathematics, appellant should have relied on his own calculations, and not upon those of Kehl. There is no evidence that the latter pretended to be an hydraulic expert. And, lastly, there never was any question of the fact of the amount of water in any stream, nor any pretense that appellant was deceived as to that fact by any misrepresentation of Kehl. Under the evidence the nonsuit was properly granted. The above views cover substantially, we think, all the positions taken by appellant which need consideration. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(132 Cal. 42)

BAUM v. ROPER et al. (S. F. 1,486.)¹

(Supreme Court of California. Feb. 27, 1901.)

EJECTMENT — ADVERSE POSSESSION — EVIDENCE — SUFFICIENCY — SPECIFICATION OF ERRORS — PRELIMINARY QUESTION — FAILURE TO SHOW RELEVANCY — DEBTS OF DECEASED PERSON — SALE OF PROPERTY — PROBATE COURT — JURISDICTION — PETITION FOR SALE — SUFFICIENCY.

1. B. took possession of the lot in controversy in 1858, and it continued in possession of his successive grantees until 1874, when it was sold to plaintiff's intestate under a probate order, to pay debts of a subsequently deceased grantee. In 1874 defendant fenced the north part of the lot, but recognized plaintiff's title to the remainder, and defendant's possession subsequent to that date was not such as would affect plaintiff's ownership. *Held*, that the title of plaintiff's intestate deraigned from B.'s adverse possession was unimpeachable.

2. Where the record contained no specification of error to the effect that plaintiff's derangement of title in ejectment was defective because of an outstanding trust deed, error based on that ground will not be considered on appeal.

3. Defendant contended on appeal that plaintiff's derangement of title in ejectment was defective because of an outstanding trust deed executed by M. The record contained a recital that plaintiff introduced a reconveyance, wherein all the interest which had been conveyed by the deed of trust executed by M. was reconveyed. The date of the reconveyance was 18 years prior to the action of ejectment. *Held*, that the evidence did not show any outstanding title available against plaintiff at the time of the commencement of the action.

4. Where plaintiff in ejectment did not claim that a certain judgment affected defendant's title, and the judgment was not introduced in evidence, it was not error to exclude a satisfaction of the judgment, since there was no necessity of showing that the judgment was satisfied.

5. Defendant claimed property by adverse possession, and after showing that C., a brother of the witness, pastured a cow on the premises in controversy for 12 years, asked if the witness knew by whose permission C. kept his cow on the premises, but did not show what dates were covered by the 12 years referred to, or that the permission to pasture the cow was given by defendant, or by any one whose rights defendant claimed. *Held*, that the question was properly excluded, as defendant failed to show the relevancy of the offered testimony.

6. Defendant in ejectment claimed the property in controversy by adverse possession, and the court excluded the question whether witness ever heard C., who pastured a cow on the premises, say, while the witness and C. were

on the premises, that C. kept the lot for himself, or was occupying it by permission of another. Subsequently the witness testified that he did not know that he was ever on the lot with C., and that he did not think he was. *Held*, that the exclusion of the question was not prejudicial to defendant, since it was merely preliminary, and the subsequent testimony of the witness showed that any further inquiry would not have developed anything favorable to defendant.

7. Where plaintiff in ejectment claimed title under a sale made by order of the probate court to pay the debts of a deceased person, the objection that the petition for the sale was defective, in that it failed to state the condition of the property, cannot be raised for the first time on appeal.

8. Code Civ. Proc. § 1543, provides that if the court is satisfied, after a full hearing on the petition to sell the property of a deceased person for the payment of debts, that a sale of the whole or some portion of the real estate is necessary, an order may be made to sell the whole or so much of it as the court shall adjudge necessary or beneficial. A petition for the sale of real estate to pay the debts of a deceased person alleged that a lot belonging to deceased on V. avenue was in the adverse possession of R., and that it was not advisable to offer it for sale, but that it was necessary to sell the greater portion of deceased's real estate to pay his debts, and concluded with a prayer for the sale of the whole of said real estate, or such parts thereof as the court should deem necessary, and that such further order be made as is meet in the premises. *Held*, that the probate court had jurisdiction, under the general prayer, to order a sale of the lot.

9. A petition for the sale of the property of a deceased person alleged that it was necessary to sell the greater portion of deceased's real estate, but that in view of the fact that his lot on V. avenue was in the adverse possession of another, which would affect its value, it would be advisable to sell the other property, and prayed that the whole of such real estate, other than the lot on V. avenue, or so much thereof as the court should deem necessary, be sold, and that such other and further order be made as is meet in the premises. Defendant, in ejectment for the lot on V. avenue, attacked plaintiff's title under the petition, on the ground that it showed on its face that it was to sell other real estate, and not the lot in question. *Held*, that the petition was sufficient to authorize a sale of the lot on V. avenue as against a collateral attack.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Clara Baum, administratrix of the estate of Julius Baum, deceased, against Edward Roper and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

T. M. Osmont and John B. Mhoon, for appellants. Edward B. Taylor, for respondent.

PER CURIAM. This is an action in ejectment. The case was tried before the court without a jury. The plaintiff had judgment, from which, and from an order denying them a new trial, the defendants appeal. The subject of the suit is a lot on the southeast corner of Turk street and Van Ness avenue, in the city of San Francisco, and fronting 50 feet on said avenue, and 109 feet on said street.

¹ Rehearing denied March 29, 1901.

1. The appellants' first contention is to the effect that the evidence does not justify the finding of the court that the plaintiff was the owner of the lot in controversy. The title claimed by each of the parties depends, in part at least, upon adverse possession. The plaintiff claims that her deceased husband, Julius Baum (who was the original plaintiff in this suit), was the grantee of the lot in controversy at a probate sale in the matter of the estate of Robert Muhlendorff. The executor's deed to Baum under this sale bears date January 22, 1874. It is further claimed by plaintiff that the title of Muhlendorff had its origin in an adverse possession of one Beideman, beginning as early as 1858, and continued by him and successive grantees down to the time of the said conveyance to Baum. The evidence is claimed particularly to be insufficient in respect to this adverse possession. We have examined the evidence in this particular, and find that, while there is much conflict, yet the conclusion reached by the trial court in this respect is not without evidence to support it. Beideman's possession as early as 1858 is shown by the testimony of the witness McGlone, who worked for Beideman, and looked after his fences inclosing the land in controversy. Beideman had the lot, with other lands, inclosed with a fence when McGlone went to reside on the block, of which said lot was a part, in 1858. McGlone resided on that block, near the middle of it, in Beideman's house, for two and a half years thereafter, and testifies, in substance, that Beideman was in the occupation of the lot in controversy, and that it was within his inclosure, during that period. The witness P. D. Dunn moved to a place on Turk street just west of the lot in controversy in 1860, and lived there for 18 years thereafter. When he moved out there, the Beideman fences inclosed said lot. The testimony of several other witnesses tends strongly to show that these fences erected by Beideman were maintained and continued to inclose the said lot down to a date long after the said probate sale to Baum, and that there was no change in the fences from 1858 until after such sale. In 1874 or in 1876, or some time thereafter (the evidence being in conflict as to the date), a fence was run diagonally through the lot in controversy by defendant or under his direction, and since the erection of that fence he has claimed, as we understand the evidence, that portion of the lot to the north of this diagonal fence; but, treating the probate sale to Baum as valid (as we shall presently show it to be), the evidence as to possession of the premises subsequent thereto is not of a character to show title in defendant by adverse possession or in any way to affect the finding as to ownership. We deem it unnecessary to quote at length the evidence on this question of adverse possession, or to attempt to analyze it to any extent. The record on ap-

peal illustrates the wisdom of the rule which leaves the decision of questions of fact with the trial court, for from it we learn that the witnesses, in defining boundaries, showing the location of the lot in question, where fences were located, and in testifying as to the possession of the premises, used a map or maps in a way perfectly intelligible to the trial judge, no doubt, but from which we can derive no aid whatever, as the matter is presented in said record. So far as we can see, therefore, the court was warranted in the conclusion reached as to the adverse possession of Baum's predecessors, and, the probate sale to Baum being valid, the finding of title in him was justified.

2. Appellants contend that there is a fatal flaw in plaintiff's deraignment of title by reason of the evidence showing an outstanding title by virtue of a trust deed of the premises given by Muhlendorff and another to Burr and Dean. There are two good reasons why this point is not available to appellants—First, there is no specification directed to this point as a matter in regard to which the evidence is insufficient; second, the evidence shows that the trust deed was given to secure the payment of a debt, and the record before us contains the following recital: "Plaintiff then offered in evidence a deed of reconveyance dated August 12, 1874, and acknowledged August 21, 1874, wherein all the interest which had been conveyed by the aforesaid deed of trust of Muhlendorff and Weck to Burr and Dean was reconveyed. * * * Said deed was thereupon read in evidence." This reconveyance took place, it seems, 18 years before the commencement of this action. The deed last referred to is not before us; but we cannot see on the record, as above quoted, how it can now be said that there was any outstanding title on account of the making of the trust deed that would be available as against the plaintiff at the time of the commencement of this action.

3. There was no error in excluding evidence of satisfaction of judgment in the case of Reed against Buckelew et al. It was not contended by plaintiff that said judgment affected defendants' title adversely; indeed, the judgment was not in evidence; nor was it offered in evidence. What necessity, then, could there be to show that it was satisfied? Appellants contend that it was relevant to show Roper's good faith, but Roper's rights in the land depended, not upon his good faith, but upon the adverse possession of himself and his predecessors in occupation, to whose rights he had succeeded.

4. After showing by the testimony of William Culligan, brother of John Culligan, deceased, that the latter had been in the habit of pasturing his cow on the lot in controversy for a period of 12 or 13 years, the defendants asked said William the following question: "Did you know how John Culligan happened to put his cow there,—by whose permission?"

An objection to this question was sustained, and defendants claim this was error. At the time this question was asked it had not been shown what dates were covered by the 12 or 13 year period during which the cow was kept on the lot, nor was any offer made to show any dates in connection with the question. The question was also merely preliminary,—could have been answered by "Yes" or "No,"—and no effort or offer seems to have been made to follow it up. The witness was not asked to state by whose permission the cow was placed on the premises, nor was any offer made to prove that the cow was placed there by permission of defendants, or by permission of any one to whose rights they claimed to have succeeded. We can see no error in the ruling of the court.

5. The court sustained an objection to a question asked by defendants of William Culligan, which question reads as follows: "Mr. Culligan, did you ever hear your brother John Culligan, while he occupied that lot, and upon the premises, say anything as to whether or not he was occupying the lot for himself or claiming it for himself or keeping it by permission of another?" Here, again, a question, merely preliminary, was asked with no attempt to follow it up, and in this instance the subsequent answers of the witness show conclusively that any attempt to pursue the inquiry further would have been ineffectual, for the witness subsequently testifies, "Do not know that I was ever on this lot with my brother John; do not think I was;" and when asked if, when on the lot or alongside the lot, he ever heard any conversation between Roper and his brother "touching their relations to each other, and as to whether or not Mr. Culligan, your brother, held under Mr. Roper," he answered, "I don't remember, sir." In view of these answers of the witness, it is not necessary for us here to determine whether the declarations of a party in occupation of premises, not made against his interest, as to how he holds the same, come within the rule rejecting hearsay evidence.

6. An objection is urged to the petition for a sale of the real estate in the Muhlendorff estate, to the effect that said petition was insufficient to give the probate court jurisdiction to make the order of sale under which Baum claimed title. The petition describes all the property of the estate, and shows the real estate to consist of four parcels, three of them being in the Potrero, and their condition is described in said petition as "unimproved and unproductive." As to the lot in controversy, the petition alleges that it "is improved, and about one-half of it is in the adverse possession of one Reay, who claims title to said portion of said lot. In said condition it was appraised at and is worth the sum of five thousand dollars." Also "that it is necessary to sell the greater portion of the real estate of deceased for the purpose of paying the debts against the estate and

the expenses of administration, and that in view of the possession of the lot on Van Ness avenue hereinbefore described being partly held adversely by another, and the value thereof being thereby affected, it would be advisable to sell all the lots on the Potrero hereinbefore described, rather than the lot on Van Ness avenue." The petition concluded with a prayer for a sale of "the whole of the said real estate situated on the Potrero of San Francisco, or so much or such parts thereof as this court shall deem necessary; that such sale may be made at private sale; and that such other and further order be made as is meet in the premises." The objection made by appellant at the trial to this petition was based upon the following grounds only: "First. That it does not appear from any evidence before the court that the lot in question was any part of the estate of said Muhlendorff, deceased. Second. On the ground that the petition on its face is to sell other real estate, and not the lot in question. Third. That any proceedings which might be taken by the probate court in the matter of the sale of real estate upon said petition would be without jurisdiction, for the reason that the statute requires that an administrator or executor, in order to sell real estate in the probate court, must proceed by petition to sell that particular real estate." There was no objection made to the petition on the ground that it failed to state the condition of the property, and therefore no such objection can be considered on this appeal, but the petition must be treated as containing a proper statement as to such condition. The only ground of objection made to the petition at the trial that appellant presents for our consideration is the second one quoted above. We think the probate court had jurisdiction to order the sale of the Van Ness avenue property under the general prayer "that such other and further order be made as is meet in the premises." Indeed, it would seem, from the statute in force at the time the sale in question was had, that the court is not controlled as to its order of sale by the desire of the executor, or by his prayer, or by the representations contained in the petition. All that is necessary in the petition is that it shall state the jurisdictional facts required by the statute, and then, "if the court is satisfied, after a full hearing upon the petition, and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this article, or if such sale be assented to by all the persons interested, an order must be made to sell the whole or so much and such parts of the real estate described in the petition as the court shall judge necessary or beneficial." *Bel. Prob. (3d Ed.)* § 1543, p. 139; *Code Civ. Proc.* § 1543. The attack on the petition here is collateral and not direct, and the petition must be held sufficient as

against the objection here considered. *Dennis v. Winter*, 63 Cal. 16. The petition being sufficient, it will be presumed, from the orders and notices which the record shows to have been placed in evidence, that the order of sale was valid.

7. The fifth and seventh defenses, as set up in the answer, are disposed of by the finding directed to the various statutes of limitation pleaded in the answer by the numbers of the sections of the Code in which they were respectively contained. The other points made on behalf of appellants are immaterial. The judgment and order appealed from should be affirmed; and it is so ordered.

(122 Cal. 62)

SUTLIFF v. SEIDENBERG et al.
(S. F. 1,606.)¹

(Supreme Court of California. Feb. 27, 1901.)
CONTRACTS — CONSTRUCTION — APPEARANCE
— VAGUENESS — PLEADING — COMPLAINT ON
CONTRACT — SUFFICIENCY — EVIDENCE — TRIAL
— REMARKS OF COUNSEL — APPEAL.

1. Where a contract provided that, in consideration of plaintiff's assisting a distributing agent of defendants in making a success of their line of cigars in the distributor's territory, plaintiff was to receive a certain commission on all sales, the arrangement to remain in force so long as the goods found a ready sale, the contract was not void for uncertainty on the ground that it was not possible to determine what was meant by "assisting to make a success."

2. Where a contract provided that, in consideration of plaintiff assisting defendants' distributing agent in making a success of defendants' line of cigars in the territory allowed the agent by his contract with defendants, plaintiff should be paid a certain commission on all sales made by the agent, the complaint in an action on the contract to recover commissions was not insufficient because it did not set out the contract between defendants and the distributing agent, it not appearing from the complaint that such contract was a written one, and it not being necessary to plaintiff's recovery that the terms of the contract should be shown.

3. In June, 1894, defendants employed plaintiff to assist their distributing agent in making a success of their line of cigars for a commission on all sales. In an action on the contract for commissions, a verdict in favor of plaintiff was reduced by the court. Beginning with August, 1894, defendants had made statements to plaintiff of sales and of commissions due him, continuing to and including January, 1895, and the commissions were paid save as to December and January, and the statements showed a greater amount due than was embraced in the verdict as reduced, though there was evidence tending to show that such statement was in excess of the actual sales, representing consignments to the agent, and defendants claimed expenses should be deducted from the proceeds of sales; but it appeared from the statements that defendants must have understood the contract to have provided for commissions on gross sales. *Held*, that the evidence would have supported a larger verdict than the verdict as reduced, and hence defendants were not prejudiced thereby.

4. Where defendants contended that plaintiff's counsel improperly referred to an effort of compromise between the parties, but the statement did not contain the language used, and nothing appeared from which the appellate court could know the extent of the alleg-

ed irregularity, and it appearing that the court instructed the jury not to consider any evidence relating to compromise, the judgment would not be disturbed.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Henry Sutliff against E. Seidenberg and others. There was a judgment in favor of plaintiff, and from an order denying a new trial defendants appeal. Affirmed.

Henry U. Brandenstein, for appellants. Naphtaly, Friedenrich & Ackerman, for respondent.

PER CURIAM. Plaintiff, assignee of Charles J. Simon, brought the action against defendants for services rendered and commissions earned by said Simon under the following contract: "San Francisco, June 16th, 1894. In consideration of Mr. Charles J. Simon assisting our distributing agents, Messrs. Adelsdorfer & Brandenstein, to make a success of our line of cigars in San Francisco and other territories allowed as per contract with Adelsdorfer & Brandenstein, and for all services necessary to represent our interest, we agree to pay Mr. Simon five (5) per cent. commission on all sales made in California and above-mentioned territories sold by Messrs. Adelsdorfer & Brandenstein, or any future house we may select. This arrangement to remain in force as long as our goods find ready sale on this coast. Commissions to be paid monthly. [Signed] E. Seidenberg, Stiefel & Co." Defendants interposed a general demurrer to the complaint, which was overruled, and they answered, admitting the execution of the contract, but denied that Simon had rendered any service under it, or complied with its terms. They also alleged a modification of the contract in January, 1895, and also that they discharged Simon in May, 1895. The cause was tried by a jury, and plaintiff had a verdict for \$1,236.81. On hearing the motion for a new trial, the court made an order overruling the motion on condition that the plaintiff remitted the sum of \$517.25 from the amount of the verdict. This was done by plaintiff, and defendants appeal from the order alone.

1. The point chiefly relied on by appellants is raised by the demurrer, and also by an exception to the ruling of the court in admitting the contract in evidence when offered by plaintiff. It is claimed that the contract is void for uncertainty, in this: that there is no certain promise on Simon's part to assist Adelsdorfer & Brandenstein "to make a success of defendants' line of goods"; that it is not possible to determine what is meant by "assisting to make a success"; that the word "success" is itself too indefinite to give certainty to the contract; that the contract set out refers to another contract, which is not stated. "Where a contract has but a single object, and such object is * * * so vaguely expressed as to be wholly unascertainable,

¹ For opinion on rehearing, see 64 Pac. 469.

the entire contract is void." Civ. Code, § 1598. We must give the contract such an interpretation as will make it "operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties" (Id. § 1643); and we must give to the words of the contract the meaning as used in their ordinary and popular sense (Id. § 1644). If the terms used are ambiguous or uncertain, the promise must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. Id. § 1649. A contract may be explained by reference to the circumstance under which it was made and the matter to which it relates. Id. § 1647. Read in the light of these rules, the contract seems to us quite intelligible and certain. Defendants were doing business as cigar manufacturers in New York City, and desired to make a market for their goods in California. Adelsdorfer & Brandenstein, who were merchants in San Francisco, were made their distributing agents, and Simon was to assist them in introducing the goods to the public. Defendants not only spoke in the contract of making their line of cigars a success, but they further explained their meaning in the clause, "and for all services necessary to represent our interest we agree to pay," etc., and by the clause, "this agreement to remain in force as long as our goods find ready sale on this coast." Whatever of uncertainty there may be in the meaning of the clause "to make our line of cigars a success in San Francisco" seems to be cleared up, at least sufficiently as against a general demurrer, by the subsequent clauses. There is no appeal from the judgment, and the only question is whether the complaint states a cause of action sufficient to sustain the judgment. We cannot say that the contract is so "vaguely expressed as to be wholly unascertainable," and we must hold that the general demurrer was rightly overruled, and the testimony offered properly admitted.

2. The complaint did not fail to state a cause of action because it failed to set out the contract with Adelsdorfer & Brandenstein, referred to in the contract. In the cases cited by defendants it was held that, where a party relies in his complaint upon a contract in writing, and it affirmatively appears that all the terms of the contract are not set forth in *hæc verba*, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient. It was so held in *Gilmore v. Insurance Co.*, 55 Cal. 123, cited by defendants. Here the complaint does not show that the contract referred to in plaintiff's contract was in writing (it may have been oral), nor does it appear that it was necessary to plaintiff's recovery that the terms of the Adelsdorfer & Brandenstein contract should be set out or shown. So far

as this latter contract concerned plaintiff, it was to limit the territory in which plaintiff was to give his services.

3. The evidence sustains the verdict as reduced by the court. The contract was made in June, 1894. Beginning with August, 1894, defendants made statements in writing to plaintiff of sales and commissions due him, continuing to and including January, 1895. The commissions were paid except as to December and January, which were not paid. The statements for these months showed a greater amount due than was embraced in the verdict as reduced. This evidence, coming from defendants themselves, carried with it strong implication, not to speak of plaintiff's testimony, of services rendered, as well as the compensation earned. There was evidence tending to show that these statements were in excess of actual sales, and represented consignments to Adelsdorfer & Brandenstein, rather than sales. But this was an issue which the jury determined, and their verdict finds support in the evidence. Defendants claimed, and sought to show by evidence, that they expended much money through Adelsdorfer & Brandenstein in making the sales, and that the expenses of sales should be deducted and commissions allowed on net proceeds. But the court—rightly, we think—held that plaintiff was entitled to commissions on gross sales, and defendants show by their statements to plaintiff that they must have so understood the contract. The issue as to whether plaintiff was discharged in May becomes immaterial in view of the reduced verdict which limited recovery to commissions earned previous to May. Upon this issue it may be said also that the evidence was conflicting.

4. Error is claimed because counsel for plaintiff, in addressing the jury, referred to a certain effort to compromise the claim for \$1,000 by an agent of defendants. The error is assigned as "the references made by David Friedenrich, counsel for plaintiff, in his opening and in his closing argument to the jury, to the offer of compromise made by the defendants to Charles J. Simon." The statement does not contain the language used, and nothing appears from which we can know the extent or character of the alleged irregularity. Besides, the court instructed the jury that they were not to consider the evidence relating to an offer of compromise.

5. Defendants submit certain affidavits in support of their motion on the ground of surprise. We infer from their brief that no great reliance is placed on this point. However, we have examined the affidavits, and fail to find in them any ground for the relief asked. We have also carefully read the instructions asked by defendants and refused by the court, and the instructions as given, and discover no error. The order is affirmed.

(132 Cal. 137)

PEOPLE v. WALKER. (Cr. 533.)¹

(Supreme Court of California. March 8, 1901.)

CRIMINAL LAW—APPEAL—LIMITATION—TRIAL—BILL OF EXCEPTIONS—JUDGMENT—OBJECTIONS—WAIVER—MOTION IN ARREST.

1. Pen. Code, § 1248, requiring five days' notice of motion to dismiss appeals in criminal cases, has no application to such appeals brought after the time limited by section 1239, as the objection to such appeal is jurisdictional.

2. Where defendant moved to vacate a judgment and correct the minutes on the ground that they incorrectly stated that before sentence the defendant was informed of the nature of the charge and of the verdict, and asked if he had any cause why judgment should not be pronounced, an order refusing the motions could not imply a finding that the minutes were correct, in view of a statement in the bill of exceptions settled by the judge in which he found facts substantially negating the facts recited in the minutes.

3. Pen. Code, § 1200, requiring that, before sentencing a defendant, he must be informed of the nature of the charge against him, and of his plea, and the verdict thereon, and be asked if he has any cause why judgment should not be pronounced, is mandatory, and a failure to comply therewith deprives the defendant of substantial rights.

4. Where, before sentence, the court called defendant, whereon his counsel, without waiting, moved for a new trial, and after denial of which sentence was pronounced, such action was not a waiver of defendant's right to be informed of the nature of the charge, plea, and verdict, and to be asked if there was any reason why judgment should not be pronounced.

5. Where defendant moved to vacate a judgment and correct the minutes on the ground that they incorrectly stated that before sentence defendant was informed of the nature of the charge, plea, and verdict, and asked if there was any reason why judgment should not be pronounced against him, an appeal would lie from orders refusing the motions, as they affected substantial rights, and could not have been reviewed on appeal from the judgment.

6. No appeal lies from an order denying a motion in arrest of judgment, but it can be reviewed only on appeal from the judgment.

7. Where defendant was sentenced without being informed of the nature of the charge against him, or the plea and verdict, or asked if there was any reason why judgment should not be pronounced, he was not entitled to be discharged on motion.

In bank. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

Order dismissing appeal (61 Pac. 800) affirmed, and cause remanded.

Geo. D. Collins, for appellant. Atty. Gen. Ford, for respondent.

BEATTY, C. J. The defendant, having been convicted of the crime of embezzlement, appeals from the judgment of the superior court and from five separate orders made after judgment. The several notices of appeal were served more than a year after the rendition of the judgment, and the question arises whether we have any jurisdiction of the appeal therefrom. In civil cases it seems to have been settled that this court is without jurisdiction to determine an appeal taken or attempted after the expiration of the time prescribed by the statute, Fairchild

v. Daten, 38 Cal. 286; Langan v. Langan, 89 Cal. 195, 26 Pac. 764. But it is contended that the same conclusion does not follow in criminal cases. The language of the Penal Code, however, is on this point quite as mandatory as that of the Code of Civil Procedure: "An appeal from a judgment must be taken within one year after its rendition and from an order within sixty days after it is made." Pen. Code, § 1239. In *People v. Varnum*, 53 Cal. 630, this court held that an appeal taken from an order in a criminal case more than 60 days after it was made must be dismissed, and for the same reason an appeal attempted from a judgment more than a year after its rendition must be dismissed. If the legislature can limit the time within which appeals in criminal cases must be taken, it seems very clear that such limit has been fixed by the above-quoted section 1239. But appellant contends that the apparent force of the language there used is materially qualified by the provisions of section 1248: "If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on any day, on motion of the respondent, upon five days' notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed." According to appellant's construction of this section no appeal can be dismissed in a criminal case for any irregularity except upon five days' notice; and, as there has been no motion to dismiss this appeal, he contends that it must be decided (as it was argued and submitted) upon its merits. This conclusion would probably follow if the objection to the appeal was not jurisdictional; but we can see no ground upon which a distinction in this respect can be made between civil and criminal cases, and upon the authority of the decisions above cited we feel constrained to hold that the appeal from the judgment herein cannot be considered.

The appeals from the orders after judgment were taken in time, and must be decided on their merits. The most important of these orders were those overruling the motions of the defendant to vacate the judgment and to correct the minutes of the court reciting the proceedings taken at the time the sentence was pronounced. The judgment, as entered in the minutes of the trial, contains a recital to the effect that, when the defendant was brought into court for sentence, he was duly informed of the nature of the charge against him, of his plea, and the verdict, and was asked if he had any cause to show why judgment should not be pronounced against him. By his motion to amend the defendant sought to have these minutes so corrected as to show that he was not informed before or at the time of the rendition of the judgment, either by the court or by the clerk, of the nature of the charge against him, and of his plea, and was not asked whether he had any cause to show why judgment should not be pronounced against him.

¹ Rehearing denied March 30, 1901.

Necessarily, the motion to vacate the judgment was involved in the fate of the motion to correct the minutes, and both were denied. It is contended on behalf of the people that the orders of the court imply a finding that the minutes of the trial were correct, and, since there is some evidence (in the minutes themselves) to support such finding, the order must be affirmed on that ground. But there can be no implication of a finding that the minutes were correct in view of the statements contained in the bill of exceptions settled by the judge, which show that he found the facts substantially in accordance with the affidavit of the defendant and the official reporter's notes of the proceedings, and that what actually took place was this: The judge simply called the name George Walker, whereupon his counsel, without waiting for more, moved for a new trial, which, after argument, was denied by the court upon a pretty full review of the evidence in the case. At the conclusion of this review the judge immediately pronounced sentence. These facts being shown by the bill of exceptions, we conclude that the superior court did not deny the motion to correct the minutes because the judge found them literally true, but because he held that they stated the legal effect of what actually occurred. The question is therefore presented whether any substantial right of the defendant was infringed by pronouncing sentence without clearly informing him of the nature of the charge, etc., and asking him if he had any cause to show why judgment should not be pronounced.

In felony cases the defendant must be present when the judgment is rendered, and when he appears for judgment "he must be informed by the court, or by the clerk under his direction, of the nature of the charge against him, and of his plea, and the verdict, if any, thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him." Pen. Code, § 1200. These provisions are mandatory, and a substantial compliance therewith is essential, for they affect important rights of the defendant, who, when thus called upon, may show either that he is insane, or that there are grounds for a new trial or for arrest of judgment. If a sentence is pronounced without a substantial compliance with these requirements, and the clerk enters up a judgment upon a stereotyped form showing full compliance, certainly the court has power to correct its minutes upon a proper application, and it ought to do so; and more especially because the mistake can be easily and speedily corrected by simply setting aside the judgment as entered, and then proceeding regularly in the arraignment of the defendant, who, if he shows no good cause why judgment should not be pronounced, may be duly and properly sentenced. We presume that course would have been followed in this case if the

judge who decided the motions had not been of the opinion that the action of defendant's counsel in moving for a new trial before arraignment amounted to a waiver. We think that the decision of the case really turns upon this point: Was there a waiver of the arraignment? It has been decided here that a defendant, when arraigned to plead, may waive a copy of the indictment by asking time to plead, before a copy has been delivered; and it is said that he may waive other formal steps prescribed by the statute. *People v. Lightner*, 49 Cal. 228. In that case, however, the indictment had been read to the defendant, and the clerk had stated that a copy would be completed, and handed to the defendant's counsel, which was done before he was called upon to plead. Under these circumstances it was held that the court properly entered a plea of not guilty upon the refusal of the defendant to interpose any plea. That case is, therefore, scarcely a precedent for this. There every substantial requirement of the statute was complied with, while here several such were wholly omitted; and we do not find that it has been held in any case that a waiver of any substantial right of a defendant can be implied from the acts of his counsel. We think the motions to correct the minutes and vacate the judgment should have been sustained.

No question has been raised by counsel for the people as to the right of appeal from these orders, but the question suggests itself, and has been considered. We think the orders were appealable. They were made after final judgment. They affected substantial rights of the defendant, and the errors to which the motions were directed could not have been reviewed on appeal from the judgment. An appeal from the judgment would have brought up only such bills of exceptions as the statute allows. These are all specifically defined and enumerated in sections 1170-1173 of the Penal Code, and only one of them applies to a case in which the judgment falsely recites that the defendant has been properly arraigned for sentence. The only possible means by which he can save an exception to an order of this character is by making a motion after judgment to correct the minutes and vacate the judgment, based upon a showing of the facts; in which case he can have an exception to the order denying his motion, if it is denied, under subdivision 5 of section 1172 of the Penal Code, which permits an exception to the action of the court "in making or refusing to make an order after judgment affecting any substantial right of the parties." Ordinarily, of course, where a party may appeal from a judgment or order, he must appeal direct, and is not allowed to move to set aside, and then appeal from the order denying his motion. But this is only a rule of practice, and it does not apply when the case is such that a direct appeal

would afford no relief by reason of the impossibility of securing a record showing the error complained of. *Pignaz v. Burnett*, 119 Cal. 162, 51 Pac. 48, and cases cited. If a defendant were sentenced in his absence, and without any pretense of arraignment, the proceeding would be virtually *ex parte*, and the right to move to vacate would be clear. It is equally clear that a false or erroneous entry in the minutes of the court, made in the absence of the defendant, by which his substantial rights are injuriously affected, is, upon the same grounds, the subject of a motion to amend or correct, and the orders made upon such motions are the subject of exception under the provision of the statute above quoted. Under that provision, and under that alone, can a record be secured in such cases, upon which the errors of the trial court may be reviewed. We are satisfied upon these grounds that the appeals lie. The other appeals need no especial consideration. The motion in arrest of judgment was not in order until the judgment, as entered, was set aside; and the order upon that motion, when properly and regularly made, can only be reviewed on appeal from the judgment. If, upon the arraignment of the defendant herein ordered, he renews his motion in arrest, or makes other appropriate motions, and if they are overruled, the various orders of the court may be reviewed upon an appeal from the judgment then pronounced. The motion to discharge the defendant was properly denied, and the order vacating the stay of proceedings is of no consequence, in view of the right of the defendant, if again sentenced, to apply for a certificate of probable cause for any new appeal he may decide to prosecute. The orders denying the motions to correct the minutes and vacate the judgment are reversed, and the cause remanded, with directions to the superior court to arraign the defendant for judgment, and to proceed thereupon as it may be advised.

We concur: McFARLAND, J.; VAN DYKE, J.; GAROUTTE, J.; HENSHAW, J.

132 Cal. 143

Ex parte WALKER. (Cr. 674.)

(Supreme Court of California. March 8, 1901)
HABEAS CORPUS—CONVICTION—DEFECTIVE JUDGMENT.

Where defendant, after commitment, for embezzlement, was duly tried and convicted, but the judgment entered was defective, he will not be discharged on habeas corpus, since the sheriff is justified in holding him under the original commitment and the subsequent proceedings prior to judgment.

In bank. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

Habeas corpus by George Walker for discharge after conviction. Denied.

Geo. D. Collins, for appellant. Atty. Gen. Ford, for respondent.

BEATTY, C. J. This is a proceeding by habeas corpus in behalf of the defendant in the case of *People v. Walker* (just decided) 64 Pac. 133. The facts developed at the hearing in this case differ in some particulars from those shown by the record in the appeal. In his petition the prisoner alleged that he was unlawfully detained in the custody of the sheriff of San Francisco upon the sole authority of a so-called "judgment of conviction," a copy of which was set out, and, as set out, is so defective as to be scarcely intelligible. The facts, as disclosed at the hearing, are that the prisoner was held to answer by one of the police judges of San Francisco on a charge of embezzlement. Thereafter an information accusing him of that offense was duly filed by the district attorney, upon which he was tried and convicted. The clerk of the superior court then proceeded to enter the judgment according to the practice which seems to have obtained in that office. There was, it appears, a set of rubber stamps, from one of which the clerk would print a blank on a page of the minute book, and then fill it out with the proper names, dates, and other particulars. In this case the impression made by the stamp was very defective, being illegible in places, and the blanks also were not properly filled out; the result being a judgment so maimed and defective as to be in itself meaningless. If, therefore, it had been true that the sheriff held the petitioner without other authority than this defective record, it would, perhaps, have been necessary to order his discharge. But the sheriff is justified in holding the prisoner under the original commitment by the police judge and the subsequent proceedings in the superior court prior to judgment. If no judgment has been entered, the simple result is that one should be entered when duly rendered, and when entered it will dispose of the question of petitioner's lawful custody. In pursuance of the order which we have just made in the appeal case, remanding the cause to the superior court, orders can now be made which will result either in the discharge of the petitioner, or his detention pending other proceedings, or his commitment to the state prison. In the meantime he is held to the custody of the sheriff.

We concur: McFARLAND, J.; HENSHAW, J.; VAN DYKE, J.; GAROUTTE, J.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by D. B. McDonald against Cornelius M. Lee and others. From an order denying a new trial, defendants appeal. Appeal dismissed.

G. H. Perry, for appellants. Haven & Haven, for respondent.

PER CURIAM. Motion to dismiss the appeal upon the ground that it was taken after the time allowed by law. The judgment appealed from was entered February 26, 1900, and the order denying a new trial was entered in the minutes of the court November 16, 1900. The notice of appeal therefrom was filed January 16, 1901, more than six months after the entry of the judgment, and more than 60 days after the entry of the order. The appellants seek to sustain the appeal by showing that the notice of appeal was served upon the respondent in San Francisco, on the 15th day of January, and deposited in the post office at San Francisco on the same day, directed to the clerk of the superior court of Alameda county, where it was filed the next day. Section 940, Code Civ. Proc., declares that an appeal is taken by filing the notice with the clerk, and serving a similar notice upon the adverse party. Section 1013, Code Civ. Proc., provides that, where service is made by mail, if the adverse party may exercise a right within a certain number of days after such service, the time within which such right may be exercised is extended one day for every 25 miles of the distance between the place of deposit and the place of address. This section, however, does not authorize any extension of the time within which a paper may be filed, or within which the service of a paper may be made upon the adverse party. The motion is granted, and the appeal is dismissed.

6 Cal. Unrep. 653

NEWHALL v. HATCH et al. (S. F. 2,407.)

(Supreme Court of California. March 11, 1901.)

MORTGAGES—FORECLOSURE—LIMITATION—ESTOPPEL.

A foreclosure suit was based on the liability specified in the mortgage, and not on a new promise to pay the debt, made before it became barred by the limitation, and before a judgment lien on the premises was created. A demurrer by the judgment creditor was sustained on the ground that the debt was barred, and, plaintiff declining to amend, judgment dismissing the action was entered, after which the creditor, relying on the allegations of the complaint, purchased the property on execution sale under the judgment, without notice of any renewal. *Held*, in a subsequent suit to foreclose the mortgage, in which plaintiff relied on a new promise, that he was estopped from maintaining the action.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; S. P. Hall, Judge.

132 Cal. 252

McDONALD v. LEE et al. (S. F. 2,669.)

(Supreme Court of California. March 18, 1901.)

APPEAL—FILING NOTICE—TIME.

Code Civ. Proc. § 1013, provides that, where service is made by mail, if the adverse party may exercise a right within a certain number of days after such service, the time within which such right may be exercised is extended one day for each 25 miles of distance between the place of deposit and place of address. *Held*, that the statute does not extend the time limited for filing a notice of appeal served by mail.

Action by George A. Newhall against A. T. Hatch and others. From a judgment for plaintiff and an order denying a new trial, defendant Sherman, Clay & Co. appeals. Reversed.

F. A. Berlin, for appellant. E. W. McGraw and Craig & Craig, for respondent.

HAYNES, C. The facts can best be stated historically, with such reference to the pleadings as may be necessary. On November 3, 1892, defendant Hatch and wife mortgaged to the plaintiff certain real estate situated in Alameda county. The instruments constituting the mortgage consisted of a deed in form absolute, executed by Hatch and wife, and a defeasance executed by Newhall, the body of which, after reciting the deed, was as follows: "And whereas, said deed is absolute in form, yet in fact is intended as security for the payment of the sum of \$4,000 loaned by said Newhall to said A. T. Hatch: Now this defeasance witnesseth that the said George A. Newhall, for himself, his heirs, executors, administrators, and assigns, hereby binds himself and agrees to reconvey the hereinabove mentioned and described property unto the said A. T. Hatch, his heirs, executors, administrators, or assigns, at any time upon the payment to him of said sum of \$4,000.00 and his demand for a deed to said property." On April 21, 1896, Sherman, Clay & Co., the appellant herein, obtained a judgment against said A. T. Hatch in the superior court of Alameda county for the sum of \$47,792.25, which was then docketed, and became a lien on said mortgaged premises. On February 3, 1897, Newhall commenced an action to foreclose his said mortgage lien, and made Hatch and wife, Dalton, the assignee of Hatch in insolvency, and Sherman, Clay & Co. defendants, alleging as to the latter that it had, or claimed to have, some lien thereon, but which was subsequent and subject to said lien of the plaintiff. In said first action the complaint set out the defeasance hereinbefore quoted, and alleged: "That no part of said sum of \$4,000 has been paid, nor has any interest thereon been paid, but the whole thereof, with interest from November 3, 1892, is now due and owing by said Hatch to the plaintiff herein." Sherman, Clay & Co. demurred to said complaint, and, among other grounds, specified that the cause of action was barred by the provisions of section 337 of the Code of Civil Procedure. Said demurrer was sustained, and, the plaintiff declining to amend, judgment that his action be dismissed as to Sherman, Clay & Co. was entered on April 27, 1897, and from that judgment Newhall appealed, and this court affirmed the judgment. *Newhall v. Sherman*, 124 Cal. 509, 57 Pac. 387. After said judgment was entered against Newhall in the superior court, Sherman, Clay & Co. took out execution upon its judgment against Hatch, and on July 22, 1897, the sheriff sold said

premises to said Sherman, Clay & Co., and, no redemption having been made, it received the deed of the sheriff therefor on July 28, 1898, and recorded it August 5, 1898. Thereafter, on June 27, 1899, said Newhall commenced the present action to foreclose his said mortgage upon the same premises, and again made the corporation known as Sherman, Clay & Co. a party defendant. The making of the deed and defeasance was alleged as before, but it was also alleged as follows: "That thereafter, on September 20, 1895, and long prior to the accruing of the claim of Sherman, Clay & Co., hereinafter mentioned, the said defendant A. T. Hatch made and subscribed in writing a new promise to pay the indebtedness secured by said mortgage, which new promise is in the words and figures following, to wit: 'San Francisco, September 20, 1895. \$50,000. One day after date, without grace, I promise to pay to the order of George A. Newhall, fifty thousand dollars, for value received, with interest at 7 per cent. per annum from date until paid; both principal and interest payable only in United States gold coin. A. T. Hatch.' And plaintiff alleges that the \$4,000 secured by the mortgage aforesaid was a portion of the \$50,000 agreed to be paid by said Hatch by the promissory note aforesaid; that no part of said sum of \$4,000 has been paid, nor has any interest thereon been paid, but the whole thereof, with interest from September 20, 1895, is now due and owing by said Hatch to the plaintiff herein." The complaint further alleged that Sherman, Clay & Co. claimed some interest or lien upon the premises arising out of a judgment obtained and docketed against Hatch in the superior court of Alameda county on April 21, 1896, for the sum of \$47,792.25, but that the same was subsequent and subordinate to said mortgage. Sherman, Clay & Co. demurred to said complaint for want of facts, also that the alleged cause of action is barred by certain specified provisions of the Code of Civil Procedure, and also demurred severally on the grounds of ambiguity, uncertainty, and that the complaint is unintelligible, and, these demurrers having been overruled, answered, and put in issue all the material allegations of the complaint, and alleged the recovery of said judgment against Hatch, the sale of the premises described in the complaint on July 22, 1897, upon execution issued upon said judgment, that it became the purchaser and received a certificate of purchase, that the property sold was not redeemed, and on July 28, 1898, the sheriff executed and delivered a deed to said corporation therefor. Said defendant corporation also pleaded the former judgment of the superior court, and its affirmance in this court. A trial was had upon said issues, and the court found the facts as hereinbefore recited, and further found that the only question considered or decided in said first action was that plaintiff's cause of action appeared to be barred

by section 337 of the Code of Civil Procedure, and that that was the only question considered by the supreme court; that at the commencement of this action Sherman, Clay & Co. was the owner of the property described in the complaint, subject to plaintiff's said mortgage, and that said former judgment is not a bar to this action; "that in this action an issue is presented as to a new promise made by Hatch before the mortgage aforesaid became barred to pay the debt thereby secured, which issue was not presented in said former action, and was not therein adjudicated." To these findings was added a conclusion of law that plaintiff have judgment of foreclosure, and from said judgment, and from an order denying its motion for a new trial, said defendant Sherman, Clay & Co. appeals.

Respondent contends that "the \$50,000 note given by Hatch to plaintiff in 1895 kept the mortgage alive." As between Hatch and Newhall, the mortgagor and mortgagee, that proposition is conceded. It was decided in *Southern Pac. Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145, cited by respondent, that a promise to pay the debt, made before it became barred by the statute of limitations, interrupted the running of the statute as to the debt, and kept alive the mortgage security. But this conclusion was carefully restricted by the qualifying words, "as between the parties." That case, therefore, does not decide the question here presented. In *Wood v. Goodfellow*, 43 Cal. 185, where it was claimed that the absence of the mortgagor from the state suspended the running of the statute of limitations, this court said: "So long as he [the mortgagor] retained the equity of redemption, and no other rights had intervened by reason of subsequent liens or incumbrances, he had the power by written stipulation under the statute to extend the time within which the debt should not be barred, or he might suspend the running of the statute by his absence from the state. So long as his rights only were to be affected, it was within his power to suspend the operation of the statute either by a written stipulation or by absenting himself from the state. But this court has repeatedly decided that, as against subsequent incumbrancers, or a subsequent holder of the equity of redemption, the mortgagor has no power, by stipulation, to prolong the time of payment, or in any manner increase the burdens on the mortgaged premises." See, also, the cases there cited. So, in *Bank v. Brooks*, 126 Cal. 198, 200, 59 Pac. 302, 303, it was said: "The first mortgagee could not renew the note, and thereby extend the statute of limitations so as to affect the second mortgagee. He may take advantage of the statute of limitations, although the debtor does not,—citing *Lord v. Morris*, 18 Cal. 482; *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Barber v. Babel*, 36 Cal. 11; *Sichel v. Carrillo*, 42 Cal. 493; *Wood v. Goodfellow*, 43 Cal. 185." See, also, *Watt v. Wright*, 66 Cal.

202, 205, 5 Pac. 91." In the case at bar, however, the new note or new promise was made on September 20, 1895, while the lien of the judgment of Sherman, Clay & Co. was not created until April 21, 1896, and at the time of said renewal the cause of action upon the liability specified in the defeasance and alleged by Newhall in his first suit was not barred by the statute. But his first suit was not commenced until February 3, 1897, and that suit, as we have seen, was based upon the liability shown by the deed and defeasance, and not upon the new promise set up in the present action. At the time the first action was brought, Sherman, Clay & Co. had only a judgment lien upon the premises described in Newhall's mortgage, and by the judgment in that action it was declared that as against said lien the plaintiff's mortgage had ceased to exist. After the rights of the parties had thus been adjudicated, and long before the present action was brought, and without notice of said renewal, Sherman, Clay & Co. bought said premises at execution sale under its judgment against Hatch, and, no redemption having been made, received the sheriff's deed therefor on July 28, 1898, nearly a year before the present action was brought. No stronger assurance could have been given by Newhall to Sherman, Clay & Co. that neither the mortgage executed November 3, 1892, to secure the \$4,000 money loaned, nor the time of payment thereof, had been in any manner changed, renewed, or prolonged, than was given by his verified complaint in the first action, and his refusal to amend after the finding and judgment of the court that the mortgage he held was barred by the statute of limitations as against the judgment lien of Sherman, Clay & Co., set up in its answer. The new promise upon which Newhall now relies was known to him at the time his first action was brought; and if, by error of judgment, he relied, on his first action, upon the original promise, he should at least have informed Sherman, Clay & Co. of the fact of the renewal, and not have stood by with closed mouth, and permitted that corporation to purchase the property in reliance upon the representation, solemnly given in a judicial proceeding, of facts which on their face conclusively showed that his mortgage lien had expired, and that Sherman, Clay & Co. might safely purchase.

It is not necessary to discuss or decide the question whether the judgment rendered upon demurrer to the complaint in the former action, upon the ground that the mortgage lien was barred by the statute of limitations as against Sherman, Clay & Co., may be pleaded by that corporation as a technical bar to a new action to determine the priority of lien, the new action having alleged a new promise by the mortgagor, made before the first action was brought; since, if it is not a technical bar, the facts show an estoppel in pais, if not an estoppel by record. As already stated, at the time the first action was

brought and determined by the judgment in the superior court, Sherman, Clay & Co. had only a judgment lien upon the premises described in Newhall's mortgage; but, relying upon the allegations of plaintiff in his first complaint, which, in effect, negated any renewal of the mortgage lien prior to the commencement of that action, Sherman, Clay & Co. purchased the premises discharged of any lien which may then have existed in favor of Newhall as against the mortgagor. The plaintiff knew of the renewal; the defendant Sherman, Clay & Co. did not, and had no means of knowing it. Even if said defendant had known of the execution of the \$50,000 note made in 1895, that instrument would not have given any information that it included the \$4,000 secured by said mortgage, or that it was a renewal of that or any other debt owing by Hatch to the plaintiff. Nor are there any controlling equities in favor of the plaintiff. The \$4,000 secured by the mortgage in question was not loaned on the security of that mortgage. As shown by the testimony of the plaintiff, it was part of and included in a note for \$50,000 made by Hatch to the plaintiff a year or more before the mortgage was given, and this mortgage was additional or collateral security for the amount thereof. The property was sold to appellant upon its bid of \$3,000, and respondent suggests that, for anything the record shows, it may be worth a million; but the presumption from the record is that it brought its full market value.

There is no conflict in the evidence. The findings of fact are full, but there are mixed with them certain conclusions of law, as we have seen,—as that appellant is the owner of the lands described in the complaint, "but subject to the plaintiff's mortgage." Eliminating these legal conclusions, the findings do not support the judgment, but require a judgment for the defendant Sherman, Clay & Co. I advise that the judgment and order be reversed, with directions to the court below to correct his conclusion of law, and enter judgment upon the findings for the appellant.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, with directions to the court below to correct his conclusion of law, and enter judgment upon the findings for the appellant.

131 Cal. 530

OWEN v. POMONA LAND & WATER CO.
(L. A. 637.)

(Supreme Court of California. March 14,
1901.)

VENDOR AND PURCHASER—RESCISSION—FAILURE OF CONSIDERATION.

Defendant contracted to convey to plaintiff certain lands and shares in an irrigation company, which entitled him to a certain amount of water. There was no guaranty that the supply

of water would be permanent. Plaintiff knew the supply of water and its source. Plaintiff received the stock, and entered and continued in possession of the land for several years, when the water supply partially failed. Held not to authorize a rescission by plaintiff, under Civ. Code, § 1689, subd. 4, authorizing the rescission of a contract if the consideration fails in any material respect, since the plaintiff received all he contracted for.

In bank. From a judgment of the court in bank (63 Pac. 850) reversing a judgment in department (61 Pac. 472) affirming a judgment in favor of plaintiff, plaintiff petitions for a rehearing. Denied.

BEATTY, C. J. Response to petition for rehearing: In his petition for a rehearing respondent insists that, although he may have had no right to rescind by reason of the delay in perfecting the title to the land, he did have a clear right to rescind on account of the failure of the water supply; and he claims that he had this right under subdivision 4 of section 1689 of the Civil Code, notwithstanding the absence of any bad faith or fault on the part of the defendant. It is true that under that provision of the Code a party to a contract may rescind if the consideration, before it is rendered to him, fails in a material respect, from any cause. But does that provision apply to the kind of rescission decreed in this case? The respondent never offered to rescind, except upon condition that he should be paid for his improvements, and such was the decree. The offer and the decree were, as we understand, alike based upon some imputation of actual or constructive fraud on the part of the defendant in contracting to convey land to which it had no title. Eliminate this feature of the case, and how does it stand? The plaintiff was to have, along with the land, certain shares of stock in an irrigation company, representing 2,032 inches of water. He knew what the company was, what its supply of water was, and what was the source of supply. When he commenced his improvements he knew as well as the defendant could have known whether the supply would be permanent. There was no guaranty that it should be permanent, and no such representation, or, if there was, it was a mere expression of opinion. The plaintiff then made permanent improvements, because of his own belief that the water supply would not fail. If there had been no difficulty about the title, and the payments had been completed, and the conveyance made in January, 1894, as the contract provided, the defendant would have got all he contracted for on his own construction of the agreement as to the water stock; but when the water failed in 1896 he would have had no right to rescind, with or without compensation for his improvement, and we see no reason why, in the case as it is, he should be allowed to throw upon the defendant the unfortunate consequences of his own mistaken judgment in a matter as to which he was uninfluenced by any fraud,

actual or constructive, of the defendant. Rehearing denied.

We concur: HENSHAW, J.; VAN DYKE, J.; McFARLAND, J.; GAROUTTE, J.

132 Cal. 294

BERLIN v. EUREKA LODGE, NO. 9, K. P.

(S. F. 2,169.)¹

(Supreme Court of California. March 21, 1901.)

INSURANCE — FRATERNAL SOCIETIES — SICK BENEFITS — BY-LAWS — CHANGE — RETROACTIVE OPERATION — SUITS AT LAW — CONDITIONS PRECEDENT.

1. Where a member of a fraternal insurance society had been paid \$10 per week for more than 100 weeks, as provided by the by-laws thereof, and the society amended the by-laws so as to give sick members "\$10 per week for the first 50 weeks; for the following 50 weeks, \$5 per week; and thereafter, \$3 per week,"—such amendment had no retroactive effect as to such member, who would therefore be entitled to weekly benefits as though he had not previously been sick.

2. Where a member of a fraternal insurance society died pending an appeal to the highest tribunal thereof, the appeal should have been decided on its merits, there being no authority in the by-laws for dismissal, and hence such dismissal would authorize the member's representatives to seek relief in a court of law.

Department 1. Appeal from superior court, city and county of San Francisco; Frank H. Dunne, Judge.

Action by Caroline Berlin, administratrix of the estate of William A. Berlin, against Eureka Lodge, No. 9, Knights of Pythias, an association. From a judgment for plaintiff, defendant appeals. Affirmed.

Davis Louderback, for appellant. Q. F. Meldon, for respondent.

GAROUTTE, J. This is an action to recover from a subordinate lodge of the Knights of Pythias an amount represented by an accrual of weekly sick benefits. The action is brought by the administratrix of the estate of William A. Berlin, deceased. Berlin was a member of the order, and entitled to weekly sick benefits by reason of certain by-laws. For a great many months he had been paid these sick benefits. Thereafter, and while he was still sick and entitled to benefits under the aforesaid by-laws, the lodge amended those laws, and provided that weekly sick benefits should be paid to members as follows: "For the first fifty weeks of disability, ten dollars per week; for the following fifty weeks of such disability, five dollars per week; and thereafter, during the continuation of such disability, three dollars per week." Berlin having been paid \$10 per week under the old by-law for more than 100 weeks, it is now claimed by appellant that he was not entitled to \$10 per week under the amended by-law for the first 50 weeks of his sickness, and \$5 per week for the next succeeding 50 weeks of his sickness, but that in

fact he was only entitled to \$3 per week from the date of the passage of the amended law. There was no attempt upon the part of the lodge to give this amended by-law a retroactive effect, even conceding that it could be done. Hence it seems that when the amended by-law went into effect it had the same force upon Berlin as upon any other member of the order. The by-law having no retroactive effect, it is an immaterial matter that he had been sick prior to its adoption, and he stood in the same position to it as if he had been taken sick upon the day of its adoption.

In view of the decision of this court in *Robinson v. Lodge*, 117 Cal. 370, 49 Pac. 170, the law of this state may be deemed settled to the effect that a member of a subordinate lodge, deeming himself aggrieved by the action of the lodge, must exhaust all the remedies provided by its laws for the redress of his grievances before he may appeal to courts of law. And, secondly, it may be deemed settled law by the same decision that a member of a lodge, by subscribing to the by-laws, may waive his right to sue in the courts of law for the redress of his grievances; and, if such member brings an action in a court of law, it is a defense thereto if he has agreed within the order to look solely to its tribunals for the redress of those grievances, and those tribunals have decided against him upon the merits of his case. In the present case, Berlin sought relief in the tribunals of the order, and, while his appeal was pending before its highest tribunal, he died. Thereafter that tribunal dismissed his appeal upon the ground that Berlin was then dead, and "there is no party in interest or beneficiary before us, and no revivor has been had." We find nothing in the laws of the order prescribing a procedure for the substitution of a new party in case of the death of the party appellant, and the appellate tribunal had no right to dismiss Berlin's appeal upon the ground set forth. It should have decided the appeal upon its merits, regardless of his death. Certainly so, in the absence of some express law of the order authorizing a dismissal of the proceeding.

If this, the highest tribunal of the order, had decided the appeal upon its merits adversely to Berlin's claim, possibly in view of the *Robinson Case*, supra, its decision would have barred a recovery in this action. But the dismissal upon the grounds stated was, in substance, a refusal to hear the appeal upon its merits; and Berlin's legal representatives had the right, under those circumstances, to come to a court of law for relief. Berlin was only bound to abide by the decision of the tribunals of the order if those tribunals decided his case upon its merits. Under the laws of the order, they were required to so decide it, and, if they refused, of necessity his only relief was an appeal to the courts. Dismissing his appeal for the

¹ Rehearing denied April 20, 1901.

reasons stated was not authorized, and he, having taken the appeal in good faith seeking to test the merits therein involved, thereby exhausted all the remedies furnished by the laws of the order, and, there being no final decision against him upon the merits, his representative was justified in bringing this action.

There are a great many points made by appellant upon which reliance is placed in order to reverse this judgment. They are of a most technical character, and, upon a careful examination of them, we find them too technical to interfere with the substantial administration of justice.

For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(132 Cal. 254)

GREEN et al. v. SOUTHERN PAC. CO. (L. A. 810.)¹

(Supreme Court of California. March 19, 1901.)

RAILROADS — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate was killed by a collision on a railway crossing. Intestate was familiar with the crossing, and knew that the train was due at about the time he attempted to cross. The whistle was sounded on approaching the crossing, and the bell was ringing continuously. Defendant's right of way, to within 12 feet of the track, was planted in corn, which was about 9 feet high, and obstructed the view until within 12 feet from the crossing. Intestate was driving his wagon rapidly, and from his position in the wagon could have seen the approaching train, and, if he had looked and listened before going on the track, he could have avoided the collision. *Held*, that he was guilty of such contributory negligence as precluded recovery.

Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Mary Green and others against the Southern Pacific Company. From a judgment for plaintiffs, defendant appeals. Reversed.

R. B. Canfield, for appellant. Murphy & Gottschalk, for respondents.

HARRISON, J. On September 2, 1895, George N. Green was struck by a locomotive of the defendant, and instantly killed. His widow and children have brought the present action to recover damages therefor, alleging that his death was caused by reason of the negligence of the defendant. The case was tried by a jury, and a verdict given in favor of the plaintiffs for the sum of \$9,000. The defendant has appealed directly from the judgment, presenting the grounds of its appeal in a bill of exceptions.

At the time of his death, Mr. Green was 70 years of age, and in good health and the enjoyment of his faculties. He had resided in Santa Paula for several years, and on that morning started in an express wagon, with

a team of horses, to go to some land of his which was about three miles east of Santa Paula, to get a load of wood. In going there he went for about two miles along the county road, which runs near to the railroad, and at its intersection with the Brock road turned southerly into the Brock road, and was driving along this road, when the regular morning passenger train of the defendant, coming from the east, struck and killed him. The train was running at a speed of about 40 miles an hour, and was due at Santa Paula at 1 minute after 11 o'clock. It was 2 minutes before 11 when the accident occurred. The track of the defendant for a distance of upwards of 2,000 feet east of this crossing is straight, and is substantially upon a level with the adjacent ground, varying less than a foot therefrom for several hundred feet. Eighty rods east of the crossing is a whistling post, and from that point to the crossing the grade falls 11.2 feet, so that trains of cars are easily moved thereon without the aid of steam. The intersection of the Brock road with the county road is about 3 feet higher than at the crossing of the railroad, and is 180 feet northerly therefrom. The general surface of the ground slopes to the south, with about the same grade. The right of way of the defendant between the crossing and the whistling post is 100 feet in width, and, with the consent of the defendant, a portion of this right of way had been planted in corn, which at the time of the accident had an average height of about 9 feet. Between the north rail of the track and the south line of the corn there was, however, a space of 12 feet, but to one driving along the Brock road any view of an approaching train would be obstructed by the corn until he had got within 12 feet of the crossing. There was also an orchard on the east side of the Brock road, just south of its intersection with the county road, whose trees were about 9 feet in height. It appears without any substantial conflict in the evidence that the whistle upon the locomotive was sounded and the bell rung, as required by section 486, Civ. Code. The engineer testified, as did the fireman, that he gave the regular crossing whistle—two long and two short blasts—at the whistling post, and that the bell was ringing continuously. The locomotive had an automatic bell ringer, and he testified that it was started half a mile back, and was ringing until the train came to a stop at the crossing. Each of the witnesses who was asked thereon testified that they heard the whistle; and, although some of them did not hear the bell, their failure to hear it was sufficiently accounted for. It was shown that there was a strong west wind blowing that morning, and with one exception the witnesses were all west of the Brock road, and some distance from the railroad. Mrs. Welchman, who lived between the Brock road and the whistling post, and about 100 yards north of the railroad, testi-

¹ Rehearing denied April 19, 1901.

fied that she heard the whistle and heard the bell ringing as the train was passing her house. Other witnesses heard both the bell and the whistle. Mrs. Trotter testified that she heard the bell after the collision; thus confirming the testimony of the engineer. Mrs. Tinder testified that she heard the bell, and then she heard the whistle. In view of this testimony, the fact that two of the passengers on the train did not hear it is not entitled to any consideration. It appears that their attention was not directed to it, and the noise of the train might readily have prevented them from hearing it. Upon the evidence on this point no sensible or impartial person could fail to find that the bell was rung and the whistle sounded, and, in the absence of any express finding to the contrary, it must be assumed that the jury so considered the evidence. The plaintiffs, therefore, failed to show any negligence on the part of the defendant in giving notice of the approach of the train; and it cannot be held, under any of the circumstances shown herein, that the running of a passenger train through a sparsely-settled country, at the rate of 40 miles an hour, is, as matter of law, negligence.

The plaintiffs, however, contend that the defendant was guilty of negligence in permitting the view of its track and approaching train to be obstructed by the corn which was growing there. The claim that such negligence was wanton cannot be sustained. On the other hand, the defendant contends that, even if this be conceded to be negligence, it was not the proximate cause of the death of Mr. Green; and that it was shown by the evidence that his own negligence was not only contributory thereto, but was the real cause of his death. The only eyewitnesses of the accident were the engineer and the fireman upon the locomotive and Mrs. Trotter. The engineer and the fireman testified that when the train was about 30 or 40 feet from the crossing they saw the heads of the horses, which were then about 10 or 12 feet from the outermost rail, and "they appeared to be coming pretty fast." Mrs. Trotter was at her home upon the Brock road, about 1,000 feet south of the crossing, and testified that her attention was drawn by hearing the whistle; "and when I looked the team was just leaving the main county road, and had turned down towards the track, and was coming pretty fast. All at once he jerked the team around to the right, the northwest side of the fence, and the car just swept by quicker than I could tell it." She further said: "When I first saw the team coming from the main county road down there, why it was coming pretty fast, and then in an instant, when the train came through the cattle guard, the team was right upon the track, and he was trying to rein the horses around to the right apparently." And upon her cross-examination she said: "When I first saw Mr. Green on this occasion in his wagon,

he had turned from the main county road to come down to the Brock road, and was coming down from the county road this way. His team was coming pretty fast when I saw him, and that was when I stepped out to get a bucket,—coming fast; but he got near just before the train come, and right at the track apparently he jerked his horses around this way, I believe to the right. It was just as he got to the track I saw him pull around the team. His horses ran fast before he got there." It is the settled rule in this state that contributory negligence is a defense to be affirmatively established by the defendant, unless it is shown or can be inferred from the evidence given in support of the plaintiff's case. *Robinson v. Railroad Co.*, 48 Cal. 426. It is also well settled that, while contributory negligence is a question of fact to be determined by the jury, yet, when the facts are undisputed, the question is one of law for the court (*Glasscock v. Railroad Co.*, 73 Cal. 137, 14 Pac. 518); and if the evidence thereon is without conflict, and of such a character that the only conclusion to be reasonably drawn therefrom is in favor of its existence, the court may grant a nonsuit at the close of the testimony, or may direct a verdict for the defendant (*Davis v. Railroad Co.*, 105 Cal. 131, 38 Pac. 647; *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 53 Pac. 651). It was said in the case last cited: "The cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined, and, if any element is wanting, the courts will hold as matter of law that the plaintiff has been guilty of negligence. And, when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence." Under the evidence which was before the court it must be held, in view of the principles thus declared, that the deceased was guilty of contributory negligence, and that the court should have granted the defendant's motion, at the close of the testimony, for a nonsuit. It is very clear that if Mr. Green, at any time after he had entered upon the Brock road, had taken the precautions which any prudent man would have taken, he would have learned that the train was approaching, and thus have avoided the danger. One of the witnesses was working that morning in a field near the intersection of the Brock road with the county road, and heard the whistle at the whistling post, and saw the top of the train. The place at which he was working was shown to be five feet higher than the railroad crossing, and nearly two feet higher than the intersection of the Brock road with the county road. At the time the whistle sounded, Mrs. Trotter testified that Green had just turned into the Brock road. He was sitting upon the seat of his wagon, which

it was shown brought his eye to a point seven feet and four inches above the ground, so that he had practically the same opportunity for seeing the train as had the witness who was working upon the ground. It was the regular time for the train to be at that point, and it was shown that this train had been running upon this schedule for several months. Green had resided in Santa Paula for several years, and his occupation—the transfer business—was such that it must be assumed that he knew the time at which the train would reach Santa Paula. He had frequently driven over that route, and was familiar with the location of the track and the extent to which its view was obstructed by the corn. His wagon was equipped with a brake, and the horses he was driving were accustomed to the cars. If he had stopped when he reached the turn in the road, he would have heard the whistle, and, if he had looked, he would have seen the approaching cars. In *Herbert's Case*, supra, it was said: "The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains. What he must do in such a case will depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions." The noise caused by the rumble of his empty wagon was an additional reason for caution, and his knowledge that the track was hidden by the corn was a reason for his taking more than ordinary precautions against meeting the train. Instead of taking any precautions, the testimony of all who saw him is that he was driving at a rapid gait towards the crossing. The only inference to be drawn from his conduct in view of his knowledge of the surroundings is that he was attempting to get across the track before the cars should come along. If such be the case, it can only be regarded as recklessness. *Hager v. Southern Pac. Co.*, 98 Cal. 309, 33 Pac. 119. The judgment is reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

132 Cal. 250

MOHR v. BYRNE et al. (KOWALSKY,
Intervener. S. F. 1,843).

(Supreme Court of California. March 18,
1901.)

APPEAL—ADVERSE PARTIES—NOTICE OF
APPEAL—DISMISSAL.

Where, in an action on notes executed by one defendant, judgment is entered against the defendants for the amount due, and that an intervener, who claims an interest in one of the notes, has no interest therein, the appeal of the intervener would not be dismissed because defendants are not served with notice of the appeal, since a reversal of the judgment as be-

tween the plaintiff and intervener would not affect the defendants, and they are not, therefore, adverse parties to the intervener on such appeal.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Henry Mohr against Kate C. Byrne and others (H. I. Kowalsky, intervener). From a judgment for plaintiff, the intervener appeals. Motion to dismiss the appeal denied.

W. A. Kirkwood and W. C. Sheperd, for plaintiff. W. H. H. Hart and Wilson & Wilson, for defendants. H. I. Kowalsky, for intervener.

HARRISON, J. Motion to dismiss the appeal of the intervener for failure to serve all of the adverse parties. The plaintiff brought this action to recover from the defendant Kate C. Byrne the amount due upon certain promissory notes executed by her, and that the defendant Florence Blythe Hinckley be directed to pay the said judgment out of certain moneys owing by her to said Byrne. Issues were joined upon this complaint by the defendants Hinckley and Byrne, and a complaint in intervention was filed by the appellant, Kowalsky. Judgment was entered in favor of the plaintiff and against the defendant Hinckley for the amount found due on the notes, and, in case he should be unable to collect the same from her, that he recover the same from the defendant Byrne, and that the intervener take nothing by the action. From this judgment the intervener appealed. His appeal, so far as it affects the defendant Byrne, was dismissed December 31, 1900, upon the ground that he had not served her with the notice of his appeal. 63 Pac. 341. The defendant Hinckley now moves to dismiss his appeal upon the ground that the defendant Byrne was an adverse party, and his failure to serve her has taken away the jurisdiction of this court to hear the appeal.

The "adverse party" who is to be served with the notice of appeal is one whose interest in the subject-matter of the appeal will be affected by the reversal or modification of the judgment or order appealed from. Whether the parties to an action are adverse to each other is to be determined from the record (*Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103), and the record herein fails to show that upon the appeal of the intervener the interest of the defendant Byrne is adverse to that of the defendant Hinckley, or that his appeal cannot be determined without affecting her interest. By his complaint in intervention he seeks to have it determined that, as against the plaintiff, he is entitled to a certain interest in one of the notes set forth in the complaint, and upon that issue the court found against his claim. He does not seek relief against any other party to the action, and his controversy with the

plaintiff can be determined without the presence of the defendant Byrne. The judgment against him can be reversed or modified without affecting her rights or changing the judgment against her. The motion is denied.

We concur: GAROUTTE, J.; VAN DYKE, J.

(132 Cal. 209)

SMITH v. CAPITAL GAS CO. (Sac. 831.)¹

(Supreme Court of California. March 13, 1901.)

GAS—DUTY TO FURNISH—UNJUST DISCRIMINATION—PENALTY—METERS—RENT.

Under Civ. Code, § 629, declaring that a gas company must supply gas to any person within 100 feet from a main on written application, a company has the right to refuse gas to one who refused to pay rent for a meter, and who did not consume enough gas by a sixth part to pay for the rent of a meter, though other consumers were furnished meters free.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by William M. Smith against the Capital Gas Company. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

Catlin, Shinn & Catlin, for appellant. Devlin & Devlin, for respondent.

SMITH, C. The suit was brought to recover of the defendant liquidated damages amounting to \$1,300, alleged to be due under the provisions of section 629 of the Civil Code, for refusal to furnish gas to the plaintiff. The judgment was for the defendant, and the plaintiff appeals. The provision of the Code in question is that, "upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main of the corporation * * * the corporation must supply gas as required for such building or premises," etc.; and, further, that "if, for the space of ten days after such application, the corporation refuses or neglects to supply the gas required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars a day as liquidated damages for every day such refusal or neglect continues thereafter." The case as presented by the findings is as follows: The defendant is a corporation engaged in supplying the city of Sacramento with gas, and the plaintiff is an occupant of premises within 100 feet of one of its mains. September 22, 1898, the plaintiff served on the defendant a written notice, which (omitting date, address, and signature) was as follows: "You will please immediately supply me with gas for the premises occupied by me," etc. (describing them). The defendant, in reply, within 10 days thereafter "notified plaintiff that it would supply plaintiff with

gas for said building and, premises if plaintiff would furnish a meter, or agree to pay defendant fifty cents per month as rent for a meter"; and "plaintiff refused to furnish a meter, or to pay said rent to the defendant." The rent demanded was found by the court to be "fair and equitable," representing the monthly cost of the meter to the defendant for care, labor, interest on investment, etc. But it is found that the defendant had no rule requiring payment of rent for meters, nor did it charge its other customers therefor. The defendant, it seems, had, prior to September 8, 1898, been supplying plaintiff with gas; but the plaintiff, during the year preceding that date, had used electrical lights mainly, and almost exclusively, and the total amount of gas used on the premises amounted only to the value of \$1.75; and the defendant on that date had removed the meter, thereby depriving the plaintiff of gas. It is found, in a passage following the statement of the above facts and the written notice, that "said gas" was and is necessary for the plaintiff's use on the premises in question; but, unless this expression be construed as referring to the gas used prior to September 8, 1898, it does not appear how much or what gas was needed.

There can be no doubt, I think, of the right of gas companies ordinarily to charge rent for meters. Civ. Code, § 632; *Sheward v. Water Co.*, 90 Cal. 641, 27 Pac. 439. But the point is made by the appellant that in charging him with such rent when other consumers were not required to pay it "the defendant arbitrarily discriminated against the plaintiff." But I do not think this is the case. Ordinarily, compensation for the meter is received from the return for the gas consumed. But here the value of the gas consumed during the year preceding the removal of the meter was not equal to a sixth part of the annual expense of the meter. The plaintiff's written demand did not specify, even in a general way, the amount of gas required, or even that he required more gas than he had been in the habit of using (*Andrews v. Power Co.* [City Ct. N. Y.] 51 N. Y. Supp. 872), and the defendant was quite justified in supposing that he required no more (Code Civ. Proc. § 1963; 1 Greenl. Ev. § 41). A "state of mind once proved to exist is presumed to remain such until the contrary appears." 1 Greenl. Ev. § 42. The case, therefore, stands as though the plaintiff's demand had been simply for the restoration of the status quo; i. e. for the use of the quantity of gas he had been using. The plaintiff's case was, therefore, altogether exceptional, and, we may assume, unique; for there is neither finding nor allegation that there were any others in the same category, and, if none, then there was no discrimination. But, if there were any such, it devolved on the plaintiff to allege and to prove it; for, to render one

¹ Rehearing denied April 12, 1901.

liable for a penalty, every material fact necessary to bring the case within the statute must be affirmatively shown. Conly v. Clay, 90 Hun, 20, 35 N. Y. Supp. 521; Village of Hardwick v. Vermont Telephone & Telegraph Co. (Vt.) 40 Atl. 169. The defendant was justified, then, in notifying the plaintiff that he would be charged with rent for the meter if supplied by the company, and the plaintiff's refusal to agree to this was its sufficient justification in refusing to furnish gas. I advise that the judgment be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

132 Cal. 261

PEOPLE v. BIRD. (Cr. 692.)

(Supreme Court of California. March 19, 1901.)

CRIMINAL LAW—PRELIMINARY EXAMINATION—EVIDENCE—ADMISSIBILITY.

1. Under Pen. Code, § 686, providing that a defendant shall have the right to confront the witnesses against him, except where the charge has been preliminarily examined by a committing magistrate, and the testimony taken down in the presence of defendant, the prosecution cannot introduce the testimony of a deceased witness, which was taken on a former trial of the case.

2. An accused may waive the right of confronting his witnesses secured by Pen. Code, § 686, and hence may introduce in evidence the testimony of a deceased witness, whether the testimony was given at the preliminary examination or on a former trial.

3. Where irrelevant evidence, prejudicial to accused, is admitted on assurance of the prosecutor to connect it with the case, and he fails to do so, it is proper for the court to strike it out, and instruct the jury to disregard it.

Department 2. Appeal from superior court, Los Angeles county; John L. Campbell, Judge.

R. A. Bird was convicted of forgery, and he appeals. Reversed.

R. A. Bird, in pro. per. Atty. Gen. Ford, for the People.

HENSHAW, J. This is an appeal from a judgment of conviction of the crime of forgery. The facts sufficient for an understanding of the matters of law here presented for consideration will be found in the former appeal of People v. Bird, 124 Cal. 33, 56 Pac. 639. Upon the trial of this cause, a witness (Grove), the teller of the bank who had paid the money on the check presented by defendant, was admitted to be dead. He had testified at the preliminary examination of defendant and upon two trials of this case. The prosecution offered, and there was admitted in evidence, the testimony of the deceased witness given upon the preliminary examination. The defendant then, in various ways and by different offers, sought to introduce in evidence the testimony of Grove

given at the former trials of this case, and the evidence was excluded. Some objection is here made by respondent to the sufficiency of the form of these offers, but the objections are too technical to justify consideration in so important a matter; for it is plain that the rulings of the court went, not to the form of the objection, but to the single proposition that the testimony of the deceased witness, given upon former trials, was under no circumstances admissible, and that only the testimony that such a witness had given upon preliminary examination was admissible. At common law the testimony of a witness, given upon a former trial of a cause between the same parties, was admissible for or against either party, upon showing that he was dead or without the jurisdiction of the court. Such was the undoubted rule of evidence at common law, and before the adoption of the Codes it was sanctioned and employed in this state. People v. Murphy, 45 Cal. 137; Same v. Devine, 46 Cal. 46; 1 Greenl. Ev. § 1631, and note; 1 Bish. Cr. Proc. § 527. In Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409, the question is learnedly considered and elaborately treated, the cases are reviewed, and it is declared that authority is overwhelming in favor of the admissibility of such testimony for or against the defendant, when the defendant was present, either at the examination of the deceased witness before a committing magistrate, or at the former trial, with an opportunity for a cross-examination afforded him. Upon the adoption of our Codes, it was provided by section 1870 of the Code of Civil Procedure (subdivision 8) that the testimony of a witness deceased or out of the jurisdiction, or unable to testify, given in a former action between the same parties relating to the same matter, is admissible; and, as the rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in the Code (section 1102, Pen. Code), the same rule obtains in this state, unless changed by positive enactments. There has been by section 686 of the Penal Code a restriction placed upon, and a narrowing of, this common-law rule of evidence. Under the title of the "Rights of Defendant in a Criminal Action," it is provided that a defendant shall have the right of confrontation of the witnesses against him, saving in those cases where the charge has been preliminarily examined by a committing magistrate, the testimony taken down by question and answer in the presence of the defendant, who either in person or by counsel has cross-examined, or had an opportunity to cross-examine, the witness, or where the testimony of a witness, who is unable to give security for his appearance, has been taken conditionally in like manner in the presence of the defendant. It is here to be noted that the section is declarative of the rights of a defendant, and, in so defining those rights, limits the evidence, and the mode and man-

ner of its production and introduction, which may be employed against him. In effect, therefore, and as our decisions hold, it deprives the prosecution of the right which theretofore it enjoyed of introducing against a defendant the evidence of a deceased or absent witness, unless taken before a committing magistrate, or by deposition in the mode prescribed. It forbids the introduction of the testimony of such witness, absent or deceased, which may have been given upon a former trial of the cause. Why the legislature should have so modified the common-law rule, we need not now stop to inquire. Sufficient to say that it is quite plain that it has done so. *People v. Oiler*, 66 Cal. 101, 4 Pac. 1066; *Same v. Chin Hane*, 108 Cal. 597, 41 Pac. 697; *Same v. Sierp*, 116 Cal. 251, 48 Pac. 88; *Same v. Cady*, 117 Cal. 10, 48 Pac. 908; *Same v. Plyler*, 126 Cal. 382, 58 Pac. 904.

But, upon the other hand, there is in this no restriction upon the rights of a defendant. The rule as to him is the same as it was before the adoption of the Codes, and as it stood at common law. He may waive his right of confrontation, if he so desires, and introduce in evidence the testimony of such dead or absent witnesses, whether that testimony was given at the preliminary examination or upon a former trial of the cause.

The refusal of the court to admit the testimony of George Francis and of C. C. Corum, given upon the former trial of the cause, was, for the reasons above stated, also prejudicial error. The offer was not alone to prove the testimony by the recollection of the official reporter, reinforced by his stenographic notes, but included as well an offer to prove it by the official transcript of those notes on file in the court.

No other of appellant's specifications seems to require particular mention, saving one, where the court admitted evidence clearly prejudicial to defendant concerning his presence with, and relations to, a certain woman, under a general assurance of the prosecution to connect it with the case. Upon the failure so to do, the court properly struck out the evidence, and instructed the jury to disregard it. The practice, however, is one not to be commended; for there is inevitably some impression made and effect left upon the minds of the jurors. The judgment appealed from is therefore reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

(132 Cal. 197)

PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA v. EDGAR. (L. A. 790.)¹

(Supreme Court of California. March 12, 1901.)

APPEAL BOND—FILING—RECORD—CERTIFICATION.

Code Civ. Proc. § 940, provides that an appeal is ineffectual unless, within five days

after notice thereof, an undertaking be filed, or a deposit of money be made. Sections 950 to 953 require copies of the notice, judgment roll, and other papers to be furnished the appellate court, accompanied with a certificate of the clerk or attorneys "that an undertaking on appeal in due form has been properly filed or a stipulation of the parties waiving an undertaking." *Held*, that a reference in the transcript in the clerk's certificate to the record, that "an undertaking in due form of law is on file in my office," was insufficient to show that an "undertaking on appeal" was filed in due time.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

Action by the Pacific Mutual Life Insurance Company of California against John Edgar. Judgment for plaintiff, and defendant appeals. Dismissed.

Graves & Graves, for appellant. Fox & Gray, for respondent.

COOPER, C. Respondent asks that the appeal herein be dismissed because the transcript fails to show that an undertaking on appeal in due form was properly filed. Respondent's brief was served and filed in September, 1899. Appellant has not suggested any diminution of the record, or offered to supply any proof as to the filing of an undertaking. The Code of Civil Procedure provides (section 940) that "the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed, or a deposit of money be made with the clerk as herein-after provided, or the undertaking be waived by the adverse party in writing." Sections 950-952 provide that copies of the notice of appeal, judgment roll, statement, bill of exceptions, and other papers must be furnished the appellate court; and in section 953 it is provided that the copies so furnished must be certified by the clerk or the attorneys to be correct, "and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal in due form has been properly filed or a stipulation of the parties waiving an undertaking." The language of the Code is unambiguous, and it has been held that the transcript must show that an undertaking has been filed in due time. *Franklin v. Reiner*, 8 Cal. 341; *Wakeman v. Coleman*, 28 Cal. 59; *Railroad Co. v. Anderson*, 77 Cal. 297, 19 Pac. 517.

In this case the only reference to any undertaking in the transcript is in the clerk's certificate to the record. After certifying that the copies of the complaint, demurrer, order overruling demurrer, answer, answer to counterclaim, judgment, bill of exceptions, and notice of appeal are true and correct, the certificate states: "I further certify that an undertaking in due form of law is on file in my office." This is clearly insufficient. It does not appear that it refers to an undertaking on appeal, nor that it was properly filed, neither does it show the date

¹ Rehearing denied April 11, 1901.

of filing. While we would not, in all cases, require the exact language of the Code to be followed in the certificate, yet it must appear that an undertaking on appeal has been properly filed. If the certificate does not so state, it might show the date of filing the undertaking or a copy of the undertaking. It must appear, however, that such an undertaking has been filed either "properly" or of a date that shows it was in due time. The appeal should be dismissed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal is dismissed.

(132 Cal. 178)

SMITH et al. v. STEARNS RANCHOS CO.
et al. (L. A. 771.)¹

(Supreme Court of California. March 12, 1901.)

INJUNCTION—IRRIGATION CANAL—CONVEYANCE—DEED—RESERVATION—REPAIRS—AGREEMENT—CONSTRUCTION.

A conveyance of a canal by deed reserved a perpetual right of way to carry 350 inches of water, subject to the vendor's payment of such proportion of the entire expense of maintaining and repairing such canal as the 350 inches should bear to the entire amount of water from time to time being carried through such canal. Held, that the vendor's successors were not obliged to pay the expenses specified in the reservation as a condition precedent to have their water flow through the canal, the right thereby given being one of reimbursement merely.

Department 1. Appeal from superior court, Riverside county; J. W. Ballard, Judge.

Injunction by J. W. Smith and others against the Stearns Ranchos Company and others. From an order granting the injunction with leave to defendants under conditions to have the same vacated, plaintiffs appeal. Reversed.

See 61 Pac. 662.

John G. North and Purington & Adair, for appellants. E. W. McGraw, for respondents.

VAN DYKE, J. This was a suit for an injunction to restrain the defendants from stopping the flow of plaintiffs' water in the North Riverside & Jurupa Canal, or depriving the plaintiffs of the enjoyment of their easement therein. A temporary injunction was granted as prayed for, and after the trial the injunction was made permanent, "provided, however, that said defendant I. D. Rogers may, at any time he may desire, make out and present to each and every of said plaintiffs herein a statement, claim, or bill for and on account of their proportion of the expense of the maintenance and repair of said canal during the times hereinbefore mentioned, eliminating therefrom the charge above-named of \$135 for abstracting; and that thereafter the said defendant I. D. Rogers may apply to this court to have this de-

cree vacated and set aside as to the injunction hereinbefore granted; and upon sufficient showing to this court that such statement, claim, or bill eliminating said charge for said abstracting has been so made out and presented to plaintiffs, then said defendant I. D. Rogers shall be entitled to have this decree, so far as it grants an injunction against said defendant, vacated and set aside." The plaintiffs appeal from the judgment so made and entered. On February 5, 1890, the North Riverside Land & Water Company, a corporation, party of the first part, then the owner of the canal or irrigating ditch referred to in this case, conveyed the same by deed of that date to the Stearns Ranchos Company, a corporation, party of the second part, which deed contained the following reservation: "Hereby especially reserving, however, the perpetual right of way to carry through such canal the three hundred and fifty inches of water, being same 350 inches of water reserved by first party in its conveyance of other water to second party by indenture dated March 23, 1888, * * * subject, however, to the first party's paying the proportion of the entire expense of maintaining and repairing such canal that 350 inches of water sustains and bears to the entire amount of water from time to time being carried through such canal." In Rogers v. Irrigating Co. (L. A. 772) 64 Pac. 95, we had occasion to consider this grant, and the reservation in said conveyance above quoted, and to determine what expenses or services were or might be included within the terms "maintaining and repairing such canal." The plaintiffs and appellants, 52 in number, are grantees and successors of the North Riverside Land & Water Company, and the defendant and respondent I. D. Rogers is the lessee of the Stearns Ranchos Company, and in the management and possession of said canal or irrigating ditch. The water in question, which it is sought to restrain the defendant from shutting off or interfering with, belongs to the several plaintiffs and appellants, and not to the owner of the canal, or the lessee of such owner; and it is contended on the part of appellants that their right to have such water flow through said canal is not dependent upon the condition precedent that they should pay the proportion of the expenses specified in the reservation referred to, but that the meaning is that the party to whom such right is reserved agrees or covenants to pay such proportion of the entire expense. We think the contention of the appellants must be sustained. It cannot be determined in advance what the expense of maintaining and repairing the canal will be, nor can the whole amount of water carried in the canal at any particular time be determined in advance; and by the right reserved in said grant it is only agreed to pay the proportion of the entire expense "that 350 inches of water sus-

¹ For opinion on application for rehearing, see 61 Pac. 716.

tains and bears to the entire amount of water from time to time being carried through such canal." There may be a wide difference of opinion between the owner of the canal and the owner of the portion of water entitled to have it carried therein in reference to the expenses of maintaining and repairing the canal. There is nothing in the language of the reservation from which it can be inferred that the parties to the deed intended that the owner of the canal should, in such case, be the sole judge of what should constitute maintaining and repairing, or the amount thereof. In this case, for instance, the defendant Rogers, in his claim for maintaining and repairing the canal, overcharged to the extent of \$135, which was disallowed by the court. The right of the appellants to have their water carried through the canal under the terms of the reservation in question is an easement, and constitutes property. It would not do to give the owner or the manager of the canal the power to deprive the owner of the water of the right to have the same conveyed therein, unless he should submit to paying such expenses for maintaining and repairing as the company or its lessee might see fit to charge. The cases referred to by respondents' counsel of water companies or gas companies possessing the power to shut off water or gas for nonpayment of rates have no application here. In such cases the rate of water or gas is previously ascertained and fixed. Here, as already stated, the proportion of the expenses to be paid is not fixed, and, in the nature of things, cannot be fixed, in advance. Besides, water and gas companies own the water or gas, as the case may be, supplied to the customer, and should not be compelled to part with their property without being paid therefor. Here the owner of the canal does not own the water, and when it flows down to the owner thereof the canal company parts with no property. The right of the Stearns Ranchos Company under the terms of the reservation is simply to be reimbursed for the expenses of maintaining and repairing the canal, by the parties having an easement therein, in the proportions stated in the said reservation. The judgment is reversed, and the cause remanded.

We concur: GAROUTTE, J.; HARRISON, J.

132 Cal. 143

THOMASON et al. v. CARROLL et ux. (S. F. 2,392.)

(Supreme Court of California. March 11, 1901.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—PROTEST BY PROPERTY OWNERS—SUFFICIENCY OF PROTEST.

1. St. 1891, p. 196, § 3, provides that the owners of a majority of the frontage of property on a proposed street improvement may make a written objection to the same, and that

such objection shall be a bar for six months to any further proceedings. *Held*, that such objection not only suspends the right of the board of supervisors to make the improvements, but precludes its subsequent construction after the expiration of six months without a republication of notice of intention.

2. Under St. 1891, p. 196, § 3, providing that the owners of a majority of the frontage of property on a proposed street improvement may file a written objection thereto with the clerk of the city council, who shall indorse the date of filing thereon, and it shall then be a bar to any further proceedings for six months, a protest duly filed is not insufficient because the indorsement of filing thereon is not signed by the clerk; hence he is not required to certify thereon.

3. Under St. 1891, p. 196, § 3, providing that a proposed street improvement may be suspended on the filing of objections, by a majority of the owners of property fronting thereon, within 10 days from the expiration of the time of publication of notice of intention, such protest is not invalid, as prematurely filed, because it is filed before the last day of the publication.

4. Where an erroneous finding is not made the basis of judgment rendered, it is harmless error.

5. The right to protest, under St. 1891, p. 196, § 3, providing that the owners of a majority of the frontage of property on a street improvement may protest against such proposed municipal improvement, which shall suspend proceedings thereon for six months, is not affected by later provisions in the section, providing that the council may, under certain circumstances, disregard such objections.

Commissioners' decision. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by E. R. Thomason and another against John J. Carroll and wife to enforce the lien of a street-improvement assessment. From a judgment in favor of the defendants, and from an order denying a motion for a new trial, the plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. H. N. & Jabish Clement and D. H. Whittemore, for respondents.

CHIPMAN, C. Action to foreclose a street-assessment lien. Defendants had judgment, from which, and from the order denying motion for new trial, plaintiffs appeal.

It was admitted at the trial that the assessment, warrant, diagram, and certificate were all in due form, and that they constituted a prima facie case for plaintiffs, who are assignees of one C. F. Cormack, the contractor. The work ordered was for paving and laying granite curbs on Guerrero street, between Eighteenth and Nineteenth streets, in the city and county of San Francisco; the total frontage of the work being 1,040 feet. It was alleged in the answer "that the owners of the major portion of the frontage of the lots fronting on said proposed work filed with the clerk of said board [the supervisors] written objections to the same within 10 days after the expiration of the time of the publication and posting of the notice of the passage of the resolution of the board, declaring their intention to order said work,

and said owners never petitioned to have said work done," and that the board never acquired jurisdiction to order said work. The court found the above allegations of the answer to be true, and this finding is challenged. On May 15, 1893, more than six months after the protest was filed, the board ordered the work done without republication and posting of a resolution of intention, as required by section 3, Act March 31, 1891 (St. 1891, p. 196). Such order was invalid, if there was a valid protest filed. *Improvement Co. v. Babcock*, 123 Cal. 205, 55 Pac. 762; *Paving Co. v. Reynolds* (Cal.) 62 Pac. 212. Appellants contend that the board had authority to order the work, because (1) the protest was not filed in time, and (2) it was not indorsed by the clerk. Defendants produced from the office of the clerk of the board and offered in evidence a document, with certain indorsements thereon. The document was a protest addressed to the board, dated San Francisco, October —, 1892, and purported to be signed by the owners of 658½ feet of the frontage, being more than one-half of the frontage on Guerrero street proposed to be improved. The protest had thereon the following indorsements: "Protest. Property owners. Against paving Guerrero St. between 18th and 19th streets, 638½ feet." "Oct. 10-92, S. C. recom. & Int. 7,721." By rubber stamp indorsed as follows: "Majority protest, which, under the law, stops further proceedings for 6 months. Oct. 27, 1892." Further indorsed as follows: "Clerk's Office. Filed Oct. 24, 1892. San Francisco. Board of Supervisors, No. 27." "Protest. Guerrero street between 18th and 19th Sts. Dated Oct. 24, 1892."

Plaintiffs objected to the evidence on the grounds: (1) That there is no evidence that the above document "was ever filed or officially indorsed by the clerk, or any one," and therefore it "did not amount to a protest, under section 3 of the street law, or have the effect to stop or bar further or any proceedings, for six months or any time"; (2) there was no evidence of the genuineness of the signatures to the protest, or of any ownership of any lots fronting on the work. The objections were overruled, and plaintiffs excepted. The second ground of objection is not now urged. The only resolution of intention was adopted October 10, 1892, and was regularly posted October 14th, and regularly published, daily, the first insertion being October 17 and the last October 24, 1892.

The report of the street committee, and the action of the board thereon, appeared from the minutes of the board of October 24, 1892, as follows: "Petitions, protests, etc., were presented, received, and referred, as follows: * * * To the committee on streets, wharves, grades, and public squares, * * * protests: * * * Guerrero street, between Eighteenth and Nineteenth streets." The minutes of October 31, 1892, were read, showing as follows: "The committee on streets,

* * * by Supervisor Taber, presented a report, which was received, read, and, on motion, adopted as the action of the board on the matters contained therein." The committee on streets filed their report October 31, 1892, and the minutes relating thereto read as follows: "The following protests against performance of street work, each representing a majority of the property liable for the cost of the work thereof, bar for six months any further proceedings in relation thereto, to wit: * * * Against paving, etc., Guerrero street, between 18th and 19th streets." Plaintiffs objected to this evidence, on the ground that the board did no more than "to adopt the legal opinion of the committee as to the effect of the protest, if legally and officially filed and indorsed as provided by section 3 of the general street law." The objection was overruled, and plaintiffs excepted. The foregoing constituted all the evidence in the case.

1. It is urged that the evidence fails to show any filing of a protest because the indorsements appearing on the document are not authenticated by the clerk's signature. The contention seems to be that it was the duty of the clerk to authenticate the indorsements, failing in which the evidence was inadmissible, and proved nothing if admitted. The statute provides that the owners of a majority of the frontage of the property fronting on the proposed work "may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notice, (notice of street work), which objection shall be delivered to the clerk of the city council, who shall indorse thereon the date of its reception by him, and such objections so delivered and indorsed shall be a bar for six months to any further proceedings in relation to the doing of said work or making said improvement, unless the owners of the majority of the frontage, as aforesaid, shall meanwhile petition for the same." St. 1891, p. 196, § 3. The statute does not require the clerk to do more than indorse on the protest the date of its reception by him. He is not required to authenticate his indorsement by any certificate. If the protest were in fact filed with the clerk, his failure to indorse the date when received would not defeat its object; for the fact could be proved as any other fact, by proper evidence. When the document was deposited with the clerk for filing or indorsement, it was, in contemplation of law, filed with the board. *Tregambo v. Mining Co.*, 57 Cal. 501. In *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337, and *Warren v. Ferguson*, 108 Cal. 535, 41 Pac. 417, cited by appellants, the engineer had failed to make the certificate required by the statute. But, as we have seen, no such certificate is required of the clerk. In the present case the protest was produced from the records of the board in their official custody, and showed the indorsements as above stated, and it appeared by

the minutes of the board that the protest was filed October 24, 1892. We think this made sufficient proof of the facts.

2. It is also contended that the protest was prematurely filed, and was therefore ineffectual to accomplish any purpose. The point made is that the posting and publication of the "notice of street work" must have been completed, after which 10 days are given within which to file the protest. If filed after said 10 days, it is claimed to be too late, and, if before, it is too soon. The resolution was passed October 10th, was posted October 14th, and the first publication was October 17th and continued daily to and including October 24th, on which latter day the protest was filed. Section 3 of the act requires the notice "to be published for six days." It was held in *Warren v. Russell* (Cal.) 62 Pac. 75, that the protest, not having been filed within the 10 days prescribed by the street law, was too late to give jurisdiction in the premises to the board of supervisors. We think, however, that the statute is intended to prescribe the time within which the protest shall be filed, or, in other words, beyond which it cannot be made, and that the protest may be filed at any time after publication has been made, although not yet completed. The object of the law is to apprise the owners of the lots by the notice of the contemplated improvement, and we can see no reason for holding that the lot owners may not file their objections as soon as the notice is published. There was an obvious purpose in limiting the time beyond which the owners could not object, but we can see no reason for providing that a protest must not be made until the notice has run the six full days, and we do not think the law should receive the construction contended for by appellants. The situation is not unlike that of a person holding a claim against an estate. He is required by the Code to present his claim within the time fixed by the notice to creditors (Code Civ. Proc. § 1453); but he may present it before notice to creditors is published (*Janin v. Browne*, 59 Cal. 37). In the case here the board received the protest on October 24th, and referred it to the street committee, and that committee acted upon it. The owners would not be heard to say they filed the protest too soon, nor can the board now be heard to dispute the binding force of their act.

3. Finding 4 recites the bringing of an action by plaintiffs' assignor against these defendants to foreclose his lien for the work mentioned in the complaint. That issue was joined, and a trial had, resulting in a judgment in favor of defendants, based upon certain irregularities in the assessment, diagram, and warrant. It is urged, and is true, that there is no evidence to support this finding. The complaint said nothing about such an action being brought, and the answer referred to it only by way of an admission, but the warrant described purported to issue De-

cember 7, 1893, while the warrant in the present action is alleged to have issued November 4, 1896, although the work was apparently the same in both instances. The answer does not purport to plead the judgment in bar, and we cannot see why mention was made of the former action either in the answer or in the finding referred to. So far as appears, however, the finding was not made, and could not have been made, the ground for the judgment, and hence there was no injury done to plaintiff by the finding.

4. It is claimed that a majority protest does not stop proceedings where the work is for only one block. Section 3, supra, reads that "the owners of a majority of the property, * * * where the same is for one block or more, may make written objections," etc. The right to protest is not affected by the later provisions in the section, where it is provided that the council may, under certain circumstances, disregard the objections. When a protest is duly filed, the council obtains jurisdiction to order the work by passing upon the legality of the protest. Section 3, supra, provides that "at the expiration of twenty days after the expiration of the time of said publication, * * * if no written objection to the work therein described has been delivered as aforesaid, by the owners of a majority of the frontage, * * * or if any written objection purporting to be signed by the owners of a majority of the frontage is disallowed by said council, * * * the city council shall be deemed to have acquired jurisdiction to order any of the work to be done," etc. In the case here the board declared the protest to be a bar, without which action it would have been their duty, under the act, to fix a time to hear the protest. Having treated the objections as a bar, there was no necessity for giving the owners a hearing. It is advised that the judgment and order be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

132 Cal. 195

HOFFMAN v. KEETON et al. (S. F. 1,783.)
(Supreme Court of California. March 12, 1901.)

PLEADING—SUIT IN FICTITIOUS NAME—STATE OF LIMITATIONS—PARTY AB INITIO—ORDER TO AMEND—NO ACTUAL AMENDMENT—NAME IN PUBLIC RECORDS.

1. Where suit was commenced against John Doe, and later the court made an order reciting that the true name of John Doe was B. Sinsheimer, and directing that the latter name be inserted in the complaint in lieu of the former, but the change was not actually made, the order of the court was a sufficient amendment.

2. Where a person was sued by the name of John Doe, and his real name was thereafter substituted in the complaint, but not before the

statute of limitations had run against the claim, recovery could nevertheless be had, since the defendant was a party to the action from its commencement.

3. The objection to a recovery against a person sued in the first instance in the name of John Doe, that the plaintiffs might have learned his right name by looking up public records, would not be entertained.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by Christian Hoffman against Charles Keeton, B. Sinsheimer, and others. From a judgment in favor of plaintiff, defendant B. Sinsheimer appeals. Affirmed.

S. F. Geil and Wilcoxon & Bouldin, for appellant. Frank M. Stone, for respondent.

SMITH, C. This is an appeal from a judgment foreclosing a mortgage. The appeal is by the defendant Sinsheimer, to whom, subsequently to the execution of the mortgage, and before the commencement of the suit, an undivided half of the mortgaged premises was conveyed by the mortgagors, the defendants Keeton. The mortgage and the note secured by it were executed January 1, 1891, and became due two years after date. The suit was commenced December 28, 1896, against the defendants Keeton and fictitious defendants John Doe, etc. But by an order made April 13, 1897, reciting that "the true name of John Doe [was] in fact B. Sinsheimer," it was directed that the latter name be inserted in the complaint in lieu of the former. The complaint, it seems, was not actually amended. The defendant Sinsheimer was duly served, and filed his answer, setting up that his name was not John Doe, and that the action was barred by the provisions of section 337, Code Civ. Proc. The court found against him on the latter issue, and judgment was entered accordingly. The points made for reversal are: First, that there is nothing in the complaint to show that appellant was a party to the action, and, consequently, that as to him the judgment is in fact void; and, secondly, that the action was barred as to him by said section.

1. With regard to the first point, the order of the court directing the amendment was in itself a sufficient amendment; and the finding of the court "that the court, by said order, inserted the name of B. Sinsheimer in the complaint," and the recital of the decree to the same effect, are correct. *Kittle v. Bellegarde*, 86 Cal. 563, 25 Pac. 55. It would have been more regular to have made the amendment in the complaint, but the error, if any, is immaterial (Code Civ. Proc. § 475), and, being merely clerical, may be corrected by the court below at any time (*Baldwin v. Bornheimer*, 48 Cal. 436). The case of *McKinlay v. Tuttle*, 42 Cal. 570, has no application. In that case there was no order substituting the names of the defendants Castro for the fictitious names used,

or to connect them with the cause of action. *Kittle v. Bellegarde*, 86 Cal. 563, 25 Pac. 55. See, also, *Baldwin v. Bornheimer*, supra, where, instead of reversing the judgment, as in *McKinlay v. Tuttle*, the court below was directed to make the amendment, and the judgment, as amended, was affirmed.

2. The claim that the action was barred by the statute is based on the assumption that the defendant Sinsheimer became party only at the date of the order substituting his name for that of John Doe, which was more than four years after the note and mortgage became due. But this assumption is incorrect. He was sued by the name of John Doe, and "was a party to the action from its commencement." *Farris v. Merritt*, 63 Cal. 119. There is nothing to show that the plaintiff knew the true name of the fictitious defendant sued, nor can the objection that he might have learned by searching the records be entertained. *Irving v. Carpentier*, 70 Cal. 25, 27, 11 Pac. 891. The case of *Rosencrantz v. Rogers*, 40 Cal. 489, has no application. There the appeal was from an order of the lower court dismissing the case as to certain defendants served on grounds there appearing. Here the ruling of the lower court was in favor of the plaintiff, and there is nothing to show that there was error or irregularity. The judgment appealed from should be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

PEOPLE v. LEM DEO. (Cr. 659.)

(Supreme Court of California. March 12, 1961.)

CRIMINAL LAW—MURDER—GRAND JURY—WITNESSES—INTERPLEADER—INDICTMENT—MOTION TO SET ASIDE—DYING STATEMENT—EVIDENCE—INSTRUCTIONS—FLIGHT.

1. The defendant, indicted for murder, moved to set aside the indictment under Pen. Code, § 995, providing that an indictment must be set aside when a person is present during the session of the grand jury, when the charge embraced in the indictment is under consideration, except as provided in section 925, which specifies the judge, the district attorney, a stenographer, the members of the grand jury, and witnesses actually under examination. Two of the main witnesses against defendant were Chinese, who could not speak English, and an interpreter was called in. *Held*, that the interpreter was a witness, within the definitions of Code Civ. Proc. § 1878, declaring that a witness is a person whose declaration under oath is received as evidence for any purpose; and section 2005, providing that an oral examination is one where the testimony is heard from the lips of the witness; since, under section 1884, the interpreter must be sworn, and he states under oath to the jury what the other witness said; and Pen. Code, § 1102, provides that the rules of evidence in civil actions are applicable also to criminal actions, except as oth-

erwise provided; hence the interpreter was properly before the grand jury.

2. Where a man was wounded through the vital parts of the body, and grew continually weaker until he died, five or six hours afterwards, and stated that he expected to die, and that he was not going to live, his dying declaration was sufficiently shown to have been made under a sense of impending death.

3. Where, on a trial for murder, defendant requests an instruction which assumes that the main case of the prosecution rests on circumstantial evidence, when in fact the main proof is direct testimony of eyewitnesses, the instruction should be refused.

4. Where the court instructed as to the flight of a person immediately after "the crime has been committed with which he knows he is charged," an objection to the next sentence of the charge, that it leaves out the proposition of the knowledge of the defendant "either of the fact of the killing of the deceased, or that he (the defendant) was accused of the same," should be overruled; the whole instruction being clearly based on that condition.

Department 2. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Lem Deo was convicted of murder in the first degree, and appeals. Affirmed.

W. H. Carlin and W. S. Johnson, for appellant. Tirey L. Ford, Atty. Gen., for the People.

McFARLAND, J. The appellant was convicted of murder in the first degree, and sentenced to life imprisonment, and he appeals from the judgment, and from an order denying a motion for a new trial.

1. The main point made by appellant for a reversal is that the court erred in denying his motion to set aside the indictment, made under section 995 of the Penal Code, upon the ground that a person not mentioned in section 925 of said Code was permitted to be present during the session of the grand jury when the charge against appellant was under consideration. The person alluded to was one Wong Ock, and the facts touching the matter are these: When the grand jury was about to take up the charge against appellant, it was discovered that two of the main witnesses to be examined were Chinese, and could not speak or understand the English language; whereupon the said Wong Ock, also a Chinese, but who understood and could speak both Chinese and English, was subpoenaed and sworn as an interpreter. During the examination of said two witnesses, which occupied about one-half hour, Wong Ock was present and acted as such interpreter; and as soon as said examination was concluded he left, and was not again present, and was not present during any of the deliberations of the grand jury concerning said charge. The court did not err in denying the motion on the ground above stated. Waiving the absurdity of the proposition that the legislature intended that a grand jury should be precluded from inquiring into a public offense where the investigation made necessary the hearing of the testimony of witnesses who spoke only a

foreign language, it is evident that the word "witnesses" used in section 925 includes interpreters. The provisions of the Codes make the proposition sufficiently clear. The law of evidence is the same in criminal as in civil cases, except as otherwise provided in the Penal Code. Pen. Code, § 1102. A witness is described in Code Civ. Proc. § 1878, as follows: "A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit;" and section 2005 provides that an oral examination is one where the testimony is heard "by the jury or tribunal from the lips of the witness." An interpreter "must be sworn." Id. § 1884. He states under oath to the jury what the other witness said, and this is testimony, —as clearly such as the statement of any ordinary witness who testifies to the declaration or admissions of another person. In 17 Am. & Eng. Enc. Law (2d Ed.) p. 30, it is said: "An interpreter, whether in the trial of a case in court, or as interpreter of a witness giving his deposition, must give his testimony under oath. In either case he is a witness, and there is every reason for saying that the general rules which govern the testimony of other witnesses apply to him" (citing cases); and that "an interpreter is a witness distinguished from the person whose testimony he interprets"; and again, on page 31: "The testimony of an interpreter, like the testimony of any other witness, may be impeached. His testimony goes to the jury under those rules of law by which the testimony of all witnesses is weighed." The authorities cited support these quotations from the text. Can there be any doubt that perjury could be assigned where an interpreter had knowingly and feloniously sworn falsely as to what the other witness had said? Therefore, what essential of the definition of a witness does an interpreter lack? That he is a witness, and that what he says under oath is testimony, is strikingly illustrated by the case of *Scheerer v. Harber*, 36 Ind. 536. In that case it was sought to show that the plaintiff had made contradictory statements at a former trial. This was sought to be done by a witness named Smith, who was present at the first trial. But it appeared that the plaintiff was a German, who did not understand English, and had been examined through an interpreter, and it thus appeared that Smith was swearing as to what the interpreter said. It was held that this could not be done, at least without accounting for the absence of the interpreter. The court, having said that an interpreter appointed by the court "is not thus made the agent of the party whose testimony is to be interpreted," proceeds as follows: "The interpreter, on the trial of the cause before the justice, we may assume was duly sworn, because the law required that he should be sworn. He translated

what the appellant testified to in the German language into English, and in the latter language delivered it to the justice and the jury. To this extent the interpreter was a witness, and the case falls clearly within the rule that regulates the introduction of evidence of what a witness testified to on a former trial. The rule is, that such evidence is inadmissible unless the witness be dead, out of the jurisdiction, or is insane or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party. 1 Greenl. Ev. § 163. There was no reason whatever shown why the interpreter could not be produced, and therefore there was no foundation laid for the introduction of evidence of what he swore to on the former trial; in other words, of the interpretation he gave of the plaintiff's evidence on that trial. The evidence therefore was incompetent, and should have been stricken out on the motion of the appellant, which seems to have been made as soon as it was ascertained that the witness Smith was testifying to what the interpreter said, instead of what the appellant said." The same ruling was made by this court in *People v. Lee Fat*, 54 Cal. 527, where the opinion in the above case of *Schearer v. Harber* is quoted from, and also in *People v. Ah Yute*, 56 Cal. 119. Under the above views, it is not necessary to inquire whether the re-enactment of section 925 in 1897 repeals, by implication, the statute of March 23, 1872 (St. 1871-72, p. 540), which expressly authorizes the district attorney to have an interpreter before the grand jury.

2. The court did not err in admitting the dying declaration of the deceased, Hoey Goon. He was wounded through the vital parts of the body. He grew continuously weaker from the time of the wounds until he died, about five or six hours afterwards. The physicians in attendance told him, or tried to tell him, through two interpreters, Loy and Mix, that he was going to die. Loy told him, "The doctors cannot do nothing for you; you haven't got no pulse." Mix, in answer to the question, "Well, did the doctors tell you to tell him he was going to die?" said, "The doctor told me the way he was wounded it is fatal." Loy testified: "He told me he was going to die. He said the shot in his leg did not hurt him much, but that he was going to die right there from the shot through his body;" and said that "he expected to die," and that he "was not going to live." Mix testified that deceased said to him, "The way I am wounded, there is no hope for me." There was other evidence, and, although the witnesses now and then used a word not quite so strong to the point of immediate dissolution as those above quoted, yet, taking all the evidence together, and considering all the attending circumstances, it was sufficiently shown that the deceased

made the dying declaration under a sense of impending death.

3. The third instruction asked by appellant was properly refused. It assumes that the main case of the prosecution rested upon circumstantial evidence, which was not the fact. The main proof of the prosecution was the direct testimony of eyewitnesses, who testified that they saw the appellant shoot the deceased. Moreover, the substance of the instruction was given in other parts of the charge, and particularly in appellant's instruction No. 5.

4. Appellant complains of the instructions of the court upon the subject of "flight." Appellant's counsel deals with one sentence of the charge by itself, and contends that it leaves out the proposition of the knowledge of the defendant "either of the fact of the killing of the deceased, or that he (the defendant) was accused of the same." But the whole of the instruction must be considered, and the sentence immediately preceding the one objected to speaks of the flight of a person immediately after "the crime has been committed with which he knows he is charged," and the whole instruction is clearly based on this condition. Perhaps it would have been better in the beginning to have held that no instruction about flight should be given at all, and that the significance that should be attached to the fact of flight should be left entirely to the jury upon the arguments of counsel; but it is too late to hold that instructions on that subject are erroneous, for such instructions have been frequently approved. Moreover, the instruction as given in the case at bar was not prejudicial to appellant. The four points above noticed are the only ones made by appellant. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

6 Cal. Unrep. 660

BLOCK v. KEARNEY. (S. F. 1,780.)

(Supreme Court of California. March 12, 1901.)

FORCIBLE ENTRY AND DETAINER — JUDGMENTS — MOTION TO SET ASIDE — AFFIDAVIT OF MERITS — SUMMONS — ERROR — PROOF OF SERVICE — COURT — PENALTY — DAMAGES — APPEAL AND ERROR.

1. Where on a motion to set aside a judgment there is no affidavit of merits, the ground of mistake and excusable neglect cannot be considered.

2. Under Code Civ. Proc. § 475, providing that the court must disregard any error or defect which does not affect the substantial rights of the parties, the fact that a summons in unlawful detainer alleges that plaintiff seeks to recover the amount claimed "in U. S. gold coin," while the complaint prays only for an ordinary money judgment, is not ground for setting aside a judgment entered in accordance with the prayer of the complaint, since the error is immaterial and could not harm the defendant.

3. Under Code Civ. Proc. § 410, providing that, when a summons in unlawful detainer is

served by a person other than the sheriff, it must be returned with an affidavit of service by such person, it is not necessary that it should appear that the party making the service did so at the request of the plaintiff or his attorneys.

4. Where a judgment in unlawful detainer purports to have been rendered in open court, it cannot be attacked by an affidavit of counsel that it was in fact rendered in the judge's chambers, adjoining the court room; the door being open between the rooms.

5. Where, in an action of unlawful detainer, plaintiff has recovered by way of penalty three times the amount of rent due, it would not be proper to also allow him damages for a frivolous appeal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Leo Block against Peter A. Kearney. From a judgment for plaintiff, and an order refusing to set aside the judgment, defendant appeals. Affirmed.

R. M. F. Soto (N. Hamilton, of counsel), for appellant. Edmund Tausky and Wallace A. Wise, for respondent.

SMITH, C. Appeals from a judgment for the plaintiff in a suit for unlawful detainer, and from an order refusing to set aside the judgment. One of the grounds of the motion to set aside the judgment is mistake and excusable neglect, etc.; but as there is no affidavit of merits, this ground cannot be considered. The other grounds, which are equally involved in the appeal from the judgment, are (1) the insufficiency of the summons; and (2) of the proof of service; and (3) that the judgment was not rendered in open court. None of these grounds can be sustained.

1. The only objection to the summons that need be considered is that it states, in referring to the relief sought, that the plaintiff seeks to recover the amount claimed "in U. S. gold coin," whereas the complaint prays only for an ordinary money judgment. This was doubtless erroneous, but the error was corrected by the complaint, which was attached, and the judgment was rendered in accordance with the prayer of the complaint. The error was immaterial, and could not have harmed the defendant. Code Civ. Proc. § 475.

2. As to the proof of service, the objection is that it does not appear "that the party making the service did so at the request of the plaintiff or his attorneys." But it was unnecessary that it should do so. Code Civ. Proc. § 410.

3. The judgment purports to have been rendered in open court; but it is stated in the affidavit of plaintiff's counsel, in the bill of exceptions, that it was in fact rendered in the judge's chambers, adjoining the court room,—the door being open between the rooms. I do not think, however, that the judgment can be attacked in this way. Nor is there any reason why the court may not hold its sessions, when it has been so or-

dered, in any room of the court house, or elsewhere, provided it conforms to the requirements of the law. Code Civ. Proc. §§ 73, 142, 144.

The respondent asks that damages may be allowed for frivolous appeal. But as he has already recovered, by way of penalty, three times the amount of rent due, we do not think it would be proper to grant such relief. The judgment and order should be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

132 Cal. 173

In re TOMPKINS. (S. F. 1,742.)

(Supreme Court of California. March 11, 1901.)

WILL—ADVANCEMENT—TESTATRIX'S INTENTION—EXTRINSIC EVIDENCE—RELEASE OF INDEBTEDNESS.

Where a will bequeathed all the residuary estate of the testatrix in equal shares to her children, but provided that amounts of money formerly loaned to two of them should be deducted, as advancements, from their distributive portions, an instrument, executed prior to the making of the will, releasing them from all liability to the testatrix for the loans in question, is not admissible to show the intention of the testatrix, since such prior release could not affect her right to make such disposition of her property as she saw fit.

In bank. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Judicial settlement of the estate of Eliza Tompkins, deceased. From a final decree excluding Albert and Ira Tompkins from any share in the estate, they appeal. Affirmed.

Reed & Nusbaumer, for appellants. Metcalf & Metcalf and Wm. R. Davis, for respondents.

HARRISON, J. In the ninth paragraph of her will the testatrix disposed of the residue of her estate to her six children (naming them), share and share alike, and at the close of this paragraph made the following statement: "I declare that I have heretofore loaned to my son Albert Tompkins the sum and amount of \$4,000, to my son Ira Tompkins the sum and amount of \$4,000, and to my son William C. Tompkins the sum and amount of \$1,000, upon all of which amounts I have and do remit interest; but I hereby will and direct that the respective amounts aforesaid, or whatever may be yet owing and unpaid by my said sons to me at the time of my death, be respectively deducted from the respective distributive portions to which they would otherwise be entitled, and my estate have due credit therefor." William C. Tompkins, named therein, died before the testatrix. Upon the hearing of the application for distribution, the attorney for the

above-named Albert and Ira Tompkins offered in their behalf the following instrument, which had been received by them from the testatrix in 1886: "My Dear Sons Albert and Ira: As I understand it, the question you now submit to me is one of honor, more than law. Therefore I waive all technicalities, and undertake to answer it upon the strict rules of equity. It is and always has been my purpose and desire to have the children share alike in the property. I have concluded, after carefully reviewing the matter, that inasmuch as the \$7,000 taken from the avails of the North Troy property in 1873, and at the time of your father's death, charged to Tompkins Bros., was used, together with your efforts, to secure to all the heirs father's life insurance, and my title to said real estate, that it should be charged to all the heirs jointly, instead of being assumed by you two alone. And inasmuch as I gave to each of the other children \$1,000 at the time of father's death, and inasmuch as the agreement now held by me, in which you promise to pay me \$5,000 and the note of \$3,000, making a total of \$8,000, is really the old \$7,000.00. And in consideration of the interest paid me on said \$8,000, that I will cancel both said agreement and note, and do hereby so cancel them, and up to this date do hereby pass you a receipt in full of all demands or claims due me. May 14, '86. Eliza A. Tompkins. Witness: S. Foster." Upon the objection of one of the other children, the court excluded this instrument from evidence, and, in its decree of distribution, excluded the said Albert and Ira from any share of the estate. From this decree they have appealed.

It is contended by the appellants that the court erred in refusing to admit in evidence the above letter from the testatrix; that this instrument was one of the "circumstances" under which the will was made, and should have been considered by the court in ascertaining her intention in the above-quoted clause of her will; that the effect of the instrument was to release the appellants from all liability to her for the money she had loaned them, and therefore the amounts of these loans should not have been deducted from the portion of her estate to which they would otherwise have been entitled. If it should be conceded that this instrument would have been a defense to any action thereafter brought by Mrs. Tompkins for a recovery of the money thus loaned, it does not follow that it is available to qualify the language of the will. There is no inconsistency on her part in releasing her sons from their obligation to repay the money thus loaned to them, and afterwards determining that the amounts so loaned should be treated as an "advancement," and declaring in her will that they should be deducted from the distributive portion of her estate to which they would otherwise be entitled. The instrument of release was executed in 1886,

and, whatever motive may have then prompted her to give it, she was not thereby precluded from making in 1892 such testamentary disposition of her property as she desired; and if she deemed it just or proper, for the purpose of bestowing upon each of her children an equal portion of her property, that the amounts received by these sons should be deducted from their shares, she was at liberty to express such purpose in her will, and, if so expressed, it is the duty of the court to carry it into effect. Whether such was her intention must be determined from the terms of the will itself. The will must be interpreted by the language which she has used therein, and cannot be affected by an instrument made by her several years previous, and to which she makes no reference. The circumstances under which the will is made are to be taken into view only when there is an uncertainty "arising upon the face of the will," and only for the purpose of ascertaining "from the words of the will" the intention of the testator. Civ. Code, § 1318. Even if it could be shown that her execution of the document of 1886 had escaped her memory, it would merely result that the purpose or motive for directing the deduction was produced by a mistake or oversight, and would constitute no reason for disregarding the language of her will. "It is incompetent to show by any extrinsic evidence that the testator has, by his own mistake or that of some other person, given a legacy of less value or of a different character from that which he in fact actually meant to give." Underh. Wills, § 912. See, also, *Harrison v. Haskins*, 2 Pat. & H. 388; *Rop. Leg.* 1461 (8). In *Re Aird's Estate*, 12 Ch. Div. 291, the testator recited in his will that he had advanced £4,000 sterling to each of his sons, and directed that said sums, or so much as should not have been repaid at the time of his death, should be considered as an advancement and deducted from his share of the estate. It was shown that this recital was erroneous, and that he had in fact advanced to one of his sons only about £3,000 sterling, and it was sought to charge his share with only the amount actually advanced. The court, however, held that he was bound by the recital, and that the direction to deduct the £4,000 sterling must be observed, saying: "If the testator was in error in the view in which he was proceeding, it appears to me that the error is binding on those who benefit under his will."

In the above clause quoted from her will, the testatrix, after declaring that she had previously "loaned" to each of the appellants the sum of \$4,000, expressly directs that her estate "shall have due credit therefor," and that "these amounts" shall be respectively deducted from the shares to which the appellants would otherwise be entitled, thus making the sums loaned to them a part of the corpus of her estate, which she had declared in a previous portion of the same para-

graph should be equally divided between her children. Her declaration remitting the interest on the amounts loaned implies that in her mind the obligation of her sons for the loans had not been removed, even though such obligation was not enforceable against them; and the use of the phrase, "I do remit interest," shows that in her mind this obligation existed at the time she executed the will. The parenthetic clause, "or whatever may be yet owing and unpaid by my said sons to me at the time of my death," also implies that in the mind of the testatrix these amounts were then owing and unpaid, and that some portion thereof might be paid between the date of her will and the time of her death, but that, if any amount thereof should be "unpaid" at the time of her death, it should be deducted from their distributive shares. The term "owing" does not necessarily imply an enforceable obligation, and in this case must be read as explained by its associate, "unpaid." It is a fundamental rule of construction that the words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative. Civ. Code, § 1325. The testatrix must have intended that this clause in her will should have some effect in the distribution of her estate, and the only purpose deducible from its language is that she intended thereby that the shares of the appellants should be diminished by reason of these loans. It would render the entire clause inoperative if it should be held that its provisions could be defeated by an inference to be drawn from an instrument executed many years previously, and to which the will makes no reference. The judgment is affirmed.

We concur: TEMPLE, J.; VAN DYKE, J.; GAROUTTE, J.; McFARLAND, J.

132 Cal. 167

SEARS v. TUOLUMNE COUNTY. (Sac. 714.)

(Supreme Court of California. March 11, 1901.)

FRANCHISES—TOLL BRIDGE—DEDICATION—ABANDONMENT—COMPENSATION.

In 1879 the supervisors of defendant county authorized plaintiff and others to maintain a toll bridge for 20 years. Plaintiff bought the interests of the others, and maintained the bridge, collecting toll till in 1891, when it was destroyed by fire, leaving only the piers and abutments. The land at the bridge crossing belonged to the general government. In 1897 the defendant laid out a highway which included this crossing, and built a new bridge on the old piers and abutments. No compensation was awarded to plaintiff and he sued for the value of the piers, abutments, and approaches. *Held*, under Pol. Code, § 2618, which declares that public highways are roads and bridges laid out or erected as such by the public, or, if laid out and erected by others, dedicated or abandoned to the public; and section 2619, providing that, whenever the franchise for any toll bridge has expired by limitation or nonuser, the bridge becomes a free public highway, and no claim shall

be valid against the public for right of way, or for the land or material comprising such bridge,—that plaintiff, having failed to rebuild the bridge from 1891 to 1897, when his franchise would expire in two more years, had abandoned the bridge to the public, and was not entitled to any compensation therefor.

Department 2. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by J. F. Sears against Tuolumne county. From a judgment for defendant, plaintiff appeals. Affirmed.

J. P. O'Brien, for appellant. F. P. Otis, for respondent.

PER CURIAM. Action for the value of certain bridge piers and abutments alleged to have been taken from plaintiff by defendant, and used in the construction of a new bridge thereon. Defendant had judgment on motion for nonsuit, from which plaintiff appeals.

On March 9, 1879, the board of supervisors of Tuolumne county authorized one Starbird, one Smith, and plaintiff to maintain a toll bridge for the period of 20 years at a point on Tuolumne river known as "Ward's Ferry," and fixed the annual license at \$40. On March 19, 1887, Starbird's interest in the right and franchise was sold at sheriff's sale under a judgment of court to Smith and Sears. By mesne conveyances Smith's interest was conveyed to plaintiff December 20, 1890, and at the commencement of the action he owned whatever right remained in the bridge. The consent of the supervisors to these transfers was not asked or given. No consent was given to the grantees of Starbird to collect toll on the bridge. They made no report to the board of the cost of erecting or equipping the bridge or repairs made thereon during any year or the amount of tolls collected, or the cash value of the bridge, or the annual cost of conducting the same, and never filed any bond. The public had the unrestricted use of the bridge on payment of tolls. On February 1, 1891, the bridge was burned, leaving only the piers and abutments in question, and was never rebuilt by plaintiff. On July 24, 1897, the board, on proper petition, appointed viewers to lay out as a public highway a certain road between the termini of which, and as a part of the proposed highway, was the site of plaintiff's bridge. The viewers made no estimate for damages by reason of using the said piers, nor did the board award any damages therefor, nor declare the bridge a highway. The only mention in the viewers' report of the bridge is in the column of remarks, stating that they "have interviewed Mr. Sears, who claims a right of way to certain abutments where the old Ward's Ferry Bridge formerly stood, and claims \$1,500 damages for the use of those abutments, but claims a roadway of fifty feet on the approach on each side, which we believe to have been built by private subscription, and not his property. We believe the

said abutments proper to be worth about \$300." Plaintiff paid the taxes assessed against the bridge after 1891. The land at the bridge crossing belonged to the general government. It is admitted by defendant that the new bridge was built in November, 1897, on the piers and abutments as alleged in the complaint, and that no condemnation proceedings were commenced to condemn the old bridge, or any part thereof, or any of the materials used in its construction. Plaintiff duly presented his claim to the board, which was rejected, and on September 10, 1898, the action was brought.

Appellant claims that his property was taken without due process of law, and the county is liable therefor in damages. The grounds of the motion for nonsuit were that plaintiff had no property right in the piers or abutments; that plaintiff has never received a franchise, nor any assignment of a franchise, from his associates; that he has lost any right he may have had by not rebuilding the bridge; that the franchise has expired by limitation, and plaintiff has no right whatever. The statutory provisions under which the bridge was constructed are found in Pol. Code, § 2843 et seq. The franchise was applied for under these provisions. The order of the board of supervisors recites that the petitioners had constructed a toll bridge at the point named, and had filed their bond, and had conformed to the statute; and it was ordered that the applicants, plaintiff and his associates, "are hereby authorized to maintain a public toll bridge * * * for the period of twenty years," fixing the license tax at \$40 for the year 1879, from April 1st, which was paid thereafter yearly until the bridge burned down. When the franchise was granted, section 2618, Pol. Code, declared, as now, that "in all counties of this state public highways are roads, streets, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out and erected by others, dedicated or abandoned to the public." We think it clear that the bridge became a public highway. The public were invited to use it, and the only restriction or condition attached to the use by the public was the payment of the toll which was authorized to be collected by the franchise. The franchise was granted for no other purpose than to enable the builders to maintain the bridge as a public highway. "In dedication no particular formality is necessary. It is not affected by the statute of frauds. It may be made either with or without writing, by any act of the owner; such as throwing open his land to public travel, * * * or an acquiescence in the use of his land for a highway." *Harding v. Jasper*, 14 Cal. 643. The use of the bridge was continued from 1879, the owners paying the annual license each year of use by the public until 1891, when its further use was made impossible by fire. The fact that a toll was charged

did not affect the question of intended dedication, nor did it take away the public character of the bridge as a highway. *Elliott, Roads & S.* §§ 3, 28, 69; *People v. Davidson*, 79 Cal. 166, 21 Pac. 538. Section 2619, Pol. Code, as originally adopted, reads as follows: "Roads laid out and recorded as highways, by order of the board of supervisors, and all roads used as such for a period of five years, are highways. Whenever any corporation owning a toll bridge or a turnpike, plank, or common wagon road is dissolved or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway." This section was amended in 1874 (Amendments 1873-74, p. 116), but not to affect Tuolumne county. In 1883 (St. 1883, p. 6) the section was again amended to read as we now have it, to wit: "Whenever the franchise for any toll-bridge * * * has expired by limitation on non-user, such bridge * * * becomes a free public highway; and no claim shall be valid against the public for right of way, or for the land or material comprising such bridge." Respondent relies upon the provisions of the section as they now are as conclusive of the rights of plaintiff; citing *People v. Davidson*, 79 Cal. 166, 21 Pac. 538; *McMullin v. Leitch*, 83 Cal. 239, 23 Pac. 294; and *Blood v. Woods*, 95 Cal. 78, 30 Pac. 129. But when plaintiff and his associates built their bridge, and obtained a franchise to charge tolls for its use by the public, the statute imposed no such condition as was enacted after their rights had attached, and appellant claims that this section cannot be given a retroactive effect, and, therefore, does not apply. *People v. Davidson*, supra, was the case of a toll road constructed in 1861 upon land title to which defendant subsequently acquired. The road was constructed and maintained at defendant's expense for the purpose of using it as a toll road. In 1878 he applied to the board of auditors of El Dorado county to fix the rates of toll, and an order was duly made fixing the rates to be charged, and they were thereafter collected from all persons using this road. No other order was made until in 1886 the board of supervisors of the county passed an order rescinding the aforesaid order of the board of auditors. Defendant had paid taxes on the road for 25 years. It was held: (1) That defendant had dedicated his road to a public use, and that it was to be regarded as a public easement, and not as private property. (2) That when the franchise expired, as it did by revoking the order of the auditors, the road became a free public highway, and defendant was not entitled to recover anything as compensation for his land and improvements. In that case the franchise was not given for any definite period, and was held to have expired by limitation, within the meaning of section 2619, Pol. Code, when the franchise was revoked. In the present case the franchise had not

expired by limitation, but, if it expired by nonuser, or was lost by abandonment, the same consequences must follow, regardless of the provisions of section 2619. Mr. Elliott says in his work on Roads and Streets that "a toll bridge erected under legislative grant for the use of the public for ordinary travel is in so far a highway that upon its abandonment by the owners the public may claim the right to maintain and use it if the local authorities so elect." The case cited in support of the text is *State v. Lawrence Bridge Co.*, 22 Kan. 438, which was an action to determine the right of the builders of a toll bridge to retain the property as their own after the termination of the charter, and it was held that, when the right to take tolls ceased, the right of the public to use the bridge free from any burden of tolls attaches, without any right on the part of the builders to remove the structure or destroy the highway.

The question here, then, is whether ceasing to use the remnants of the bridge from February, 1891, to November, 1897, taking no steps to rebuild, and manifesting no intention ever to rebuild, constitute acts of abandonment to the public. We think the circumstances show an abandonment by plaintiff, and that it would be unreasonable to hold that he could keep the public from occupying the piers and abutments until his franchise expired by limitation in face of the fact that he has for so long a time done nothing to restore the bridge, and did not, at the time the county appropriated the property, express any intention to rebuild. It is clear upon authority and upon reason that, had his franchise expired by limitation, plaintiff would have had no claim for compensation for his bridge. His franchise expired in 1899, and it is not reasonable to assume that he would have rebuilt after 1897 in order to enjoy tolls for so short a period.

Plaintiff's contention that he had a property interest, which, under the constitution, could not be taken from him without just compensation, cannot be maintained. As was said in *People v. Davidson*: "It is not a case where private property is sought to be taken for public use without just compensation. In some of the states compensation is made to toll-road owners upon the expiration of their franchises, but in those states it is expressly provided by law that such compensation shall be made. In this state there is no such provision, and section 2619, Pol. Code, expressly declares to the contrary." Plaintiff's compensation was to be derived from tolls levied by public authority. As was said in *Com. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654, "The cost of construction and maintenance is reimbursed by a toll levied by public authority for this purpose." When plaintiff dedicated this bridge to the public on condition that he might charge such toll for 20 years as should be

fixed by public authority each year, he, in effect, said: "When my franchise expires, or when I cease to maintain the bridge, or abandon it as a toll bridge, the public shall have the free use thereof without compensation to me." It was said in the Massachusetts case: "We think a turnpike is a public highway, established by public authority for public use, and is to be regarded as a public easement, and not as private property." As already intimated, there is no difference between a toll road and a toll bridge, and the same principles must control in both cases. The judgment is affirmed.

(132 Cal. 240)

SOUTHERN PAC. CO. v. HYATT et al.
(Sac. 595).¹

(Supreme Court of California, March 16, 1901.)

RAILROADS—RIGHT OF WAY—LIMITATIONS AND PRESCRIPTION—FORMS OF ACTION.

1. A railroad right of way is such a public use as to prevent the running of limitations or the acquisition of adverse title thereto by prescription.

2. There being but one form of common-law action in California, the substance of the action determines its character, and it is immaterial to the right of a railroad to recover possession of a part of its right of way, claimed adversely, that the proceeding is called "ejectment."

Department 1. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Action by the Southern Pacific Company against J. W. Hyatt and others. From a judgment for defendants, plaintiff appeals. Reversed.

John M. Fulweiler, Fred B. Lake, and Wm. Singer, for appellant. Tuttle & Wright and Tabor & Tabor, for respondents.

VAN DYKE, J. The questions involved in this appeal are: (1) Whether a railroad right of way is such a public use as to prevent the running of the statute of limitations, or the acquisition of an adverse title thereto by prescription. (2) In case of intrusion upon such right of way, is ejectment the proper remedy?

Respondents entered upon and occupied, for more than five years prior to the commencement of the action, a portion of the right of way in Placer county granted to the Central Pacific Railroad Company by act of congress of July 1, 1862 (12 Stat. 489). The court finds that prior to 1867 the predecessor of the plaintiff constructed its line of railroad over said right of way, and plaintiff and its predecessor have ever since maintained its railroad over said right of way; that the defendant Hyatt has been in the open, notorious, and exclusive possession and occupancy of the property described in the complaint for more than five years previous to the commencement of the action, and has paid taxes thereon, and defendant Savage was the tenant of said Hyatt, but that plaintiff during

¹ Rehearing denied April 15, 1901.

said time has also paid all taxes levied and assessed upon said right of way. The court below held, as a conclusion of law from the facts found, that the plaintiff is not entitled to recover possession of the premises in question, and from the judgment in favor of defendants the plaintiff appeals.

1. The questions involved are not new, but have been passed upon frequently in the courts of the United States, and in this state and other states. In *Railroad Co. v. Caldwell*, 31 Cal. 371, this court says: "Whether the use of the property taken for the purposes of the railroad is a public use, within the meaning of the constitution, or the contrary, is involved in the question presented for consideration. But on this subject there is no room for controversy at this time, if respect is to be paid to the adjudications of the highest courts of the land. Railroads are esteemed as public highways, constructed for the advantage of the public,"—citing several authorities from other states. In *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547, it is said: "Railways are a species of public highways, and as such have uniformly been held to be public improvements, to which the right of eminent domain attached, although they may be considered as private corporations or individuals, and operated for the emoluments to be derived therefrom by the operators,"—citing *Mills*, Em. Dom. § 14; *Wood*, Ry. Law, § 226; and other cases. *Southern Pac. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032, was an action like this, to recover possession of about five acres of land situated in Placer county, within and forming a part of the right of way granted to the Central Pacific Railroad Company by the act of congress referred to; citing from section 2 of that act, wherein the right of way is granted to the Central Pacific Railroad Company of California for the construction of said railroad through the public lands, the plaintiff in that case, as in this, being the successor in interest of said grantee. The defendant in that case was the successor in interest of the party to whom a patent to the quarter section embracing the disputed premises was issued by the United States in December, 1880, and as such he claimed title in fee. The defendant had the land inclosed, and the plaintiff offered to allow him to maintain his inclosure, and use the land, on condition that he would accept a lease thereof, and pay a nominal rent, which he accepted; but at the expiration of the term of one year he refused to renew it, claiming the land as his own. After commenting upon some other cases, the court says: "Here there was a special grant of a right of way two hundred feet in width on each side of the road. This grant is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced

within the grant. It is true, the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the four hundred feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so." In *Olcott v. Supervisors*, 83 U. S. 678, 21 L. Ed. 382, the United States supreme court says: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly, it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals when they obtain the power to construct it from legislative grant. It would be useless to cite the numerous decisions to this effect which have been made in the state courts. * * * It is said that railroads are not public highways per se; that they are only declared such by the decisions of the courts; and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. True, they must be used in their peculiar manner, and under certain restrictions, but they are facilities for passage and transportation afforded to the public, of which the public has a right to avail itself. As well might it be said a turnpike is a highway, only because declared such by judicial decision. A railroad built by a state no one claims would be anything else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation; yet it is the purpose and the uses of a work which determine its character." In *Venable v. Railway Co.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68, it was held that a conveyance to a railroad company of a right of way through the grantor's land is a dedication to the public. In the court opinion it

is said: "There can be no doubt from the text books and adjudications that, where a railroad is empowered, as in the present instance, to condemn land for a public use, it occupies in all respects the same footing as any other corporation or quasi corporation, municipal or otherwise, or governmental agency, when exercising similar authority, to obtain land for a market place, for a street, highway, jail, or court house." In *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578, the court had under consideration the congressional railroad right of way grant above referred to. "The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route. The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands from this circumstance it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists. * * * We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road." Jones on Easements lays down the rule that the prescriptive right to a passageway along the track or right of way of a railroad cannot be acquired by the public, or by individuals, while the railroad is constantly using a single track over such right of way. The construction and operation of one track on its location is an assertion of right to the entire width of its right of way. The presence of one track, constantly in use, is a definite badge of ownership, and the only practical assertion of title that can be made. If the public has used paths by the side of the railroad track for any length of time, the use must be considered as permissive, and not adverse; citing a long list of authorities from different states. Jones, Easem. p. 232, §§ 2, 81. Individuals may intrude upon or obstruct the public thoroughfare, but cannot acquire title by prescription to such lands. *Orena v. City of Santa Barbara*, 91 Cal. 631, 28 Pac. 268; *Hoadley v. City and County of San Francisco*, 50 Cal. 265; *City of Visalia v. Jacob*, 65 Cal. 435, 4 Pac. 433; *People v. Pope*, 53 Cal. 450; *City and County of San Francisco v. Bradbury*, 92 Cal. 414, 28 Pac. 803; *Archer v. Salinas City*, 93 Cal. 51, 28 Pac. 839, 16 L. R. A. 145.

2. Respondents' counsel contend that, "if the appellant can maintain the present action [ejectment] at all, then the plea of the bar of the statute is good." And he cites in support of this contention *Allen v. McKay*, 120 Cal. 332, 52 Pac. 828, wherein it is claimed the court held that, if the title to the lands in question was such as to found thereon an action to recover the possession of the same, such title may be lost by adverse possession. That was an action to recover possession of a tract of land in Humboldt county covered by the waters of Humboldt Bay, and the court says: "If the land in controversy was not private property, plaintiffs had no title. If it was private property, there certainly could be an adverse occupancy of it for the statutory period." The difference between that and this is that the contest there was in reference to the ownership and possession of private property. Here, as already shown, the premises in question were granted for, and dedicated to, a public use. There is but one form of civil action in this state. The substance of the action determines its character. Being entitled to the possession of the premises in question as a part of the railroad right of way under the congressional grant for the purposes therein specified, and the defendants having intruded thereupon and withholding the same, the plaintiff has a right to recover the possession thereof by any appropriate action; and whether that action be called "ejectment," or by any other name, is quite immaterial. *Railroad Co. v. Benity*, 5 Sawy. 118, Fed. Cas. No. 2,551, was an action in ejectment by the railroad company against the defendant therein for a portion of the railroad right of way acquired under the grant in question. The court there says: "If the plaintiff is entitled to actual possession of the land for the purpose of effecting the object in view when the right of way was granted, it can recover such possession in some judicial proceeding. The mere form of the action has ceased to be of any importance in this court. There is now but one form of all common-law actions. * * * We think this complaint does state a good case. It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy. But, in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under the grant of a right of way, it becomes necessary to take and keep an actual possession of the land." *Southern Pac. Co. v. Burr*, supra, was also an action at law to recover possession of a portion of the railroad right of way in question. As already shown, the court held that that action was not only maintainable, but that the statute of limitation did not run against the right of the plaintiff therein. *City of Visalia v. Jacob*, supra, was also an action of ejectment, and the court in

passing says: "An action of ejectment may be maintained by a municipal corporation for the recovery of the possession of a street wrongfully possessed by an individual, whether the corporation owns the fee or the adjoining proprietor retains it. In the latter case the right of a municipality to regulate the public use, and, for that purpose, to possess, use, and control the property, is treated by the court as a legal, and not merely an equitable, right,"—citing authorities; and adding: "But it does not follow that such an action is barred by an adverse possession for a statutory period;" and referring to *City and County of San Francisco v. Calderwood*, 31 Cal. 589, where it seems to have been held that ejectment would be barred, the court says: "But in that case it was found that the 'slip' had never been dedicated to the public use,"—referring, as against that case, to *Hoadley v. City and County of San Francisco and People v. Pope*, supra. *City and County of San Francisco v. Bradbury*, supra, was ejectment to recover the possession of an engine lot reserved to the city under the Van Ness ordinance. See, also, the later case of *City and County of San Francisco v. Grote*, 120 Cal. 60, 52 Pac. 127, 41 L. R. A. 335. For the reasons stated, the judgment must be reversed; and it is so ordered.

We concur: GAROUTTE, J.; HARRISON, J.

132 Cal. 204

YARWOOD et al. v. WEST LOS ANGELES WATER CO. et al. (L. A. 796.)

(Supreme Court of California. March 12, 1901.)

WATERS AND WATER COURSES—SUBTERRANEAN STREAM—DIVERSION THEREOF—EVIDENCE—SUFFICIENCY—APPEAL.

1. A subterranean stream passed under the land of plaintiff, and came to the surface on lower land, and defendant constructed a ditch diverting the stream from its natural course at a point below plaintiff's land, the head of the ditch being much lower than the bed of the stream at such point, and than plaintiff's land. Plaintiff's evidence showed that the water table commenced to sink immediately after the construction of the ditch, and had continued to sink away, and injured his wells, grass, and trees. Defendant's evidence showed that there had been a series of dry years since the construction of the ditch, which had produced the same effect throughout the locality. Evidence as to the effect of the ditch beyond a distance of 400 feet, was contradictory. Held to sustain a finding that the ditch had not injured plaintiff, or affected his water supply, in an action for the diversion of such water.

2. A finding of the trial court will only be disturbed on appeal where there is no substantial evidence in its support.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Grace E. Yarwood (Louis Michaud and others, interveners) against the West Los Angeles Water Company and others. From a judgment in favor of the defendants

and an order denying a motion for a new trial, plaintiff and interveners appeal. Affirmed.

Lynn Helm, for appellants. Freeman & Bates and Borden & Carhart, for respondents.

PER CURIAM. The plaintiff and the interveners appeal from an order denying them a new trial. The plaintiff Yarwood and three several intervening plaintiffs each in a several complaint allege ownership of one or more lots of the "Rancho Providencia and Scott tract as resurveyed," etc., situated in Los Angeles county. In their several complaints said plaintiffs further allege that a certain stream or wash flows in a natural channel and water course on the surface and under ground "adjacent and contiguous to and in" the several lots and premises belonging to each of said plaintiffs, which water, if allowed to flow in its natural course, would supply the necessities of plaintiffs; that plaintiffs are entitled to the use of said waters for domestic and irrigation purposes; that at all times since the 1st day of July, 1895, the said defendants have wrongfully and unlawfully interfered with the use of the water to which plaintiffs were entitled as aforesaid, and have wrongfully diverted and abstracted and deprived plaintiffs of large portions of said waters, so that said plaintiffs have not sufficient water for their purposes as aforesaid; that defendants threaten, and, unless restrained from so doing, will continue, to so wrongfully and unlawfully divert said water, and deprive plaintiffs of the use thereof, to their permanent and irreparable damage and injury; that defendants claim an interest in said water and a right to interfere with, abstract, and divert the same, and deprive plaintiffs thereof, but said claim is without any right, etc.; that by means of said wrongful acts of defendants plaintiffs have been injured, and their crops, orchards, and trees have been destroyed and damaged,—each plaintiff setting out the specific sum in which he or she has been so damaged. Plaintiffs pray that they may have judgment that they are entitled to the rights of riparian owners upon said stream, and to the use of the water therein "undefiled and undiminished" for their necessary domestic purposes and for purposes of irrigation; and that defendants have not had, and do not have, the right to interfere therewith, or to abstract, develop, or divert any of the water flowing therein, to the damage of plaintiffs; and that defendants be enjoined from further interference with the rights of said plaintiffs in said stream, and from developing the water thereof, against the rights of plaintiffs; and that plaintiffs may have judgment for damages in the sums set out in their several complaints.

In answer to the said several complaints the defendants deny the existence of any natural stream or water course upon the premises or lots belonging to plaintiffs, or

either of them. Defendants also deny that they have interfered with said stream or water course in any way; and, further, they deny that plaintiffs, or either of them, or any of their lands, have been injured by any act or acts of defendants whatever. A trial was had without a jury, and on the evidence taken the finding of the court as to the natural water course was favorable to plaintiffs. Said finding reads as follows: "That at all the times in the complaint and in the several complaints in intervention herein there was a natural stream or water course running in, through, and under the said lands of the said complainants herein, which stream ran under ground through said lands and below said lands to a point about eight hundred feet east of the eastern line of the lands of the intervenor Michaud, being the point at which the ditch hereinafter mentioned, made by the defendants, terminated; and at said point a portion of the water of said stream rose to the surface, and ran above ground; and from that point to the Los Angeles river the said stream ran partly above the ground and partly under ground, the surface stream increasing in size from the point of its rise above mentioned to the eastern line of lot 44 of the subdivision of the Rancho Providencia and Scott tract, at which line it attained such a size as to be a constant stream running sixty inches of flowing water, miners' measurement; and, when not diverted by artificial means, said surface and subterranean stream has ever since continued to flow to the Los Angeles river in a southeasterly direction from said lot 44 over and through lots 55, 56, and 66 of said subdivision. That said stream is a branch of the stream known as 'Big Tejuanga Creek,' and separates from the channel of said creek above lot 20 of said subdivision. Said creek continues from said point of separation southeasterly, in a separate channel, through the lands of the intervenor, Clark, and over the southwestern part of the lands of the plaintiff and of the intervenor Michaud into said river."

The development works of the defendants on account of which plaintiffs claim damages are described in the findings as follows: "That on the 10th day of September, 1895, the defendants John A. Pirtle, George Hanna, George W. Hooper, and William N. Monroe began an excavation at the eastern line of said lot 44 for the purpose of intercepting and diverting the waters of said first described stream, and carrying the same over a line of hills several miles from these lands, to be there sold for use on other lands situated without the valley and watershed wherein said stream rises and flows. In pursuance of said purpose said defendants made a ditch along the channel of said stream as the same appeared on the surface, extending from said line of lot 44 up the stream northwesterly with the meanderings thereof a distance of 2,540 feet, the depth thereof at the beginning being about

2 feet, and at the upper end about 20 feet below the natural surface of the ground. In the bottom of said ditch the defendants laid a flume 6 feet wide, and open at top and bottom. Said defendants continued the construction of said ditch and flume until November 18, 1895, and at that time transferred all their rights and claims thereto to the defendant the West Los Angeles Water Company, and said company continued said work, and completed the same on December 15, 1895. By means of said ditch and flume said defendant West Los Angeles Water Company has, ever since the completion thereof, continuously diverted, and still continues to divert, from said stream or water course the water flowing continuously at the rate of 8 cubic feet per second, or 400 inches miners' measurement, and have carried the same out of the valley aforesaid." The evidence shows that the excavation made by defendants is on their own land, and entirely below all the lands of plaintiffs on the stream referred to, and is nearly a mile in length. The nearest point of said excavation to any of said lands is the head or upper end thereof, which is about 500 feet from the nearest point on the Michaud tract. The court also finds that "said defendants have not interfered with the water of said stream; and said diversion has not diminished the volume of said stream above the said ditch, nor affected it in any way in its course through the lands of the plaintiff and intervenors, or either of them, nor caused any injury or damage to them or either of them."

Appellants' attack on the order appealed from is directed mainly against the finding last quoted. It is strongly urged that this finding is contrary to the evidence. If this contention is well founded, the order should be reversed. On the other hand, if the finding is not contrary to the evidence, the order must be affirmed, for it can make no difference to plaintiffs whether defendants are making an unlawful or improper use of the waters or not, so long as plaintiffs' rights are not interfered with, and they are in no way injured. The question, then, is, was the trial court warranted in making said last finding? The land of plaintiffs is situated in a valley, is of an even, nearly level, character, and extends for nearly a mile up the stream above the head of defendants' excavation or ditch. It slopes gently down stream, and its surface is all the way from about 18 feet to 40 feet above the bottom of the ditch at its head. Plaintiffs gave evidence tending to show that immediately after the construction of this ditch the water table began to sink away in plaintiffs' lands, and that it had been sinking away constantly since (except after heavy rains) down to the time of the trial in March, 1897. This lowering of the water level or table was first noticed in wells, and then the alfalfa and the orchard trees showed

signs of perishing, and some did perish, for lack of moisture, as the witnesses stated. It is argued on the part of plaintiffs that this failure of water in the wells and of moisture in the earth, rendering the land unfit for raising crops that had theretofore flourished thereon, was the direct and inevitable result of constructing the ditch in question. On the other hand, the defendants introduced evidence tending to show that there had been a series of dry years in Los Angeles county, and that in 1895, 1896, and in 1897 the water had sunk away in the wells generally, and the crops had been affected and the water table in moist lands had been lowered generally throughout that section of country, as a result of a decrease in the usual rainfall. An engineer bored experimental wells, some 33 in number, in the vicinity of the head of defendants' ditch, at various distances and in varying directions therefrom, and from these wells he constructed a profile of the water table in the vicinity of said ditch, and gave it as his opinion that the water table could not be affected by the ditch at a distance of more than 400 feet therefrom. This opinion was concurred in by another engineer on behalf of defendants, and disputed by others on behalf of plaintiffs. The evidence as to these experimental wells and the profiles drawn therefrom was placed before the trial court. It should be kept in mind that the burden of proof was upon plaintiffs to show to the satisfaction of the court that the subterranean stream through their premises had been interfered with to their injury by defendants. The question of fact was, from its very nature, difficult, and hard to determine. The evidence was of the circumstantial or inferential kind, much of it vague and uncertain. Certainly, the trial court was in a better position than this court can be to determine these questions of fact. This court is warranted in interfering with the decision of the trial court as to a question of fact only when there is no substantial evidence to support the finding. We see no reason to interfere with the findings of the trial court, and, as they are decisive of the case, the order appealed from should be affirmed, and it is so ordered.

(132 Cal. 247)

McNAMARA et al. v. OAKLAND BUILDING & LOAN ASS'N. (S. F. 1,824.)

(Supreme Court of California. March 16, 1901.)

MORTGAGES—FORECLOSURE—LIS PENDENS—HOMESTEAD—PRIORITY—RE-STRAINING SALE.

Where plaintiff's husband executed a mortgage in which she did not join, she cannot set up a homestead in the premises after order of judgment for the mortgagee in foreclosure proceedings, to which she was not a party, but in which a lis pendens had been filed, and claim priority for it over the judgment of foreclosure.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; S. P. Hall, Judge.

Action by Annie F. McNamara and another against the Oakland Building & Loan Association. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

R. Clark, for appellants. John Yule (John M. Postoy, of counsel), for respondent.

CHIPMAN, C. Action to restrain the sale of certain land under decree of foreclosure. Defendant had judgment, from which, and from the order denying motion for new trial, this appeal is taken.

Plaintiffs are husband and wife. J. M. McNamara, being the owner of the land in question, executed a mortgage thereof to defendant's assignor, in which his wife did not join; and, McNamara failing to pay the debt secured thereby, defendant, assignee of the note and mortgage, brought its action to foreclose, but did not make Mrs. McNamara a party defendant. Lis pendens was duly filed. The cause was tried, and judgment ordered for plaintiff in the foreclosure action, whereupon, and before judgment was entered, Mrs. McNamara filed a homestead on the premises. Judgment of foreclosure was shortly thereafter duly entered, and, plaintiff in that action being about to cause the sale of the premises, this action was brought by Mrs. McNamara, joining her husband as a party plaintiff. It appeared that the mortgage in question "was acknowledged before one Thomas W. Jeffries, a notary public, who was at the time he took such acknowledgment a member of the co-partnership firm of Jeffries & White, which firm then owned ten shares of stock of said corporation, defendant; J. M. McNamara also owned stock therein at the time he acknowledged said mortgage before said Jeffries; and that said corporation was a mutual corporation." The court found that the mortgage was duly and regularly executed and acknowledged. Appellants make the point that this finding is not supported by the evidence.

The principal question presented by appellants is, was Jeffries disqualified to take the acknowledgment? Appellants rely on *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955. The view we have taken of the case makes it unnecessary to decide whether the notary was disqualified. The case of *Roach v. Water Co.*, 74 Cal. 263, 15 Pac. 776, was an action in ejectment brought by plaintiffs to recover possession of a piece of land alleged to constitute a part of their homestead. The defendant had in that action commenced proceedings to condemn a right of way over the land of plaintiff William Roach for a public purpose, and duly filed notice of lis pendens, after which Rufina, wife of William, filed a declaration of homestead on the land in question. Thereafter judgment of

condemnation was duly rendered on a stipulation entered into between the parties to the action. Rufina was not a party to the suit, and, although William stipulated that he and his wife would execute a deed of the right of way on payment of a certain sum, which was paid into court subject to the order of William, the record does not show that Rufina was in any way bound by the stipulation. It was urged on her behalf that she was not a purchaser or incumbrancer, within the meaning of section 409, Code Civ. Proc., which provides, with reference to notices of lis pendens, that "from the time of filing such record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action." The court decided that the statute applies to condemnation proceedings, and that "the word 'purchaser' must receive a liberal construction, and be held to include those who have acquired a homestead interest in the property." Appellant contends that *Roach v. Water Co.* is not in point, and, if it is, that *Lee v. Murphy*, supra, overrules it. We think the case is in point, and has not been overruled. In *Lee v. Murphy* the homestead was declared before the foreclosure suit was begun, and the defense was made by the husband and wife as parties to the action to foreclose the mortgage. In *Richardson v. White*, 18 Cal. 103, the court stated with some fullness the office of a lis pendens. As to the rule of the statute, it was said to be as if it read, "The commencement of a suit and the filing of a notice of it are constructive notice to all the world of the action, and purchasers or assignees, afterwards becoming such, are mere volunteers and bound by the judgment." It is not important whether Mrs. McNamara acquired some right or title by her homestead declaration; for the question is not whether she has any right to the property, but whether that right has not already been adjudged against her. *Id.* The object of the notice is to give the opportunity of defense to any one acquiring subsequent rights. "Another object of the statute was to give notice in this way of litigation, that third persons might not purchase except advisedly." *Id.* A purchaser pendente lite, and after the statutory notice of the pendency of the action, is not a necessary party to the suit. *Horn v. Jones*, 28 Cal. 195. In an action against a corporation to foreclose a mortgage purporting to have been executed by it, where a lis pendens is filed, and a decree is given enforcing the mortgage, a party who buys the mortgaged property pendente lite at sheriff's sale, made on a judgment which does not enforce a lien older than the lis pendens, is estopped from saying that the mortgage was not the act of the corporation. *Id.* When the plaintiff has filed his notice, he need not concern himself with persons acquiring subsequent rights to the property. All such persons take with notice, and must appear in the action and

assert their rights, or they will be estopped by the judgment, and cannot afterwards question its validity. In the present case Mrs. McNamara had constructive notice that the property was mortgaged as early as in 1880. She had like notice that an action was pending to foreclose the mortgage, and, after the court had tried the cause and rendered a decision, she sought to defeat the action by impressing the mortgaged premises with the homestead character; and she now claims that this homestead has priority over the judgment of foreclosure, and asks to have that judgment declared void. We think she cannot be heard to do this. The judgment and order should be affirmed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(132 Cal. 154)

MCDUGALD v. HULET et al. (Sac. 866.)¹
(Supreme Court of California. March 11, 1901.)

LANDLORD AND TENANT—GUARANTY—SURETYSHIP—COUNTERCLAIM—PLEADING—AMENDMENT—LIMITATION OF ACTION—ESTOPPEL.

1. Where one of two guarantors of rent sued the landlord and his co-guarantor, praying that the amount of rent due be determined, that plaintiff be decreed only a surety, and that his co-guarantor pay the amount due, and the landlord, in his answer, set forth the facts out of which the guaranty arose, and sought a decree as to the rent due, and a judgment therefor against plaintiff, it was error for the trial court to hold that the amount of rent due was not the subject of a counterclaim; both parties being before the court, and both asking a finding as to the amount of rent due, and the guaranty being joint and several.

2. Where plaintiff allowed the trial court to pass on an issue raised by defendant's plea of counterclaim without objecting that the matter relied on was not a proper subject of counterclaim, plaintiff was estopped from making the objection on appeal; the statute of limitations having run against the counterclaim since the commencement of the suit.

3. The character and sufficiency of a pleading is to be determined, not by what it is denominated by the pleader, but by the facts which it sets up.

4. Where a case is tried without objection on the part of plaintiff that the pleadings are not such as to support a counterclaim of defendant, such objection cannot be raised for the first time on appeal.

5. Under Code Civ. Proc. § 438, declaring that a defendant may set up a counterclaim existing at the commencement of the action, the filing of a complaint suspends the running of the statute of limitations as to a counterclaim arising out of the transaction set forth in the complaint.

6. Where at the time defendant filed his counterclaim an independent action for the same cause of action as that relied on as a counterclaim was pending, but the same was dismissed before trial of the action in which the counterclaim was interposed, there was no action pending to prevent defendant's relying on the counterclaim.

7. Where one of two guarantors of rent sued the landlord and his co-guarantor, praying that the amount of rent be determined, that plain-

¹ Rehearing denied April 11, 1901.

tiff be held as surety on the guaranty, and that the co-guarantor pay the amount due, and defendant sought a judgment against plaintiff for the rent, and during the trial the landlord asked permission to file an amended answer containing a copy of a note executed by plaintiff to the landlord,—the offer to file the amended answer being accompanied by an affidavit which showed the note was made for rent due, and that the landlord did not know until the trial that the note could be litigated in the action, and had not informed his counsel of the note when the answer was filed,—it was error not to permit defendant to amend.

8. Error of the trial court in refusing to allow defendant to amend his answer is cured by the subsequent reception of evidence and a finding on the matter to which the amendment was directed.

9. It cannot be contended that a finding is not within the issues where no objection is made to the evidence in support of the finding at the trial.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Edw. I. Jones, Judge.

Suit by Carrie B. McDougald, as administratrix of the estate of J. D. McDougald, deceased, against H. C. Hulet and others. From a judgment denying plaintiff relief as to the matters alleged in the complaint, and denying defendant Louise E. Boggs any judgment on the facts found, said defendant appeals. Reversed.

Jos. A. Louttit and Louttit & Middlecoff, for appellant. J. G. Swinnerton, Budd & Thompson, Dudley & Buck, and Geo. D. Dudley, for respondent.

COOPER, C. This appeal is from the judgment. The findings are not attacked, and the only question that need be decided is as to whether or not appellant is entitled to judgment for the amount found to be due from the plaintiff. The case has been here before. *McDougald v. Development Co.*, 117 Cal. 88, 48 Pac. 1021. And the facts are there very clearly and fully stated. In this opinion, in speaking of plaintiff, reference is made to plaintiff's intestate; and, in speaking of Boggs, reference is made to John Boggs, deceased, of whose will appellant is executrix. The Argonaut Land-Development Company, a corporation, on the 1st day of May, 1890, owned a certain tract of land in San Joaquin county, near Stockton, which it desired to sell for \$140,000. Boggs was at said time the owner of 12,000 acres of land in Colusa county. An agreement was made between said corporation and said Boggs whereby the corporation conveyed to Boggs its land near Stockton, and Boggs conveyed to the corporation his land in Colusa county, and also paid the corporation \$44,000 additional in payment for the lands so conveyed by the corporation. It was a condition of the sale and exchange that the corporation should furnish to Boggs a tenant for the lands conveyed to him, who would rent the said lands for five years at an annual rental of \$12,000; the rent to be guarantied to Boggs by suitable guarantors. The tenant was furnished,

and plaintiff and defendant Hulet, who was the president of the corporation, signed a written guaranty for the payment of the rent by the tenant, which guaranty was accepted by Boggs, and the tenant entered into possession in pursuance of the contract and guaranty. The tenant became indebted to Boggs in a large amount for rent, which has never been paid. This action was brought by plaintiff against Boggs, Hulet, the corporation, and its directors Fairbrother, Spect, Wilhoit, Hulet, and Foss, for the purpose of having it adjudged and decreed as to the amount due and unpaid to Boggs under the lease, and that the corporation and Fairbrother, Spect, Wilhoit, Hulet, and Foss are the principals, and bound to defendant Boggs for the amount so found to be due him, and that plaintiff is only surety for said amount. It was further sought to have judgment that the defendants other than Boggs pay to defendant Boggs the amount of unpaid rent so found to be due him, and that plaintiff should be entitled to receive and recover from the defendants other than Boggs all sums of money he might pay and all losses he might sustain by reason of his contract of guaranty, and that he be held harmless from all claims, demands, or losses that might arise by reason of said guaranty. After the cause was remanded to the court below, the action was dismissed by plaintiff as to the corporation and all the other defendants except Boggs and Hulet. The action, after such dismissal, was against plaintiff's co-guarantor alone, so far as any relief was claimed. The court, after filing findings, ordered judgment that plaintiff take nothing and that Boggs take nothing; thus denying to plaintiff any relief as to the matters alleged in the complaint and found by the court, and denying Boggs any judgment on the facts found. The plaintiff has not appealed. Appellant, as administratrix, has appealed from the judgment on the judgment roll. It will therefore be necessary to consider only the question as to appellant's rights upon the findings. The action was evidently brought under section 1050, Code Civ. Proc., which provides that an action may be brought by one person "against two or more persons for the purpose of compelling one to satisfy a debt due to the other for which plaintiff is bound as a surety." The plaintiff in this case did not deny his liability to Boggs upon the written guaranty, but he sought to have it adjudged that defendant Hulet was the principal, and that he be directed, as such principal, to pay defendant Boggs. The prayer of the complaint asked to have it determined as to the whole amount due at the time of the commencement of the action, or that might pending the action become due and unpaid, by virtue of the contract of guaranty which plaintiff had signed, and that the court adjudge that defendants other than Boggs pay to Boggs the amount so found due and unpaid on the said guaranty. The prayer of

the complaint further asks that it be decreed that plaintiff is only surety upon the guaranty, and that plaintiff recover of defendants all "sums of money he may pay and compensation for all losses he may sustain by reason of said contract of guaranty." The prayer also asks for general relief.

The contract of guaranty, concerning which the suit was brought, is as follows: "In consideration of the execution of the foregoing lease by the lessor, John Boggs, the undersigned jointly and severally undertake and promise to and with said John Boggs that they will, and they do hereby, guaranty the payment of the rent therein reserved on the part of the said lessee, to be paid, and the performance of the covenants and conditions therein contained of the said lessee to be kept and performed, and covenant and agree, in case default on the part of the said lessee, they will pay said rent and keep and perform said conditions and covenants; and they hereby respectively waive any notice of such default until the same shall have continued for sixty days. In witness whereof, they have hereunto set their hands and seals this 20th day of May, 1890. [Signed] J. D. McDougald. H. C. Hulet." The plaintiff having thus put in issue the question as to the amount due Boggs upon the guaranty, and asked for a judgment as to who should pay it, the defendant Boggs in his answer set forth the facts in full concerning the transaction by what is separately denominated a "cross complaint," and also by what is separately denominated a "counterclaim." He set forth the contract of guaranty, the amount of rent that had become due to him under it, and the payments thereon, and asked for a judgment against plaintiff upon the guaranty for the amount that might be found due him. No demurrer appears to have been interposed to the answer or to the cross complaint or counterclaim. The answer set forth the same guaranty, arising out of the same transaction, as that set forth in the complaint. The complaint sought to have a decree as to the amount of rent due Boggs, and Boggs by his answer sought the same thing. We must presume upon this appeal that the issues were all considered upon the trial as properly pleaded, and that evidence was offered and such issues litigated by the parties. The court found directly upon the issue as to the amount due Boggs, and we must presume such finding was based upon evidence, as the finding is not questioned. The finding is as follows: "That there is now due, owing, and unpaid to the successors of defendant Boggs from William D. McLaren for rent of said property mentioned the following sums, to wit: \$2,827, with interest thereon at the rate of 8 per cent. per annum from the 1st day of March, 1892; \$6,000 with interest thereon at the rate of 8 per cent. per annum from the 1st day of September, 1892; and \$6,000, with interest thereon from the 1st day of March, 1893, at the rate of 8 per cent. per annum."

Although the complaint set forth the transactions, and asked to have the court find the amount due Boggs, and the defendant Boggs alleged the amount due under the guaranty which was the subject of the complaint, and the issue as to the amount due was litigated and found by the court, yet the court declined to render any judgment for appellant, for the alleged reason that the amount due was not the subject of a counterclaim. In this we think the court erred. It took a view of the matter which was entirely too narrow. Both parties were before the court, and both asking to have the court find the amount due Boggs. Boggs had been made a party and brought into court at the request of plaintiff. He asked in his answer for the amount due him by the terms of plaintiff's guaranty, which was joint and several. Plaintiff could not have prevented the recovery by Boggs in an independent suit. Why should he in this? We do not think it necessary to go into any nice distinctions as to the name given to the answer. Plaintiff, by bringing the defendant Boggs into court and asking the court to find the amount due, and by allowing the court to pass upon the issue as though properly made, is estopped from now claiming that the matter was not the subject of a counterclaim. He will not be allowed to thus lull his adversary into repose until his claim is barred by the statute, and then raise a point which is lethal. It is not what a pleading is called, but the facts which it sets up, that determines its character. Its character and sufficiency will be determined by the court from the facts alleged in it. *Holmes v. Richet*, 56 Cal. 307; *Gregory v. Bovier*, 77 Cal. 123, 19 Pac. 232; *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764. Particularly is this so here, after the case has been tried in the lower court, and no objection made to the pleadings. The party, having tried the case in the court below upon the theory that the pleadings are sufficient, cannot for the first time raise the question here. The plaintiff brought the suit asking relief in the court as a court of equity. In such case, where the court has once obtained jurisdiction, it will decide the whole case, and will not permit litigation by piecemeal. *Whitehead v. Sweet*, 126 Cal. 76, 58 Pac. 376; *Watson v. Sutro*, 86 Cal. 528, 24 Pac. 172, 25 Pac. 64.

The court found that appellant, as executrix of the last will and testament of John Boggs, deceased, within proper time duly presented the claim for said amount so found due to the plaintiff, as administratrix of the estate of J. D. McDougald, deceased, and that it was rejected. It is said that the court found that the cause of action set forth in the cross complaint was barred by section 337 of the Code of Civil Procedure. The court did so find as a conclusion, but the other findings show that it was not barred. The facts were fully set up in other parts of the answer, independent of what

was named the "cross complaint." The record here does not inform us when the action was commenced, nor when the first answer was filed. The amended complaint was filed January 9, 1895, and the amended answer January 18, 1898. The filing of the complaint suspended the running of the statute of limitations as to the matters arising out of the transaction set forth therein. Code Civ. Proc. § 438; Perkins v. Lumber Co., 120 Cal. 27, 52 Pac. 118. The matter set forth in the answer, whether it is called an "answer," a "counterclaim," or a "cross complaint," arose upon contract, and existed at the commencement of the action. It is claimed that the findings show that an independent action was commenced by John Boggs on the 14th day of April, 1896, and was pending when the answer and cross complaint were filed. It is so found, but it is also found that the said last-named action was dismissed May 23, 1899. This was before the trial, and hence the plea of "action pending" was disposed of.

During the trial the defendant Boggs asked permission of the court to file a second amended answer. This answer contained a copy of a joint and several promissory note dated November 4, 1891, for \$4,781.34, due one day after date, with interest from date at the rate of 8 per cent. per annum, executed by plaintiff, as one of the makers, to Boggs. It alleged that Boggs was still the owner and holder thereof, and that it had not been paid, nor any part thereof. The offer to file the amended answer was accompanied by the uncontradicted affidavit of Boggs, which showed that the note was made and executed for rent due and unpaid under the lease and guaranty, as part of the transaction set forth in the complaint. The affidavit further set forth that Boggs did not know till the time of the trial that the note could be litigated in the present action, and had not informed his counsel concerning it at the time the first amended answer was filed. The court refused to permit the defendant Boggs to amend his answer in the respects named, and in this the court abused its discretion. The facts, if true, were of vital importance to Boggs. The case had not terminated. If the plaintiff had been surprised by the offered amendment, the court could and should have granted a continuance, upon just terms, so as to fully protect the rights of plaintiff. It seems to be the opinion of many trial judges that amendments should seldom be allowed pending the trial. Why not in all proper cases? The object of the trial is to settle and dispose of the issues and all matters connected with the case in the one action. If the facts in this case set up in the second amended answer were true, then Boggs was entitled to relief. If they were not true, every opportunity should have been given to plaintiff to so convince the court. The rule has been often stated here that during the trial

the court, in furtherance of justice, should allow amendments liberally, in order to mold and direct its proceedings so as to dispose of cases upon their substantial merits and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right. *Roland v. Kreyenhagen*, 18 Cal. 455; *Burns v. Scoffey*, 98 Cal. 277, 33 Pac. 86.

Although in this case the court erred in refusing to allow the amendment, the error was cured by the court receiving evidence and finding upon the very matter to which the amendment was directed. The court found: "On the 4th day of November, 1891, plaintiff J. D. McDougald, defendant H. C. Hulet, and one W. D. McLaren made their promissory note in the words and figures following, to wit: '\$4,748.34. Stockton, Nov. 4, 1891. One day after date, without grace, we, or either of us, promise to pay to the order of John Boggs four thousand seven hundred and forty-eight and thirty-four one-hundredths dollars, for value received, with interest from date at the rate of 8 per cent. per annum until paid. Principal and interest payable in U. S. gold coin at ——. And in case suit is instituted to collect this note, or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable, as attorney's fees in said suit. W. D. McLaren. J. D. McDougald. H. C. Hulet,'—and then and there delivered said note to defendant John Boggs, who is still the owner and holder thereof. That no part of the principal sum mentioned in said note has been paid, and no part of the interest due thereon has been paid, and the whole of said principal sum of \$4,748.34, with interest thereon at the rate of 8 per cent. per annum from November 4, 1891, is now due, owing, and unpaid from said plaintiff J. D. McDougald to this defendant, John Boggs. That defendant Boggs has employed attorneys to collect the amount due upon said note, and the sum of \$500 is a reasonable attorney's fee for such service." The plaintiff has not appealed or moved for a new trial. The findings are therefore binding upon the plaintiff. *Gay v. Moss*, 34 Cal. 126. The complaint asked to have the court find the amount due to Boggs. The amended answer on file alleged that default was made in the payment of all the rent which became due under the lease. But, conceding that the pleadings were not sufficient to justify the admission of evidence of the promissory note, it does not appear that any objection was made to such evidence. We must presume that the evidence was received without objection, and that it sustains the findings. It cannot be contended that a finding is not within the issues, if no objection was made to the evidence in support of the finding at the trial. *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186; *Moore v. Campbell*, 72 Cal. 253, 13 Pac. 689.

The judgment should be reversed, and the court below directed to order judgment upon the findings in favor of appellant and against respondent, as administratrix, for \$4,748.34, with interest from November 4, 1891; \$2,827, with interest from March 1, 1892; \$6,000, with interest from September 1, 1892; \$6,000, with interest from March 1, 1893,—said interest to be computed at the rate of 8 per cent. per annum to October 18, 1899, the date of filing the findings, and judgment to be entered as of that date for the amount so computed to be due, and for the sum of \$500, attorney's fees.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to order judgment upon the findings in favor of appellant and against respondent, as administratrix, for \$4,748.34, with interest from November 4, 1891; \$2,827, with interest from March 1, 1892; \$6,000, with interest from September 1, 1892; \$6,000, with interest from March 1, 1893,—said interest to be computed at the rate of 8 per cent. per annum to October 18, 1899, the date of filing the findings, and judgment to be entered as of that date for the amount so computed to be due, and for the sum of \$500, attorney's fees.

132 Cal. 286

MURRAY v. ETCHEPARE. (L. A. 648.)

(Supreme Court of California. March 20, 1901.)

FORECLOSURE—RECEIVERS—LEAVE OF COURT.

An answer in foreclosure by the mortgagor stated that a receiver had been appointed in another action in the same court, and that he had possession of the property, but it did not show that the rights of the parties in that action or the right of the receiver would be injuriously affected by a decree of foreclosure. The decree itself provided that it should not affect the rights and interests of the receiver. *Held*, that the mortgagor could not be injured by the decree, though plaintiff had not procured an order of court authorizing an action against the receiver.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Foreclosure by Elizabeth Murray against Laurent Etchepare and others. From a decree for plaintiff, defendant Etchepare, appeals. Affirmed.

H. H. Appel, for appellant. Dunnigan & Dunnigan, Horace Bell, and Geo. H. Smith, for respondent.

CHIPMAN, C. Foreclosure. Plaintiff had judgment on the verified pleadings, from which defendant Etchepare alone appeals. The complaint is in the ordinary form for foreclosure of a certain mortgage executed by defendant Etchepare on February 12, 1895, to secure the payment of a certain

promissory note made by him to plaintiff on that date. Mrs. Leonis and Wilkerson were made parties defendant, as claiming some interest in the mortgaged property. It is not necessary to consider whether the facts in Mrs. Leonis' separate answer are well pleaded and constitute a defense to the action, for the reason that she does not appeal. Etchepare in his separate answer alleges ownership of the land, and does not deny the execution of the note and mortgage. His defense is that in an action wherein Mrs. Leonis is plaintiff and he is defendant, commenced, before the foreclosure proceedings were begun, in the superior court of Los Angeles county (the same court in which the foreclosure action was commenced), the court made an order appointing a receiver of all the property involved in this action, and said property went into possession of said receiver, who was then the acting and qualified receiver, and is now acting as such in said action; that the court in the said action (Leonis against Etchepare), before the commencement of this present action, "duly made an order requiring and authorizing the said receiver to pay off and discharge plaintiff's mortgage, and said order has not been rescinded or set aside," all of which, it is alleged, was well known to plaintiff when she brought this action; that "plaintiff did not procure any order from the superior court authorizing said plaintiff to commence an action against the receiver, who is made a party defendant herein." It is prayed that the court require the receiver to pay off the mortgage, and "that for that purpose the said receiver be authorized to borrow the amount," and that plaintiff's action be dismissed. The judgment recites that the receiver, defendant Wilkerson, disclaimed any interest in the mortgaged premises, and averred that his interest was such only as was given him by the order of his appointment as receiver, and the judgment provided "that the judgment and decree herein shall in no wise affect his rights and interests as such receiver." The receiver does not appeal.

We can discover no prejudicial error in the judgment. It is true that a receiver is an officer of the court, acting under its direction, and that it is contrary to the established doctrine of courts of equity to permit him to be made a party defendant to litigation, unless by consent of the court appointing him. The rule is established for the protection of receivers against unnecessary litigation, and because in most cases ample relief can be obtained by application on motion to the court making the appointment. High, Rec. § 254. In the present case, however, it was provided by the decree that whatever rights the receiver has in the subject of the action should be reserved to him; and no injury, therefore, is shown by appellant. Nothing appears in the answer of Etchepare or in the recitals of the judgment with reference to the receiver showing that injury can come to appellant

by the enforcement of the decree. The answer states that a receiver has been appointed in another action, and that he has possession of the property; but it is not made to appear that the rights of the parties in that action or the rights of the receiver will be injuriously affected by the decree in the present action, and, as we have seen, the decree specially reserves all rights of the receiver. The judgment should be affirmed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(132 Cal. 164)

ADAMS v. ATHERTON et al. (L. A. 798).¹
(Supreme Court of California. March 11, 1901.)

GIFTS—CAUSA MORTIS—SUIT TO REVOKE—
DEATH OF DONOR.

Civ. Code, § 1151, provides that a gift in view of death may be revoked by the giver at any time. A person made a gift causa mortis to defendant, and before her death she brought an action to revoke the gift, but died before trial. *Held*, that the commencement and prosecution of the action was sufficient to revoke the gift, though it did not proceed to judgment on account of the death of the donor.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Emily J. Adams, executrix of the last will of Mary Jane Calder, deceased, against Emma M. Atherton, a minor, and F. J. Holbrook, her guardian, to revoke a gift causa mortis. From a judgment sustaining the gift as to a part of the property, plaintiff appeals. Reversed.

Will D. Gould and James H. Blanchard, for appellant. L. H. Washburn, T. D. Reymert, and R. J. Adcock, for respondents.

PER CURIAM. Suit to revoke a gift causa mortis. The plaintiff appeals from the judgment upon the judgment roll. The property which is involved in the action, and which was the subject of the gift, consisted of a note and mortgage of the value of \$900, and household furniture and some jewelry, watches, wearing apparel, etc., of the value of \$400; constituting together all the property of the donor, Mary Jane Calder. The donee was the defendant Emma M. Atherton, a niece of the donor, of the age of about 15 years, who had lived with her said aunt from infancy. The donor was a widow without children. On May 5, 1898, during her last illness, and in view of death, Mrs. Calder executed an assignment of said note and mortgage and a bill of sale of the other property to her said niece. These instruments were taken charge of by the attorney who prepared them for her, and were by him delivered to the guardian of the person and estate of the niece, by whom they were re-

corded in the office of the county recorder. This action to revoke said gifts and to cancel said assignment of the note and mortgage and said bill of sale was commenced by the donor, Mrs. Calder, on July 16, 1898. Prior to the commencement of the action she executed a will disposing of the whole of her property for the benefit of her niece. This will was executed on July 8th, and is set out in full in the answer. After her death said will was duly probated, and the present plaintiff, having been duly appointed and qualified as executrix of said will, was substituted as plaintiff herein, and filed an amended complaint. The fifth, sixth, and seventh findings are as follows: "(5) That on the 5th day of May, 1898, and during her last illness, and in view of death, the said Mary Jane Calder made a gift of all her property to the defendant Emma M. Atherton. Said property is described in paragraph 3 of the plaintiff's amended complaint. And said Mary Jane Calder was of sound and disposing mind at the time she made said gift. (6) That on or about the 30th day of June, 1898, said Mary Jane Calder was removed from her home to the Christian Hospital, a charitable institution in Los Angeles city, California, and thereafter, on or about the 5th day of July, 1898, she was taken from the said hospital to the county hospital of Los Angeles county. That thereafter, on the 8th day of July, 1898, and while a patient at said county hospital, she made her last will and testament, hereinbefore mentioned. (7) That said Mary Jane Calder did, in her lifetime, revoke said gift as to all of the property described in the plaintiff's amended complaint, except as to the note and mortgage, and that she did not revoke that portion of the gift." As conclusions of law the court found that said gift made on May 5, 1898, was a gift causa mortis, and was revoked by the donor in her lifetime as to the property described in the bill of sale, but that the donor did not revoke said gift as to said note and mortgage; and judgment was entered accordingly, each party to pay their own costs. The appeal is from that part of the judgment confirming the gift as to the note and mortgage, and from that part refusing costs to the plaintiff.

That the commencement and prosecution of this action was a revocation of the whole of the gift, including the property described in the bill of sale, would appear to be beyond question. The Code does not prescribe any particular procedure to accomplish a revocation of a gift causa mortis. It simply declares that "a gift in view of death may be revoked by the giver at any time" (Civ. Code, § 1151), and we can conceive of no more emphatic announcement of an intention to revoke the gift and retake possession and control of the property the subject of the gift than that here pursued. It is not essential to a revocation that the donor should again acquire the actual possession. If it

¹ Rehearing denied April 10, 1901.

were so, a revocation could in many cases be defeated. A subsequent will, if it expresses an intention to revoke the gift, will accomplish the revocation, under our Code. See Civ. Code, § 1152. The intention of the donor to revoke both gifts (if we may call them two) is here manifested by the same act, and at the same time, and in the same manner, and, if effectual to revoke the gift as to one part, must be equally so as to the other. The defendants, the donee and her guardian, appeared and demurred to the complaint before the death of the donor, so that, even if knowledge on the part of the donee of the revocation before the death of the donor were essential, such knowledge was communicated by the service of the summons and complaint. To such action the answer stated no facts sufficient to constitute a defense, and, if such action could effect a revocation as to a part of the property, it must operate as a revocation of the gift as to the whole of it. It is not necessarily the judgment in the action which operates as a revocation, but the intention to revoke, manifested by bringing and prosecuting the action, is quite sufficient for that purpose. There is neither allegation nor finding that there was any gift of the note and mortgage after the date of the original gift on May 5th, nor after the defendant's appearance to this action. We must, therefore, regard the finding that Mary Jane Calder did not revoke the gift of the note and mortgage as an erroneous conclusion of law that should be disregarded; and that portion of the judgment relating to said note and mortgage is reversed, with directions to the court below to enter judgment for the plaintiff canceling the assignment of said note and mortgage and said bill of sale, and that all said property be delivered by the defendants to the plaintiff, as executrix of the last will and testament of said Mary Jane Calder, deceased; and it is so ordered.

132 Cal. 214

LYNCH v. LYNCH et al. (Sac. 816.)

(Supreme Court of California. March 14, 1901.)

DESCENT AND DISTRIBUTION—COLLATERALS
—WHOLE AND HALF BLOOD.

Civ. Code, § 1386, par. 5, declares that if a decedent leave a husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate shall pass to the husband or wife. Paragraph 2 provides that, if there be no father or mother, one-half goes in equal shares to the brothers and sisters, and to the children of any deceased brother or sister by representation. *Held*, that where a decedent left surviving him a widow, brothers, and sisters of the half blood, and children of a sister of the full blood, a contention that the widow was entitled to the whole estate under paragraph 5, on the ground that the half brothers and sisters were not entitled to share because decedent left no kindred of the full blood in the same degree, and that the children could not inherit because the decedent left no brother or sister of the whole blood, was not well taken; the statute

intending no distinction between brothers and sisters of the whole and half blood.

Department 2. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Suit by Mary Lynch against John Lynch and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

P. F. Dunne, for appellant. Louis F. Dunand and H. H. McPike, for respondents.

PER CURIAM. The estate of P. C. Lynch, an intestate, was distributed to the widow, Mary Lynch, appellant here, fifteen-twentieths, as survivor of the community and statutory heir at law, and the remaining five-twentieths to certain collateral distributees, to wit, two brothers and one sister, all of the half blood, and to two sets of children, being the children of a deceased brother of the full blood and the children of a deceased sister of the full blood. The question is, are these collaterals entitled to take any part of the estate as against the widow, who claims it all?

Appellant rests her title to distribution of the whole estate upon paragraph 5, § 1386, Civ. Code, which reads: "If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife." Paragraph 2 of the same section provides that, if the decedent leave no issue, the estate goes, one half to the surviving husband or wife, and the other half to the decedent's father and mother, in equal shares, and, if either be dead, the whole of said half goes to the other; "if there be no father or mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation." Appellant's contention is that the half-brothers and half-sister are not entitled because the decedent left no kindred of the whole blood in the same degree, and that the nephews or nieces cannot inherit because the decedent left no brother or sister of the whole blood. Reliance is placed upon the decision in *Re Ingram*, 78 Cal. 586, 21 Pac. 435, where it is claimed "the question was considered and settled." In that case the intestate left a surviving husband, but no issue, and no father or mother, brother or sister. There were living, however, at her death certain children of a deceased sister who claimed to be entitled as distributees. The court said that paragraph 5 of section 1386, *supra*, "is too clear to present any difficulty of construction whatever"; and necessarily so, for the facts exactly fitted the statutory provision. In the opinion it was said: "Paragraph 2 in said section refers to the case where there is a surviving brother or sister, and provides that in such case, if there be also children of the deceased brother or sister, they shall take their parent's share by right of representation." We do not understand the question now here as necessarily

raised in the *Ingram Case*. The language of the opinion may possibly bear the construction sought to be placed upon it, but we do not think it was intended to be so understood. The provision of the statute seems plainly to mean as it reads, that "if there be no father or mother [which is the case here], then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister," etc. It does not say, nor does it mean, as is contended, that unless there are brothers and sisters of the full blood the children of a deceased brother of the full blood cannot inherit.

It seems to us that the only possible question is whether the section includes the brothers and sisters of the half blood. The statute makes no distinction between brothers or sisters of the half blood and those of the whole blood. The well-established rule in this country is that where the term "brothers" or "sisters" is used without limitation it includes half-brothers and half-sisters. In the case of *Cliver v. Sanders*, 8 Ohio St. 501, the court said: "The English canon, which excluded the half blood from inheriting real estate, did not do so on the ground that half-brothers of an ancestor were not his brothers, but because they were not presumptively of the blood of the first feudatory or purchaser from whom the estate was originally derived. * * * Half-brothers of the ancestor are included in, and designated by, 'brothers,' wherever that term is used without limitation." This is the rule of the civil law, and has been generally adopted in this country. *Gardner v. Collins*, 3 Mason, 398, Fed. Cas. No. 5,223; *Id.*, 2 Pet. 58, 7 L. Ed. 347; *Pearson v. Grice*, 6 La. Ann. 232; *Sheffield v. Lovering*, 12 Mass. 490; *Rowley v. Stray*, 32 Mich. 70; *Clark v. Sprague*, 5 Blackf. 412; *Clay v. Cousins*, 1 T. B. Mon. 75; *Marlow v. King*, 17 Tex. 177. The law of England recognizes brothers of the whole and half blood to be of kin in the degree of brothers, although by that law kinsmen of the whole blood inherit to the exclusion of the half blood. *Crooke v. Watt*, 2 Vern. 124.

Appellant contends that her view as to the contingent element in the statutory heirship of children, as depending upon the existence of brothers and sisters of the decedent, applies particularly to the situation of kindred of the half blood; citing section 1394, Civ. Code, which provides that "kindred of the half blood inherit equally with those of the whole blood in the same degree," unless the inheritance comes to the intestate in a way not important in the present case. But for the qualification found in section 1394, unimportant here, brothers and sisters of the half blood would have rights of inheritance, under section 1386, in all respects equal with those of brothers and sisters of the whole blood, the law recognizing no distinction in their right to inherit. The rights of the half brothers and sisters of the intestate are con-

ferred upon them by section 1386, and in fact are but limited by section 1394 in the particular not involved in this case. The decree is affirmed.

(132 Cal. 283)

PEOPLE ex rel. HICKS v. STEWART. (L. A. 747.)¹

(Supreme Court of California. March 20, 1901.)
ELECTIONS—CANVASSING BOARD—RETURNS.

Under Pol. Code, § 1280, providing that if, at the time of the meeting of the supervisors to canvass election "returns," all the returns have not been received, the canvass must be postponed from day to day until all the returns are received, or until six postponements have been made, the supervisors have no authority at the first meeting to send for the duplicate list of voters, tally list, and list attached thereto, and retained by the inspector of a precinct, and use them in the canvass in place of a missing return.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. S. Day, Judge.

Suit by the people, on the relation of Thomas H. Hicks, against Nat Stewart. From a judgment for defendant, plaintiff appeals. Reversed.

Atty. Gen. Ford, B. F. Thomas, J. W. Taggart, S. E. Crow, and H. C. Booth, for appellant. Canfield & Harbuck, for respondent.

SMITH, C. Appeal from a judgment for the defendant on demurrer to the complaint. The suit was brought to determine the right of the defendant to the office of sheriff of Santa Barbara county, which, it is alleged, he had usurped, and to establish the right of the relator to the same office. Code Civ. Proc. § 805. Briefly stated, the case as alleged is as follows: The relator and the defendant were candidates for the office in question at the election held therefor on November 8, 1898. The canvass of the returns was made by the board of supervisors November 14, 1898 (the first Monday following the election). When the board met on that day, the returns from one precinct of the county (the Cold Springs precinct) had not been received. But "the duplicate list of voters, tally list, and list attached thereto kept and retained by the inspector of said board of said precinct, as required by section 1262 of the Political Code, were sent for"; and the tally list, after being identified by the inspector, was used in the canvass in place of the missing return. The votes shown by this list (15 for the defendant, and 14 for the relator) were counted for the candidates, respectively, and a tie was thus produced. On the face of the returns, exclusive of this list, as was found by the board, there was a majority of one for the relator. As the result of the canvass, the board declared there was no choice of candidate, and on the next day, under the provisions of section 1067 of the Political Code (November 15th), ordered a

¹ Rehearing denied April 17, 1901.

special election. At this election the defendant was elected and qualified, which is the usurpation complained of. The relator was at this time the incumbent under an appointment by the supervisors of date January 7, 1895, to fill a vacancy. The case, so far as the defendant's right is concerned, turns on the validity of the order of the board and of the election held thereunder, and this in turn on the validity of the canvass. On this state of facts the order calling a special election and the election held under the order were, I think, void. *People v. Mathewson*, 47 Cal. 442; *Same v. Harvey*, 58 Cal. 338. The authority of the board of supervisors to call a special election depended upon its substantial compliance with the provisions of the law,—that is to say, upon a canvass of the returns as provided by Pol. Code, §§ 1278, 1280, et seq., with result appearing therefrom that there was no choice of candidates. *Id.* §§ 1066, 1067. The "returns" referred to in these provisions are "the sealed packages containing the register, lists, papers, and ballots" prescribed by sections 1261 and 1263 of the Political Code, which "in section 1263 of the Political Code are spoken of as 'returns.'" *Carlson v. Burt*, 111 Cal. 131, 43 Pac. 583. In performing this function the board had no authority to proceed with the canvass until the missing returns had been received, or until the lapse of time prescribed by the law. Pol. Code, § 1280. Its duties were merely ministerial. *Calaveras Co. v. Brockway*, 30 Cal. 337, 338, and *People v. Van Slyck*, 4 Cow. 297, there cited; *Paine, Elect.* §§ 606, 607, 611, 615. It was forbidden to act, if the returns were not all in, until the lapse of six days. *Id.* § 309. Nor, assuming its power to canvass the returns, had it any authority to consider anything but the returns before it. It had no judicial powers. *Bright, Elect. Cas.* 303, 304. The duties of canvassers are simply "to add and ascertain by calculation the number of votes given for any office." *Paine, Elect.* § 606. They were not authorized to decide "in any other mode than by an examination of the returns made to them according to law. They are not required or authorized to hear witnesses or weigh evidence. They have no power to send for persons or papers." *Id.* § 609. They "have no power to canvass, as election returns, any papers not duly authenticated in the mode prescribed by law. An attempted canvass, in which the result declared was based on papers not thus authenticated, may be treated as a nullity by the party injured" (in this case the state). *Id.* § 614. The precise question was determined in *Pacheco v. Beck*, 52 Cal. 7 et seq. There it was held that the secretary of state, in canvassing the returns as required by section 1346 of the Political Code, could not look beyond the abstract of the record of the board of supervisors entered in the proceedings of the board as required by section 1282 of the Political Code, and certified by the

clerk as required by section 1344, though it was shown by other certificates of the clerk, and by the allegations of the petition, that the result of the election declared by the board, and originally entered in the minutes, was altered by the clerk without authority before the minutes were signed. The secretary, in the proceeding involved in that case, acted in the same capacity as the board of supervisors in the proceedings here involved, and the case here therefore comes within the decision of that case. It follows that the demurrer should have been overruled. There being no demurrer to the cause of action alleged in favor of the relator, the question as to its validity does not seem to be presented on this appeal, and it will be unnecessary to pass on it. Code Civ. Proc. § 53. The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

132 Cal. 231

PEOPLE v. BOTKIN. (Cr. 832.)

(Supreme Court of California. March 14, 1901.)

CRIMINAL LAW—CRIME—POWER TO PUNISH—JURISDICTION—MURDER—LOCALITY OF OFFENSE.

1. The legislature has power to declare that a crime committed in part within the state shall be punishable under the laws of the state.

2. If A., in California, prepares and sends a poisonous article to B., in Delaware, with murderous intent, and the article causes B.'s death in the latter state, such acts constitute the crime of murder committed in part in California, and are within the meaning of Pen. Code, art. 27, subd. 1, declaring that "all persons who commit, in whole or in part, any crime within this state," are "liable to punishment under the laws of this state"; and A. is triable and punishable under the laws of California, as if the crime had been committed entirely within that state.

In bank. Appeal from superior court, city and county of San Francisco; Carroll Cook, Judge.

Cordelia Botkin was convicted of murder, and appeals. Reversed.

Frank McGowan, George A. Knight, Charles J. Heggerty, and Knight & Heggerty, for appellant. Tirey L. Ford, Atty. Gen., and Henry A. Melvin, for the People.

GAROUTTE, J. Defendant has been convicted of the crime of murder, and prosecutes this appeal. The charge of the court, given to the jury upon the law, contained declarations which were held to be unsound, and constitute reversible error, in *People v. Vereneseneckockockhoff*, 129 Cal. 497, 58 Pac.

156, 62 Pac. 111. In view of the decision in that case, the attorney general concedes that the judgment should be reversed, and the cause remanded to the trial court for further proceedings. But defendant claims that she is not triable at all by the courts of this state, and this contention should now be passed upon; for, if maintainable, a second trial becomes a useless expenditure of money, time, and labor, and necessarily should not be had. For the purposes of testing this claim of lack of jurisdiction in the courts of California to try defendant, the facts of this case may be deemed as follows: Defendant, in the city and county of San Francisco, state of California, sent by the United States mail to Elizabeth Dunning, of Dover, Del., a box of poisoned candy, with intent that said Elizabeth Dunning should eat of the candy, and her death be caused thereby. The candy was received by the party to whom addressed, she partook thereof, and her death was the result. Upon these facts, may the defendant be charged and tried for the crime of murder in the courts of the state of California? We do not find it necessary to declare what the true rule may be at common law, upon this state of facts; for, in our opinion, the statute of this state is broad enough to cover a case of the kind here disclosed. There can be no question but that the legislature of this state had the power to declare that the acts here pictured constitute the crime of murder in this state, and we now hold that the legislative body has made that declaration. Section 27 of the Penal Code reads as follows: "The following persons are liable to punishment under the laws of this state: (1) All persons who commit, in whole or in part, any crime within this state. (2) All who commit larceny or robbery out of this state, and bring to, or are found with the property stolen, in this state. (3) All who, being out of this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein." Subdivision 1 covers the facts of this case. The acts of defendant constituted murder, and a part of those acts were done by her in this state. Preparing and sending the poisoned candy to Elizabeth Dunning, coupled with a murderous intent, constituted an attempt to commit murder; and defendant could have been prosecuted in this state for that crime if for any reason the candy had failed to fulfill its deadly mission. That being so,—those acts being sufficient, standing alone, to constitute a crime, and those acts resulting in the death of the person sought to be killed,—nothing is plainer than that the crime of murder was in part committed within this state. The murder being committed in part in this state, the section of the law quoted declares that persons committing murder under those circumstances "are liable to punishment under the laws of this state." The language quoted can have but one meaning, and that is: A

person committing a murder in part in this state is punishable under the laws of this state, the same as though the murder was wholly committed in this state. Counsel for defendant insist that this section only contemplates offenses committed by persons who at the time are without the state. This construction is not sound; for, as to subdivision 1, it is not at all plain that a person without the state could commit in whole a crime within the state. Again, if the crime in whole is committed within the state by a person without the state, such a person could not be punished under the laws of this state; for the state has not possession of his body, and there appears to be no law by which it may secure that possession. Indeed, all the subdivisions of the section necessarily contemplate a case where the person is or comes within the state. If the framers of the section had intended by subdivision 1 to cover the case of persons only who were without the state when the acts were committed which constitute the crime, they would have inserted in the section the contingency found in the remaining subdivisions, which subdivisions contemplate a return to the state of the person committing the crime. It is plain that the section was intended to embrace all persons punishable under the laws of the state of California. The defendant, having committed a murder in part in the state of California, is punishable under the laws of the state, exactly in the same way, in the same courts, and under the same procedure as if the crime was committed entirely within the state. For the foregoing reasons, the judgment and orders are reversed, and the cause remanded.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.; TEMPLE, J.

132 Cal. 234

CITY OF SANTA ANA v. BRUNNER.

(L. A. 812.)

(Supreme Court of California. March 16, 1901.)

EMINENT DOMAIN—MUNICIPAL CORPORATION — CONDEMNATION — ALLEYS — PLEADING — OBJECTIONS—INSTRUCTIONS.

1. Complaint by a city, in condemning realty for an alley, under Act March 6, 1889, § 18 (St. 1889, p. 70), which conforms to the requirements of Code Civ. Proc. § 1244, relating to eminent domain, and prescribing what the complaint must contain, is not demurrable on the ground that plaintiff only asked for an easement or right of way, and set out no express grant, implied reservation, or user for any length of time.

2. In a condemnation of realty for an alley, a complaint which definitely describes the land, and asserts the purpose to be to acquire an easement or right of way for a public use by the extension of an alley through the land described, is not demurrable on the ground of ambiguity and uncertainty.

3. A denial in an answer to a complaint in condemning land for an alley that complainant was at all times mentioned a municipal corpo-

ration organized under the laws of California is not sufficient to put in issue such allegation of the complaint.

4. In condemning land for an alley, a mere denial of the city's right to lay out the alley raises no issue of fact.

5. In condemning realty for an alley, an answer alleging that the right of way was sought for the convenience of the adjoining landowners, and not for the public benefit, and that other land could be taken, presents no material issue, since a city in condemning land for an alley need only prove that the taking of the property sought to be condemned was necessary for alley purposes.

6. In condemning realty for an alley, a contention that the city had no right to condemn the land, because one of its trustees signed the petition which was presented to the board, is untenable, where it is not alleged that such trustee's vote was essential to the hearing.

7. In condemning land for an alley, an objection that the board of trustees failed to acquire jurisdiction because there was no hearing of the objections cannot be maintained, where defendant had an opportunity and did state his reasons for objecting to the board, though he was afterwards excluded from the room, so that the board might pass on the objections privately.

8. Under Act March 6, 1889, § 18 (St. 1889, p. 70), relating to the condemnation of realty, and declaring that resolutions ordering the work to be done shall be conclusive evidence of the necessity in condemning realty for an alley, the court may properly instruct the jury that the resolution ordering the alley opened was conclusive proof of the necessity for opening of the way, and they were only to determine whether it was necessary for the city to take a strip of 10 feet, and, if the whole of such strip was not necessary, then to find how much of it was necessary for the alley.

9. Where a city condemns realty for an alley, the owner is entitled to receive an amount equal to that for which the strip could be sold in the open market.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Ballard, Judge.

Action by the city of Santa Ana against J. H. Brunner to condemn realty for an alley. From a judgment for plaintiff, from an order striking portion of defendant's answer, from the final order of condemnation, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

McKelvey & Bowes, for appellant. W. F. Heathman, for respondent.

CHIPMAN, C. Action to condemn a strip of land as and for an alley. Certain issues were tried by a jury, and plaintiff had the verdict, and judgment was entered accordingly. The appeal is from the judgment, from an order striking out certain portions of defendant's answer, and from the final order of condemnation, and from the order denying defendant's motion for a new trial. A general demurrer to the complaint was filed, and also a demurrer on the ground of ambiguity and uncertainty, and appellant now urges that the demurrer should have been sustained.

1. The complaint is laid under the provisions of section 18, Act March 6, 1889 (St. 1889, p. 70), and agreeably to the require-

ments of the Code of Civil Procedure relating to eminent domain, and prescribing, in section 1244 thereof, what the complaint must contain. The objection urged in support of the general demurrer is that "the plaintiff only asks for an easement or right of way"; that no express grant or implied reservation is set out, or user for any length of time, and no servitude is shown,—citing Civ. Code, § 801; *Carey v. Rae*, 58 Cal. 162. Appellant misconceives the source of plaintiff's right. It does not spring from an express grant, or from an implied reservation, or from user for a time sufficient to create a prescriptive right, as was the case in *Carey v. Rae*, which was a controversy between contiguous owners of land. That case has no application. The right here is derived from the statute, and is given in the interest of the general public. So far as we can see, the complaint states a cause of action, and, except as to the objections above noted, appellant makes no point on this ground of demurrer.

2. The other grounds of demurrer are equally untenable. It plainly appears from the complaint that the purpose of the action is to condemn a strip of land, definitely described, for a definite purpose, to wit: "To acquire an easement or right of way over and along the land hereinafter described for a public use, to wit, the opening and extension of an alley through," etc., "as and for an alley, and that all the said land necessary to be taken, condemned, and acquired as and for said alley, as provided by law, under the right of eminent domain." It was not necessary "to show some previous right of plaintiff for an easement over the land of defendant," as appellant erroneously supposes should have been done, and as was the case of *Carey v. Rae*, supra, and it did fully appear in the complaint by what right plaintiff claimed the easement. We find no support for appellant's objections on the ground of ambiguity and uncertainty.

3. The first 10 paragraphs of the answer, and also the Exhibits A and B of the answer, were stricken out on plaintiff's motion, and this is alleged as error. It was alleged in the verified complaint that "plaintiff is and was, at the times hereinafter mentioned, a municipal corporation of the fifth class, organized and existing under the laws of the state of California," etc.; citing the particular acts. Paragraph 1 of the answer "denies that the plaintiff was, at all times herein (i. e. in the answer) mentioned, a municipal corporation of the fifth class, organized and existing under the laws of the state of California." This denial is not sufficient to put in issue, if such issue was material, the allegations of the complaint, and it was not error to strike it out. Paragraph 2 denies that plaintiff has the right and power to lay out any street or alley, etc. This raises no issue of fact. Paragraph 3 denies "that it is necessary for the plaintiff to condemn an

casement over the land of the defendant for an alley," etc., and alleges that the right of way is sought "for the convenience of adjoining landowners and no others, and not for the public benefit." An alley in a city or town is declared to be a public use (Code Civ. Proc. § 1238; see, also, section 1, Acts 1889, supra), and no inquiry on that subject can be made in this action; and when a city or town decides, by appropriate proceedings, that an alley is desirable, and institutes condemnation proceedings for a right of way therefor, it is only required to prove that the taking of the property sought to be condemned is necessary for the purposes of an alley (*City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224). Without following the paragraphs *seriatim*, the points may be covered by stating that the allegation and denial of tender to defendant by plaintiff of a certain sum as compensation was unnecessary, and raised no issue essential in the case. *City of Pasadena v. Stimson*, supra. The motive of plaintiff in bringing the action charged in the answer, i. e. that it was for private purposes, and that other land could be taken instead of the land described, presented no material issue in the present action. It is alleged that the trustees had no right to take action upon the proposition of condemning defendant's land, because one of the city trustees, George A. Edgar, signed the petition which was presented to the board; that said Edgar was disqualified from acting as a trustee, but did in fact vote and act at the hearing of the petition. Waiving the question whether this fact is any defense where the act of the board, as here, was legislative and political, and not judicial (*Brown v. Board*, 124 Cal. 274, 57 Pac. 82), it is not alleged that Edgar's vote was essential at the hearing. The board consists of five trustees, a majority of whom constitute a quorum. Municipal Corporation Act, § 761; St. 1883, p. 93.

In paragraphs 9 and 10 it is alleged that defendant filed an objection with the trustees to the opening of the alley, which is attached to the answer as Exhibit B; that said objections were to have been heard on a certain day, at which time defendant and his counsel appeared before the board, "and before said hearing had terminated, and before said board had adjourned, the defendant was ordered by said board to leave the room where said hearing was being held, and that the hearing of said objections was continued after defendant was so ordered to leave the room; that the defendant and his counsel were not ordered to leave for any conduct on their part interfering with said board, but that said board might pass upon said objections privately." It is alleged that the board did in fact pass on the objections at a private meeting, and not at a public meeting. Exhibit B gave, as reasons for objecting to the alley, (1) that public conven-

ience did not require it; (2) that it was for the convenience of certain lot owners, and not for the public; and (3) that the taking of the land will be taking the property of one person for the benefit of another, and not for the public benefit. These objections would not seem to call for any extended hearing to fully inform the board of whatever force they were entitled to. But, aside from this, it does appear that defendant and his counsel had a hearing of some duration. They appeared "where said hearing was being held" and they state that it was continued. It is not stated that there was no hearing, or that appellant had no opportunity to and did not state his reasons for objecting. It does not appear but that when ordered from the room he had already fully presented the evidence in support of his objections.

If it be admitted that we can in this action inquire into the conduct of the board in passing upon appellant's objections, we do not think he has made such showing as would form a basis for the inquiry. Appellant's point that the board failed to acquire jurisdiction because there was no hearing of his objections cannot be maintained; for, according to his own showing, there was a hearing, although cut short for some reason not explained. See *Brown v. Board*, supra. We cannot discover that appellant was in any wise injured by the order of the court. Every material issue was before the court on the pleadings after the objectionable paragraphs of the answer were stricken out.

4. Appellant claims that the court erroneously instructed the jury in stating that the resolution passed by the board ordering the alleyway opened "is conclusive proof upon the question of the necessity for opening such alleyway, and it is only necessary for you to find whether it was necessary that plaintiff take said strip of 10 feet, * * * and, if the whole is not necessary, then how much of it is necessary for the purpose of such alley." Section 18 of the act of 1889 declares that "the resolution and ordinance ordering said work to be done shall be conclusive evidence of such necessity." The instruction was quite as favorable to defendant as the law would permit, for it left the jury to determine the width of the strip, and as to the necessity for taking some part of the land the board had already conclusively determined.

5. The court instructed the jury, as to the question of value, that "the real test is, what would the strip sell for in the market on that day for cash, after reasonable time taken by the owner to make the sale?" The court also said that "the defendant is entitled to receive for this strip an amount equal to that for which it could have been sold * * * in the open market." It is complained that this was error, because a strip of land of that width, "by itself, would be of no value on the market." Appellant suggests no other or better rule for measuring the damages

than that given in the instructions, and we know of none. *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224. We discover no prejudicial error in the record, and therefore advise that the judgment and orders be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders are affirmed.

132 Cal. 224

SCHOMBERG v. WALKER. (S. F. 1,811.)
(Supreme Court of California. March 14, 1901.)

LIBEL—PUBLICATION—JUSTIFICATION—TRUTH—MALICE—OFFICIAL PROCEEDINGS—CRITICISM—EVIDENCE—DAMAGES—TRIAL.

1. A publication headed "Ring" charged that the board of trustees, of which plaintiff was a member, "had the 'wring' in the nose of the taxpayers last Monday night in a most contemptible, illegal, and unjust manner, and unworthy of citizens elected to look after the best interest of our little town"; and that the board awarded a contract to a bidder on Monday at 9 p. m., and that the contractor's materials were at the depot by Tuesday evening, and that it was impossible to get them there between the times stated; and asking the board to explain this unjust and discriminating action. Held that, in the absence of justification, the publication was libelous, under Civ. Code, § 45, defining "libel" as a false and unprivileged publication, which exposes a person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business.

2. A plea that the article was true was not supported merely by evidence of the fact of the award of the contract.

3. As the unfairness of the publication appeared on its face, and there was evidence of malice in its republication and otherwise, and no evidence of truth beyond the admitted fact of the award to the person named, a plea of privilege could not be sustained, under Civ. Code, § 47, subd. 4, declaring privileged a "fair and true report, without malice," of official proceedings.

4. Where defendant understood the injurious effect and intent of the article, and did not attempt to discover its truth, but subsequently republished it, asserting it to be true, he was not justified, under Civ. Code, § 47, subd. 3, declaring privileged a communication without malice, to a person interested, by one interested or standing in such relation as to afford a reasonable presumption that the communication was innocent.

5. It was error to admit testimony that plaintiff's standing and reputation were not in fact deleteriously affected by such libel.

6. In an action for libel, it was not error to refuse to instruct that, on a plea of justification and failure of proof to sustain it, plaintiff was entitled to exemplary damages, as the question of damages was for the jury.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Henry Schomberg against W. S. Walker for libel. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

Will M. Beggs and W. C. Kennedy, for appellant. Wm. P. Veuve, for respondent.

SMITH, C. Appeal from a judgment for the defendant and from an order denying a new trial. The suit was for libel published in the defendant's newspaper, reflecting on the plaintiff as one of the board of trustees of the town of Los Gatos. The article complained of is as follows: "Ring! Ring! Ring! Mr. Editor: With permission to encroach on your valuable space, I would state to the taxpayers of Los Gatos there are many kinds of rings. The most interesting to the recipient, I presume, is the engagement ring, especially so if it be a diamond. Then there is the marriage ring, and rings worn in the nose, and in many other ways. Now, I think the board of trustees had the 'wring' in the nose of the taxpayers last Monday night in a most contemptible, illegal, and unjust manner, and unworthy of a body of citizens elected to look after the best interest of our little town. The facts are these: The town clerk advertised for bids to build a certain culvert, the bids to be in at the town hall by five o'clock on Monday last. The august 'wringers' met, and awarded the contract to the lowest bidder about 9 p. m. on Monday night. The material for the said culvert was at the Los Gatos depot by 5 o'clock a. m. Tuesday. Now, this looks as if the 'wring' was well twisted; as Mr. Sylvester, the contractor, must have known long before the board met that the contract was his, as it was impossible after 9 p. m. on Monday night to order the lumber, load it on the car, and get it here next morning by 5 o'clock. Can our city 'wringers' explain this unjust and discriminating action to the people of Los Gatos? If a reasonable explanation is not forthcoming, I will add my mite with others to prevent the payment of any bill contracted so illegally. Justice."

It is alleged in the complaint that the article was published of and concerning the plaintiff (Code Civ. Proc. § 460), and that this was the case appears from the fact that, of the five trustees constituting the board, only three, including the plaintiff, participated in the award of the contract. It is claimed by the appellant that the article published is libelous per se, and that, in the absence of justification, he was entitled to a verdict for at least nominal damages. If so, he is now entitled to a reversal. *Lick v. Owen*, 47 Cal. 257; *Taylor v. Hearst*, 107 Cal. 272, 40 Pac. 392. The question involved, then, is whether the publication is or is not a libel per se.

The definition of "libel" in our Code is taken from Field's Civ. Code N. Y. § 29, and is but a statement of the common-law rule as given in the cases there cited. 2 Kent. Comm. 17; *Stone v. Cooper*, 2 Denio, 293; *Cooper v. Greeley*, 1 Denio, 347; *Steele v. Southwick*, 9 Johns. 214. The effect of these and other cases is thus stated, almost in the language of the Code, by Mr. Odgers: "In cases of libel, any words will be presumed defamatory which expose the plaintiff to

hatred, contempt, ridicule, or obloquy, which tend to injure him in his profession or trade, or to cause him to be shunned or avoided by his neighbors." *Odgers, Lib. & Sland. 21; O'Brien v. Clement, 15 Mees. & W. 435; Cropp v. Tilney, 3 Salk. 226; Villers v. Monsley, 2 Wils. 403.* There is indeed an apparent difference between the Code definition and the older definitions in the use by the former of words "false and unprivileged" as descriptive of a libelous publication; but this language does not materially change the rule. The burden of proving the truth of the libel or the privilege claimed still lies on the defendant, as at common law. *Newell, Defam. 771, 772; Odgers, Lib. & Sland. 169; O'Brien v. Clement, 15 Mees. & W. 435.* The difference is therefore merely verbal. According to the old definition, a libel may be justified by proving its truth or that it is privileged. Under the Code definition, the publication, if it can be thus justified, is not a libel. Under either point of view, therefore, it will be necessary to consider separately the question as to the general character of the publication and the question as to its justification.

1. The first question to be considered, therefore, is, whether, in the absence of justification or privilege, the publication complained of is in itself a libel, and this I think must be determined affirmatively. Where there is a statutory definition, it has been said by this court: "Language which is fairly included in such definition is libelous per se. It is only when the libelous meaning of the publication is covert—not apparent on the face of the language used—that averment and proof of special damage is required." Our Code defines "libel" as follows: "Libel is a false and unprivileged publication by writing, pictures, effigy or other representation to the eye, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." *Civ. Code, § 45.* This definition is very broad, and includes almost any language which upon its face has a natural tendency to injure a man's reputation either generally or with respect to his occupation. *Tonini v. Cevasco, 114 Cal. 271, 272, 46 Pac. 103.* In the case cited the gist of the libel was, in effect, that the plaintiff had "been discharged from the firm of G. B. Cevasco & Co. for conduct not irreprehensible." The case here is much stronger, and the observation of the court (page 273, 114 Cal., and page 105, 46 Pac.), with the authorities cited, must be held equally applicable here. "It cannot be justly said that the language does not import anything of a defamatory character concerning the plaintiff." See *Bettner v. Holt, 70 Cal. 270, 11 Pac. 713; Lick v. Owen, 47 Cal. 252; Edwards v. Society, 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; Fitch v. De Young, 66 Cal. 330, 5 Pac. 364.*

To constitute a libel, it is not necessary

that there be a direct and specific allegation of improper conduct, as in a pleading. The charge may be either expressly stated or implied, and in the latter case the implication may be either apparent from the language used, or of such a character as to require the statement and proof of extrinsic facts (inducement, colloquium, and innuendo) to show its meaning. In the last case, proper allegations and proofs of the facts necessary to make the meaning of the language apparent will be required. Otherwise, whether the charge be directly made or merely implied, the publication, without averment, colloquium, or innuendo, will in itself constitute a libel. "The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer." *Cooper v. Greeley, 1 Denio, 358.* Thus, in the case cited, the charge was not "made in an open and direct manner," "but [it was said by the court] an imputation made in that form is not the less actionable." So, in the case of *Steele v. Southwick, 9 Johns. 214*, where the charge was not direct, it was said: "If the words do not import perjury in the legal sense, they hold the plaintiff up to contempt and ridicule," etc. "In this view, the words are actionable, for a writing published maliciously, with a view to expose a person to contempt and ridicule, is undoubtedly actionable; and what is said to this effect by the judges of the common bench in *Villers v. Monsley, 2 Wils. 403*, is founded in law, justice, and sound policy. * * * To allow the press to be the vehicle of malicious ridicule of private character would soon deprave the moral taste of the community, and render the state of society miserable and barbarous."

The libel charged in this case not only expressly avers that the trustees referred to, of whom the plaintiff was one, had in some way treated the citizens in a manner "most contemptible, illegal, and unjust, * * * and unworthy of a body of citizens elected to look after the best interests of [the] town," and that their action was "unjust and discriminating," but it charges them by implication, as plainly as though it were directly alleged, with constituting or being members of a "ring"; by which, as used in the context, must be understood, according to the most obvious and familiar sense of the term, a combination for illegal or otherwise improper purposes (*Edwards v. Society, 99 Cal. 435, 436, 34 Pac. 128*); and also, specifically, with being guilty of a corrupt combination with the successful bidder. There can be no doubt, therefore, of the libelous character of the publication.

2. Two affirmative defenses are set up in the answer, which may be conveniently referred to as a plea of justification and a plea of privilege. The former is to the effect that the article is "a true and fair report" of the

proceedings referred to, published "without malice." Civ. Code, § 47, subd. 4. The latter consists of the single allegation "that the said publication was and is true." But, beyond the admitted fact that the award of contract and the proceedings connected therewith were correctly stated, no evidence was offered to prove the truth of the charges made. The plea of justification must therefore be regarded as unsupported by the evidence. And for the same and other reasons the plea of privilege must also be so regarded; for not only was there no attempt to prove the truth of the so-called "report," but its unfairness clearly appears on the face of the publication; and there was evidence, in the republication of the libel and otherwise, of express malice. Civ. Code, § 47, subd. 4; *Odgers, Lib. & Sland.* 272; *Chubb v. Westley*, 6 Car. & P. 436; *Newell, Defam.* 349, 350, and cases cited. The defendant's case is therefore not aided by either of his pleas.

It was, however, competent for the defendant to show under the general issue that the alleged libel was privileged, or, as otherwise expressed, that "it was published on some lawful occasion." *O'Brien v. Clement*, 15 Mees. & W. 437. It remains, therefore, to be considered whether, on the evidence, such a claim can be maintained. The theory of the defense on this point is that the proceedings referred to in the article were correctly reported, and that the rest of the publication was merely a comment upon them, which the writer, as a citizen, had a right to make, and the defendant to publish. The privilege thus claimed, if it can be sustained at all, must, it would seem, rest upon the provisions of subdivision 3 of section 47 and section 48 of the Civil Code, as none of the other provisions of the former section can apply to the case. But these provisions would seem to include within their intent the familiar doctrine of the right of the citizen "to comment on matters of public interest and general concern" (*Odgers, Lib. & Sland.* 34, 38, 89); for the writer of a communication commenting on such matters, as well as each member of the community to whom it is addressed, comes within the description of "a person interested therein," and it cannot be supposed it was the intention to alter the law in this respect. But the right of the citizen to comment on the proceedings of public officers is limited by the condition that "he does so fairly and with honest purpose," and that the line be observed "where defamation commences [and] true criticism ends." *Odgers, Lib. & Sland.* 34, 36; *Newell, Defam.* 564, 567, 569. The case, therefore, does not come within the privilege claimed; for here there was ample and uncontradicted proof of express malice. The defendant, as he himself testified, understood the injurious effect and intent of the article, and yet made no inquiry, in advance of publication, either

of the writer or others, as to the truth of the charges made. The facts stated in the article were not of a character to excite even a suspicion of improper conduct on the part of the trustees. The proceedings were regular, and the only additional fact was the arrival of certain materials on the next morning. But this is explained by the testimony of Lyndon, by whom they were ordered. The successful bidder, Syverson, had no connection with them, and it is not even asserted, directly, that they had been ordered by him. There was nothing in the fact, either as it was or as it was supposed to be, to justify the grossly vituperative epithets applied to the trustees. The defendant made no subsequent inquiry as to the justice of the charges, or, if he did, failed to retract them. On the contrary, after full time for examination and reflection, he republished the libel with injurious comments, and again, in his answer, reiterated the libel and asserted its truth. *Odgers, Lib. & Sland.* 178. From these facts, the inference of actual malice is irresistible.

Other points made by the appellant are that the court erred in allowing defendant's witnesses to testify, over his objections, that the plaintiff's standing and reputation in the community were in fact not deleteriously affected by the libel, and that the court erred in refusing to instruct the jury, at his request, that upon a plea of justification, and failure of proof to sustain it, the plaintiff would be "entitled to exemplary damages." The admission of the testimony objected to was erroneous. *Titus v. Sumner*, 44 N. Y. 266; *Herrick v. Lapham*, 10 Johns. 281. The instruction was rightly refused. The question of damages, and whether they should be exemplary or otherwise, was for the jury. *Childers v. Publishing Co.*, 105 Cal. 285, 38 Pac. 903. I advise that the judgment and order appealed from be reversed, and the cause remanded for new trial.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for new trial.

132 Cal. 278

SOUTHERN PAC. R. CO. v. CHOATE.
(L. A. 763.)

(Supreme Court of California. March 20, 1901.)

VENDOR AND PURCHASER—LAND CONTRACTS
RESCISSION—PUBLIC LANDS—PATENTS.

1. Where the purchaser under a land contract waited nearly seven years after the contract was executed, and four years after the patent had issued to the vendor, before objecting to the latter's title, or the invalidity of the patent, and made no offer to restore possession, or to put the vendor in statu quo, he was not in position to rescind.

2. Conceding that land included in a grant was claimed by others, and hence did not pass, on its being subsequently decided that it did not belong to the adverse claimants it became a part of the public domain, and congress had power to confirm the title to it to the grantee by patent.

3. Under Act Cong. March 2, 1896, providing that no patent to any lands held by a bona fide purchaser shall be annulled, but that "the right and title of such purchaser is hereby confirmed," a bona fide purchaser under a land contract cannot resist enforcement for the vendor's defect of title in that at the time of the grant to the vendor the lands involved were claimed by others, and did not pass by the grant, and that, consequently, patents issued thereafter were without authority, and void; since the statute cured any defect or invalidity in the patent.

Department 1. Appeal from superior court, San Bernardino county; J. L. Campbell, Judge.

Action by the Southern Pacific Railway Company against Bertha Choate. There was a judgment for defendant on one count of the complaint, and plaintiff appeals. Reversed.

Wm. Singer, Jr., and H. V. Reardon, for appellants. Shirley C. Ward, for respondent.

VAN DYKE, J. The action is for the balance of the unpaid purchase price for certain tracts of land in San Bernardino county, and to foreclose the right of the defendant therein. The complaint contains two counts, each declaring upon a separate contract for a separate tract of land. Judgment went for the plaintiff as to the first count, and in favor of the defendant as to the second. The appeal is taken from the latter part of said judgment.

The finding of the court on which the portion of the judgment in favor of the defendant was entered recites that from the agreed written statement of facts introduced in evidence the plaintiff was not on the 18th of May, 1891, and has not been since, and is not now, the owner of the land described in said contract set forth in the second count, and that plaintiff has not done or performed all the things required of it by the terms and conditions of said contract, in this: that it has not at any time been able to furnish to defendant a good or marketable title to the tract of land described in said agreement. The agreed statement of facts referred to, as shown in the record, states that the lands described in the second cause of action were, at the time of the grant by congress to the plaintiff under the act of March 3, 1871, claimed by the owners of the Jurupa Rancho (a confirmed Mexican grant by specific boundaries) to be within the boundaries of said rancho according to a survey which had then been made by a deputy United States surveyor, but that such survey was never finally approved by the United States government, and upon the 13th day of May, 1876, was rejected and set aside; that by a new survey of the northern boundary of said rancho in 1878, finally

approved and patent issued thereon in May, 1879, the lands described in said second cause of action were not included within the boundaries of such rancho as finally surveyed and patented. The judgment entered in favor of the defendant on the findings was that she recover from the plaintiff the sum of money paid on the contract of purchase, and that upon the repayment of said money by the plaintiff, with legal interest thereon, the plaintiff have judgment against said defendant and all parties claiming by, through, or under her, forever barring and foreclosing them from any right to purchase the lands described in the contract set forth in the second count of the amended complaint. As appears from the argument contained in respondent's brief, the court below rendered judgment in favor of the defendant upon the second count on the ground that the land in question, having been claimed as a part of a former Mexican grant, was sub judice at the date of the act of congress, and therefore did not pass by said grant to the railroad company, and that the patent issued thereafter, under the decisions of the supreme court of the United States, issued without authority of law, and was, therefore, void. But it is recited in the stipulation referred to that such contract was made between the plaintiff and defendant with the full knowledge on the part of the defendant of all the matters and things hereinbefore stipulated to be facts, and in the contract between the plaintiff and defendant "it is further agreed that the party of the second part will never deny that the tracts herein described, or any part of them, are a part of said grant, and will do no act to hinder, delay, or impede the obtaining of patent for them by the party of the first part; and that she will not obtain or hold possession of all or any of them adversely to said party of the first part." The contract in question was entered into May 18, 1891, at which time one-fifth of the purchase price was paid by the defendant to the plaintiff, and the remaining portion was made payable on or before May 18, 1896. By the terms of said contract the said defendant was entitled to the possession of the land therein agreed to be conveyed. The patent was issued to the plaintiff August 15, 1894. The defendant paid annual interest on the deferred payments under the terms of her contract of purchase up to May, 1894, and this action was commenced in March, 1898; and in answer to the amended complaint, filed April 29, 1898, the defendant first makes objection to the title on the part of the plaintiff, and demands a return of that portion of the purchase money already paid on the contract.

The defendant has not brought herself within the rule in reference to the right of rescission. Rescission, when not effected by consent, can be accomplished only by use on the part of the party rescinding of reasonable diligence to comply with the following rules:

First, he must rescind promptly on discovering the facts which entitle him to rescind; second, he must restore, or offer to restore, to the other party, everything of value which he has received from him under the contract. Civ. Code, § 1691. In this case it was nearly seven years after the contract was executed, and four years after the patent had issued to the plaintiff, before objection was made to the title by defendant; and no offer appears to have been made to restore possession, or to put the plaintiff in statu quo. After the approval of the last survey of the Jurupa Rancho, and the issuance of a patent thereon, the land in question became a part of the public domain; and, if not included in the grant to the railroad, as contended by respondent, was clearly subject to the disposal of congress. Congress had the absolute power either to confirm the title of the land to the railroad company, or to donate it to the company, or to dispose of it in any manner it saw proper. March 3, 1891, congress passed an act limiting the time within which suit should be brought to set aside patents issued under like circumstances as this to the plaintiff company, and again, March 2, 1896, passed another statute on the same subject. In *U. S. v. Railroad Co.*, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789, the supreme court of the United States had occasion to consider these several acts of congress. In the opinion the court says: "Thus, in the act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States, and open to sale and conveyance through the land department. The act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that act. It is true that these appellees cannot avail themselves of these limitations, because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of congress to uphold titles arising under certification or patent by providing that after a certain time the government, the grantor therein, should not be heard to question them. But limitation was not the only protection given. The act of 1896, which extended the period of limitation, followed such extension with this proviso: 'But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.' It is true, this act was passed after the commencement of this suit,—indeed, after the decision

by the court of appeals,—but it is none the less an act to be considered. There can be no question of the power of congress to terminate, by appropriate legislation, any suit brought to assert simply the rights of the government. * * * We are of the opinion that congress intended by the sentence we have quoted from the act of 1896 to confirm the title which in this case passed by certification to the state. It not only declares that no patents to any lands held by a bona fide purchaser shall be vacated or annulled, but it confirms the right and title of such purchasers. Given a bona fide purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the government to disturb it." Again: "These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a bona fide purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a 'bona fide purchaser,' has nevertheless purchased in good faith from the railroad company. * * * Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were 'public lands,' in the statutory sense of the term, and free from individual or other claims." It does not lie in the mouth of the defendant to say that she is not a bona fide purchaser from the plaintiff railroad company; and, besides, her acts under the purchase, as already recited, are inconsistent with any other theory than that she was a bona fide purchaser. This being the case, the act of congress referred to, as construed by the supreme court of the United States, cured any defect, or even invalidity, in the patent or title of the plaintiff, and inured to the defendant a perfect title upon obtaining a deed from the plaintiff in accordance with her contract of purchase. The portion of the judgment appealed from is reversed, and cause remanded for further proceedings in accordance with this opinion.

We concur: GAROUTTE, J.; HARRISON, J.

(132 Cal. 132)

In re NELSON'S ESTATE. (Sac. 798.)¹
(Supreme Court of California. March 12, 1901.)

WILLS—MENTAL CAPACITY—PRESUMPTION—EVIDENCE—WITNESSES—PHYSICIAN—ATTORNEY—UNDUE INFLUENCE—JURY—CHARGE.

1. Where, on an appeal from an order denying a new trial after a verdict that the testa-

¹ Rehearing denied April 11, 1901.

tor was of sound and disposing mind, contestant concedes that the testimony of the witnesses for proponent "is, in substance and effect, that testator had sufficient strength of mind and vigor of body to indicate his wishes to his attorney at great length, and with absolute precision of detail," the verdict is conclusive of that question, since any testimony to the contrary would simply raise a conflict of evidence.

2. Under Code Civ. Proc. § 1881, providing that a physician cannot be examined as a witness in a civil action without the consent of his patient as to any information acquired in attending the patient, a physician called as a witness by the contestants of the patient's will cannot answer questions based on information gained while attending the testator, tending to show that his patient had not mental capacity to make a will at the time a codicil was executed, though he acted as scrivener in drawing the original will.

3. Under Code Civ. Proc. § 1881, providing that without the consent of his client an attorney cannot be examined as to any communication made by the client to him in the course of professional employment, an attorney who drew a will may be examined and testify for the proponents of the will concerning his conversations with the testator preparatory to drawing the will, and instructions be received therefor, since from the fact of his employment to draw the will the consent of his client to do whatever may be necessary to establish the integrity of the will and make it effectual is implied.

4. Where, three days after a will was executed, a codicil was added, naming three executors, evidence by contestants that two of the executors so named had sought to obtain from the attending physician, during such interval, management of the estate, and that after the execution of the codicil one of such executors had stated that the reason the codicil was made was that they wanted some one there, rather than at another city, to manage the estate, had no tendency to show undue influence, in the absence of any evidence that either of such executors had any interview with the testator, or ever spoke to him, or to any one for him, with reference to the codicil or disposition of his property.

5. In a will contest, the court, after explaining the issues, and the right of a testator to dispose of his property according to his own desires, charged that the jury were not at liberty to consider the character of the provisions, but were solely to determine whether it was his will. *Held*, that such charge was not objectionable as an argumentative instruction by the court in support of the validity of the will, but properly confined the deliberation of the jury to the evidence, which alone could be considered by them.

6. In a contest as to the mental capacity of a testator, the court charged that a man might be in a state of extreme bodily or mental weakness and disease, and yet possess sufficient understanding to direct how his property should be disposed of. *Held*, that the charge was not an instruction that the testator might be competent to make a will though at the very point of mental extinction or dissolution, since the word "extreme" was not used in a superlative meaning, but in the sense of "grievous," "excessive," or "far advanced."

7. The trial court charged that a testator was presumed to be of sound mind at the time of the execution of his will, until the contrary was proven, and that he who alleged unsoundness must prove it. The testator signed a will, and three days afterwards declared it to be as he wanted it, and added a codicil appointing executors. *Held*, that the charge was not rendered erroneous by the fact that the jury found that he was of unsound mind at the time the original will was executed, but that he was

mentally competent when the codicil was executed, since the charge was proper when given.

8. A request, by the contestants of a will, to charge that, if the jury found the testator of unsound mind at the time of executing the original will, the presumption was that he was of unsound mind three days thereafter, when executing a codicil, should be refused where the request ignored evidence from which the jury might find that the condition on the first occasion was temporary.

9. The court charged that "the testimony of a witness who has solemnly subscribed to a will as an attesting witness, and afterwards endeavors to overthrow it, should be closely scrutinized." *Held* that, though the instruction was open to objection, it was not sufficient to justify a reversal, as it merely told the jury to do something which they would evidently do without being instructed.

10. Where there is no evidence which would justify a finding that undue influence was exercised in procuring the execution of a will, such issue should not be submitted to the jury, since the presumption of undue influence is not raised by proof of interest and opportunity alone.

Department 1. Appeal from superior court, Colusa county; H. M. Alberty, Judge.

Application for the revocation of the probate of the will of Henry C. Nelson, deceased. From a judgment denying the application and affirming the probate, and from an order denying a new trial, contestant appeals. *Affirmed*.

See 60 Pac. 772.

E. T. Crane and Ernest Weyand (A. A. Moore, Crittenden Thornton, and E. A. Bridgford, of counsel), for appellants. Platt & Bayne, H. A. Powell, and Edwin Swinford, for respondents.

HARRISON, J. The last will and testament of the above-named decedent, bearing date October 17, 1897, and a codicil thereto, bearing date October 20, 1897, were admitted to probate, and letters testamentary thereon issued, November 29, 1897. In October, 1898, the appellants herein filed a petition for the revocation of this probate upon the grounds that at the respective dates of the instruments the deceased was not of sound and disposing mind, and that the said instruments, and each of them, were made under the duress and undue influence of certain parties benefited thereby. Issues were joined upon this petition, and those relating to the competency of the deceased were submitted to a jury, who rendered a verdict that the deceased was not of a sound and disposing mind at the time of making the will on the 17th day of October, and that he was of sound and disposing mind at the time of making the codicil on the 20th day of October. These verdicts were approved by the court, and it also found that neither the will of October 17th nor the codicil of October 20th was executed under duress or undue influence on the part of or on behalf of any one. The court thereupon rendered its judgment denying the petition of the contestants and affirming the probate previously made. A motion for a new trial, made by

the contestants, was denied by the court, and the contestants have appealed.

The decedent was a resident of Colusa county, and at the time of the execution of the will and codicil was 79 years of age. In 1896 he suffered a stroke of apoplexy, and was thereafter enfeebled in body. In September, 1897, he went to San Francisco for the purpose of receiving medical treatment, and took rooms at the Langham Hotel, where he immediately placed himself under the care of Dr. Galvan, and remained under his medical treatment until his death, October 31st. During the night of October 16th his condition became worse, and on the morning of the 17th an attorney was summoned to his room for the purpose of drawing his will. After receiving certain information from Dr. Galvan, the attorney dictated to him the will of that date, which the doctor then wrote down and read to the testator. The testator indicated his approval thereof, and Dr. Galvan wrote his name upon the paper, and, with the testator touching the pen, made a cross, near which the doctor wrote the words "his mark." The doctor then wrote out the attestation clause, as dictated by the attorney, and it was signed by the witnesses. October 20th, Mr. James W. Goad came from Colusa, in response to a telegram to that effect, for the purpose of seeing Mr. Nelson. Mr. Goad was an attorney at law, and had been consulted by Nelson about drawing his will before the latter came to San Francisco. He went to the Langham Hotel, and was shown by Dr. Galvan the will of October 17th. Upon seeing Mr. Nelson, the latter said to him that the will made the proper disposition of his property, but that he desired to have Mr. Goad as one of his executors, and wished him to change it in that respect. He also named Mr. Smith and Mr. Jones as persons who he also wished to be his executors. Mr. Goad thereupon prepared the codicil of October 20th, and, after reading it to Nelson, the latter said that it was all right, and, upon being propped up in bed, told Mr. Goad to write his name to it. Goad thereupon wrote Nelson's name to the codicil, and gave him a pen with which to make his mark. Nelson took the pen, and, after making a cross near his name, wrote what purported to be his own name underneath the other. Upon Goad's inquiry as to whom he wished as witnesses, he named Goad himself, but, upon Goad's mentioning that, as he was named as executor, he had better name some one else, he named Dr. Gray and Mr. Murphy, who were present in the room, and they thereupon signed as witnesses thereto.

1. The verdict of the jury that the decedent was of sound and disposing mind at the time of his execution of the codicil, on October 20th, was given upon a consideration of conflicting evidence, and is, therefore, not open to review upon this appeal. Counsel for appellants state in their brief that the testimony of the witnesses for the respond-

ents is, in substance and effect, "that Nelson had sufficient strength of mind and vigor of body to indicate his wishes to Goad at great length, and with absolute precision of detail; that those wishes were indicated without prompting or suggestion, and that he was the complete master of the situation." Any testimony to the contrary of this would only raise a conflict of evidence, upon which the verdict of the jury was conclusive.

2. Dr. Galvan was called as a witness for the contestants, and was asked certain questions tending to show that the testator had not the mental capacity to make a will. He testified that the information he had upon these matters was acquired by him from the decedent, and from observing him while he was in attendance upon him for the purpose of prescribing for him as his physician; and upon the objection of the proponents of the will that under the provisions of the fourth subdivision of section 1881, Code Civ. Proc., the witness was incompetent to give this testimony, his answers to the questions were excluded. Under the authority of *In re Flint's Estate*, 100 Cal. 391, 34 Pac. 863, and *In re Redfield's Estate*, 116 Cal. 637, 48 Pac. 794, this ruling was correct. The proponents afterwards called as a witness Mr. Goad, who had drawn the codicil of October 20th, and, against the objection of the contestants that he was incompetent, under section 1881, the court permitted him to testify concerning his interview and conversation with Nelson preparatory to drawing the codicil, and the instructions which he received from Nelson therefor. The appellants do not seriously contend that Goad was incompetent to give testimony respecting these matters, but they say that the ruling of the court upon the testimony of the two witnesses was contradictory and inconsistent; that, if the testimony of Goad was admissible, that of Galvan should also have been received. The grounds, however, upon which the court made its rulings in regard to the competency of the two witnesses are not the same, and the rules by which Galvan's testimony was excluded are inapplicable to the testimony of Goad. The communication, as well as the relation between the attorney and his client, ceases to be confidential when it is clearly manifest that it is the intention of the client that the communication should be disclosed if any occasion therefor should be presented. The consent of the client to such disclosure, which is provided for in section 1881, may be implied as well as express; and by requesting his attorney to draw his will the client impliedly asks him to do and say whatever may at any time and place be requisite for the purpose of establishing the integrity of the will. Goad had prepared the codicil under the directions of the testator, and by employing him as his attorney for this purpose the testator had waived the protection of the statute, and released the attorney from the obligation of secrecy as fully as when the

attorney becomes a subscribing witness to the will. The client thereby makes the attorney the medium through whom the right which he seeks to create may be established. There was no such relation between Dr. Galvan and Nelson. The information which the doctor had acquired from Nelson was for the purpose of prescribing for him as his physician, and could be used by him for only that purpose. It had no connection with the preparation of the codicil, and Dr. Galvan was as much precluded from disclosing it upon the issues respecting the same as if he had known nothing about the codicil. The information which a physician acquires from his patient for the purpose of prescribing for him is given for the benefit of the patient alone, and not for the purpose of creating a right in others, nor does it carry with it any implied request to disclose the same in behalf of others in matters with which it is totally disconnected. The argument of the appellants that, inasmuch as Dr. Galvan prepared the will of October 17th under the direction of Nelson, his incompetency was thereby removed as fully as was that of Goad, loses its force in view of the fact that the jury found in favor of the contestants upon that instrument. Any error that may have been committed in reference to the issues thereon is not available to the appellants. Galvan had nothing to do with the preparation of the codicil, and the testimony sought from him was not rendered competent upon the issues upon the codicil by reason of his having prepared the original will. In all the matters relating to the codicil there was no relation between him and Nelson from which there could be implied any consent on the part of Nelson to his disclosing the information which he had acquired as his physician.

3. The contestants sought to show by Dr. Galvan that after the execution of the will on the 17th, and prior to the 20th, Jones and Smith, who are named as executors in the codicil, had sought to obtain from him the management of the estate. They also offered to show that after the execution of the codicil Jones had stated that the reason the codicil was made was that they wanted some one at Colusa, rather than at San Francisco, to handle the property. Upon the objection of the proponents that the matters thus sought were irrelevant and immaterial, the court excluded the answers. The appellants now urge that this testimony was relevant and material upon the issue of undue influence, inasmuch as the answers to these questions would show a motive and desire on the part of these persons to procure the execution of the codicil, in which two of them were named as executors, in order that they might obtain the control and management of the estate. The contestants did not, however, offer to show that either of these persons had any interview with Nelson, or ever spoke to him, or to any one for him, with reference

to the codicil, or the disposition of his property; and, in the absence of all evidence of that nature, it could be only the merest conjecture that they had anything to do with the execution of the codicil, or attempted to influence Nelson in making the same, or in the disposition of his property.

4. In its instructions to the jury, after stating to them that the issues for their determination were whether Nelson was of sound and disposing mind at the time of the execution of the will and the codicil, the court further stated to them that every one has the right to dispose of his property according to his own desires, and that, if there is no defect of testamentary capacity, the law must give effect to his will, irrespective of its provisions, or of his reasons or motives for making such disposition; that the jury were not at liberty to consider the character of its provisions, but were solely to determine whether it was his will. It is contended by the appellant that these general statements respecting testamentary disposition, and instructing the jury that they are not at liberty to consider the provisions of the will, was an argumentative instruction by the court in support of the validity of the will. We do not so consider the instruction. It was very proper for the court to call the attention of the jury to the issues that they were called upon to decide, and to confine their deliberations to the evidence, which alone could be considered by them in giving their verdict. In these statements to the jury the court made no reference to the evidence that had been given upon the issue submitted to them, but limited its remarks to cautioning the jury against allowing their verdict to be influenced by matters which it was not proper for them to consider. Its subsequent statement to the effect that the will before them could not be considered, as matter of law, to be inequitable, was not inconsistent with these instructions. It merely emphasized the previous statement that it was not a matter to be considered by the jury. It may be added that the appellants took no exception to this part of the instruction.

5. One of the instructions given to the jury was as follows: "It is soundness or unsoundness of mind, and not any particular state of bodily health, that must control your judgment. A man may be in a state of extreme bodily or mental weakness and disease, and yet he may possess sufficient understanding to direct how his property should be disposed of. The soundness of mind required by law to enable a man to make a will is not necessarily that soundness which men in good health and vigor possess." Appellants contend that by this instruction the jury were, in effect, told that Nelson was competent to make a will, notwithstanding they should find that he was upon the very point of mental extinction or dissolution; and they base their argument upon the proposition that the word "extreme" is a word which is

itself superlative in meaning, and implies a degree of the quality named which admits of nothing higher or greater. Whatever may have been the original use of the word, its distinctively superlative meaning was lost at a very early day, and throughout the various stages of English literature down to the present time has been employed as a word susceptible of different degrees, and which itself takes on a superlative form. The word "extremest" is used by Shakespeare many times in his plays, and is also found in the writings of such modern authors as Gladstone, Proctor, and Herbert Spencer. "Extreme" from the Latin "extremus," like its Saxon counterpart "utmost,"—"outermost,"—was originally an adjective of locality. It is only by a transferred and secondary application that it is used as the attribute of a quality or condition. Although, from its derivation, it indicates a superlative degree, in actual use it is often employed as the opposite of "moderate," and to indicate a very high degree, or as the equivalent of "excessive," or "very far advanced." We speak of extreme old age without meaning that the person cannot live any longer, and when we say that a person is in extreme peril, or necessity, or penury we do not mean that there is no higher degree of that condition, or that he is unable to endure any higher degree thereof. The "extreme cruelty" which authorizes a judgment of divorce is itself defined by the statute to mean only "grievous" bodily injury or mental suffering. Philology is at best an unsafe criterion for ascertaining the meaning of words which are in common use, and the definition thus obtained is always subordinate to the meaning derived from the context, or from the circumstances under which the word is used. We do not think that in the connection in which this word was used in the above instruction the jury could have understood that the court intended them to find that Nelson was capable of making a will, if it should appear to them that he was on the point of mental dissolution. They were told in the preceding sentence that his soundness or unsoundness of mind was the issue submitted to their judgment, and the sense in which these words were used in this instruction is given in the next clause of the very sentence in which they are found, wherein the extreme mental weakness here referred to is stated by the court to be that in which the man "may possess sufficient understanding to direct how his property should be disposed of."

6. The court gave the following instruction to the jury: "On the trial of the question as to whether a person was of sound mind at the time of the execution of his will, it is a presumption of law that the person was of sound mind at that time, and the legatees and devisees under the will are entitled to such presumption as a matter of evidence. The legal presumption is that every person is of sound mind until the con-

trary is proven by a preponderance of evidence, and he who alleges such unsoundness must prove it." The contestants excepted to this instruction, and in support of their exception have argued in their brief herein that, because the jury found that Nelson was incompetent at the making of the will of October 17th, the court was not authorized to instruct them that there was any presumption of his sanity. It must be borne in mind, however, that the instruction was given by the court before the jury had rendered their verdict, and at the time it was given the court could not know how they would regard the evidence. If it be conceded, as claimed by appellants, that the evidence in reference to his want of capacity on October 17th was without contradiction, it was still the duty of the court to submit the evidence to the jury for their verdict thereon. At the time the instruction was given, no fact had been established which would repel this presumption of sanity, and the instruction itself informed the jury that the presumption was only a matter of evidence, which would be overcome by a preponderance of evidence to the contrary. The instruction upon this point requested by the contestants, "If you find that the testator was on the 17th day of October, 1897, of unsound mind, the presumption is that he was of unsound mind on the 20th day of October, 1897," in effect was to tell the jury to disregard the evidence before them with reference to his capacity on the 20th, and was properly refused. The court had already instructed them that, if they found that he was not of sound mind at the time of making the will of October 17th, they might consider that fact in determining whether he was of sound mind at the time of making the codicil of October 20th; and thus gave to the contestants the right to have the weight of this presumption considered with other evidence. The court had also given to the jury the following instructions, to which no exception was taken: "The alleged will and codicil having been admitted to probate, the presumptions of law are that said will was legally executed, and that said Nelson was of sound and disposing mind at the respective dates of the execution of said will and codicil; and the defendants have the right to rely upon such presumptions of law until they have been overcome by evidence. The fact, however, that said alleged will and codicil have been admitted to probate, in no way deprives the petitioners here of their right to contest the validity of the will and codicil, and if, from the evidence, you are satisfied that his will was not executed in accordance with law, or that said Nelson was not at said times of sound and disposing mind, you will so find, notwithstanding the fact that said alleged will and codicil have heretofore been admitted to probate as the last will of said testator." There was nothing inconsistent in the finding by the jury that Nelson was competent at the time

of making the codicil and incompetent on the 17th of October. There was evidence before them from which they could have found that his condition on the 17th was only temporary.

7. While the instruction that "the testimony of a witness who has solemnly subscribed to a will as an attesting witness, and afterwards endeavors to overthrow it, should be closely scrutinized," is open to objection, it is not sufficient, under the circumstances of the present case, to justify a reversal of the order. The court did not designate any witness, or point out any particular testimony, to which this instruction was directed, and it avoided giving any expression of opinion upon the weight to which such testimony was entitled, or the credit to be given to any of the witnesses. It merely stated a well-recognized rule to be observed by the jury in the consideration of such testimony, and, as was said in reference to a similar instruction in *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405: "It could not possibly have done any harm, for it was merely telling the jury to do certain things which jurors would evidently do without being so told."

8. There was no evidence before the jury which would have justified the court in submitting to them an issue upon the question of undue influence, and the court very properly declined to submit this issue to them. The only evidence that is claimed by the appellants to authorize the submission of this issue is that which tended to establish the mental and physical infirmity of Nelson, and that those who were benefited by the codicil were the only persons who had access to him, and that Mr. Goad, before drawing the codicil, had made inquiries of him as to his desires in reference to the appointment of executors. It was not shown that either of the beneficiaries spoke to Nelson upon the subject of his will, or that Mr. Goad made any suggestion to him as to the disposition of his property, or as to the persons who should be appointed as his executors. "The presumption of undue influence is not raised by proof of interest and opportunity alone. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made." In *re Langford's Estate*, 108 Cal. 608, 41 Pac. 701. "In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator by which the will which he executes is not the expression of his own desires." In *re Calkins' Estate*, 112 Cal. 296, 44 Pac. 577. Weakness of mind may afford an opportunity for the exercise of undue influence, and, when it appears that such influence has been exerted upon testator, may be evidence tend-

ing to show that it affected his acts. But unless there is some evidence of an actual attempt to exercise some undue influence upon him, the proof of his mental weakness is insufficient to establish more than a conjecture that the will is a result of undue influence. "Circumstantial evidence must do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." In *re McDewitt's Estate*, 95 Cal. 17, 30 Pac. 101. "In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged." *Janin v. Bank*, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320.

The appeal from the order denying the revocation of the probate was taken more than 60 days after its entry, and must, therefore, be dismissed. The order denying a new trial is affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.

(132 Cal. 217)

PEOPLE v. MULLENDER. (L. A. 769.)¹

(Supreme Court of California. March 14, 1901.)

STATUTES—TITLE OF ACT—SUBJECTS INCLUDED THEREIN—GENERAL LAWS—HARBOR COMMISSIONERS—ACTION BY—JOINER.

1. St. 1889, p. 305, is entitled "An act to add thirty-four sections to the Political Code," all of which relate to the establishment of a board of state harbor commissioners for the Bay of San Diego, to be known as sections 2575-2608. Sections 2578, 2579, provide that such board shall have possession and control of San Diego Bay and the improvements, easements, etc., appurtenant thereto, and that they may institute actions in the name of the people for the possession of any portion of such premises, or for the collection of any money due or that may become due. *Held*, that such sections were not in conflict with Const. art. 4, § 24, requiring every act to embrace but one subject, which shall be expressed in its title.

2. St. 1889, p. 305, creating a board of state harbor commissioners for the Bay of San Diego, is not in violation of Const. art. 4, § 25, par. 28, prohibiting special laws in relation to offices and officers in cities, counties, townships, and election or school districts.

3. St. 1889, p. 305, creating a board of state harbor commissioners for the Bay of San Diego, is not in violation of Const. art. 4, § 25, par. 33, prohibiting any special laws where general laws can be made applicable, as the legislature is the judge of such applicability.

4. Under St. 1889, p. 305, § 2578, authorizing the board of harbor commissioners of San Diego Bay to bring action for the possession of property appurtenant thereto, and for the collection of any money due by virtue of such act, such board may join an action for the possession of such property and for damages for the wrongful withholding thereof.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Ejectment by the people, by N. H. Conklin and others, as the board of state harbor

¹ Rehearing denied April 13, 1901.

commissioners for the Bay of San Diego, against Joseph Mullender. From a judgment awarding possession of property to plaintiffs, but denying damages, plaintiffs and defendant both appeal. Modified and affirmed.

Atty. Gen. Ford and Geo. H. Neale, for the People. Oscar A. Trippet, for respondent.

PER CURIAM. Ejectment to recover possession of certain lands alleged to be tide lands of the Bay of San Diego, and for damages for withholding possession thereof. The defendant demurred to the complaint, and the demurrer was overruled. Defendant failed to answer, and judgment was entered for plaintiffs for possession of the land, and from that judgment the defendant appeals.

In addition to the demurrer, the defendant moved to strike out paragraph 4 of the complaint on the ground that it was irrelevant, and that motion was granted, and from that action of the court the plaintiffs appeal, and by stipulation both appeals are brought up in the same transcript, and are submitted together. Plaintiffs' appeal involves the question of the right to recover damages for withholding possession of the demanded premises. Defendant's appeal presents the more important question, and will be first considered. Defendant's demurrer is based upon the alleged unconstitutionality of an act approved March 18, 1889 (St. 1889, p. 305), creating the board of state harbor commissioners for the Bay of San Diego.

1. It is contended that said act violates section 24, art. 4, of the constitution, which provides: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." The title of the act is as follows: "An act to add thirty-four sections to an act of legislature of the state of California to establish a Political Code, approved March 12, 1872, said sections to be known, numbered and designated as sections 2575, 2576 [enumerating all the sections consecutively to and including section 2608], all relating to the establishment of a board of state harbor commissioners for the Bay of San Diego." The constitutional provision above quoted is not peculiar to this state. In substantially the same form it exists in many states. It was incorporated in the constitution of 1849, but at an early day it was held to be merely directory. *Washington v. Page*, 4 Cal. 388. Our present constitution provides: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Article 1, § 22. But, re-

garding, as we must, the mandatory character of the requirement that "every act shall embrace but one subject, which subject shall be expressed in its title," the question whether any particular enactment violates this provision is one of construction. Judge Cooley, in his work on *Constitutional Limitations* (4th Ed.; p. 178), speaking of this provision in constitutions, said: "There has been a general disposition to construe the constitutional provision liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted." To this proposition the learned author cites a very large number of cases from many different states. In *Ex parte Liddell*, 93 Cal. 638, 29 Pac. 251, it is said: "It is admitted that the constitutional provision under consideration has always been given a liberal construction; and this must be so, because the constitution itself does not define the degree of particularity with which a title shall specify the subject of a bill. The matter must, therefore, be left largely to legislative discretion." In the opinion in that case Mr. Justice Paterson traced the history of the part which titles of acts have played in legislation, and that history need not again be rehearsed; but we call attention to the several cases there cited illustrating the sufficiency of titles of acts under constitutional provisions of the character here in question. In *People v. Parks*, 58 Cal. 624, 636, it is said: "Provisions of an act may be numerous; but, however, if they can be, by fair intendment, considered as falling within the subject-matter of legislation, or necessary as means to the attainment of the subject, the act will not conflict with the constitution. But if the act shall be found to be made of incongruous parts, or to comprehend unconnected and dissimilar subjects to that expressed in its title, it cannot be upheld." It is not necessary to examine the provisions of said act in detail, and pass upon the constitutionality of each. We are here concerned only with the validity of the board of harbor commissioners created by and under the provisions of said act, and of its authority to bring and maintain the present action. Section 2579 of said act provides, among other things, that "the commissioners shall have possession and control of the entire Bay of San Diego, together with the improvements, rights, privileges, easements and appurtenances connected therewith, or in anywise appertaining thereto, for the purposes in this article provided"; and section 2578 provides: "The commissioners may institute and prosecute to final judgment actions in the name of the people of the state of California, for the possession of any portion of the premises described in this article, or for the collection of any money due or that may become due the state by authority of this article." These provisions of the

act would seem, upon their face, to authorize the present action, and they are clearly within the title of the act.

2. It is contended, however, that said act violates section 25, art. 4, of the constitution, which prohibits the enactment of local or special laws in the cases there specified. Appellant specially refers to paragraphs 28 and 33 of said section. The twenty-eighth has no application. It relates to offices and officers in cities, counties, cities and counties, townships, election or school districts. The thirty-third paragraph prohibits local or special laws "in all other cases where a general law can be made applicable." That the act here in question is both local and special is conceded. But that is not conclusive. The language of said paragraph plainly implies that there are or may be cases where a local or special act may be wise, salutary, and appropriate, and in no wise promotive of those evils which result from a general and indiscriminate resort to local and special legislation. The constitution submits the question whether a general law can be made applicable in any given case to the judgment of the legislature to be determined in the light of the evils intended to be avoided, and with its determination upon that question we may not interfere unless the disregard of the constitutional requirement is clear and palpable. In Indiana it is held that the legislature is the exclusive judge whether a general law can be made applicable. *State v. Tucker*, 46 Ind. 358, and cases there cited. In Iowa it is held that, where a local or special law is not within the evil which the constitution sought to provide against, or where the enactment of a general law would not afford any remedy for or relief from that evil, such local or special law is valid. *State v. Squires*, 26 Iowa, 340, 345. In discussing a similar provision of the constitution of Kansas, the supreme court of that state said: "It is not the purpose of the constitution to compel the legislature to accomplish an act of local or special legislation beneficial to one person or locality only through a general law, which might, in their opinion, result in damage when applied to other persons or localities. * * * The legislature must necessarily determine whether their purpose can or cannot be expediently accomplished by a general law. Their discretion and sense of duty are the chief, if not the only, securities of the public for an intelligent compliance with that provision of the constitution. Whether we could, in any conceivable case presenting a flagrant abuse of that discretion, hold a private law invalid as contrary to that provision of the constitution, we need not here decide, but we would certainly not hold such a law invalid merely because it would, in our opinion, have been possible to frame a general law under which the same purpose could have been accomplished." *State v. Hitchcock*, 1 Kan.

178, 185. See, also, *Farrelly v. Cole*, 60 Kan. 375, 56 Pac. 492, 44 L. R. A. 464. The act in question, if made general, could only apply to the harbors within the state. These are of different size and importance, and we may well assume that the legislature determined that laws suitable and adapted to one would not be suitable or adapted to the others, or to any of the others. There would seem to be the same necessity for diversity of laws and regulations for the different harbors that exists in the case of cities and counties; but the constitution has not directed the classification of harbors, nor would their classification at all simplify or diminish the legislation required. We do not think the act in question is within the evils sought to be remedied by said provision of the constitution, nor that the legislature, in adopting it, abused its discretion, or violated any provision of the constitution.

3. It is not required that the complaint shall specify the use to which the commissioners propose to put the premises when recovered. If the defendant has no right to the possession of the property or its control, the use to which plaintiffs may put it does not concern him.

Plaintiffs' Appeal.

Upon defendant's motion the court struck out paragraph 4 of the plaintiffs' complaint, which alleged that the value of the rents and profits of the demanded premises during the time the possession was wrongfully withheld from the plaintiffs was \$600, and sought to recover that sum as damages. In this, we think, the court erred. The argument of defendant is that the act does not authorize the board to bring suit in the name of the people for damages, that it only gives the right of action for possession, that damages are not mentioned, and that the courts cannot extend the powers of the board. The statute does not prescribe the form of the action to be brought. It provides that the commissioners, in the name of the people, may institute and prosecute "actions" for the possession, etc. The actions here referred to are the usual and appropriate actions for the recovery of the possession of real estate. No new action or new form of action is prescribed, nor is there any exemption from liability on the part of the defendant for damages, or rents and profits, such as are incident to the action of ejectment when resorted to for the enforcement of a private right to the possession of land. The general law attaches liability for damages to the wrongful possession of the land of another; and the defendant, if he would escape liability for such damages when they have been suffered, must affirmatively show an exemption therefrom. Plaintiffs' appeal is from that portion of the judgment which ordered "that plaintiffs recover nothing from defendant as damages for withholding the possession of the premises and the loss of

the value of the rents and profits thereof." The action of the court complained of by the plaintiffs appears by bill of exceptions, but it does not show that the value of the rents and profits was in any manner ascertained by the court. It is, therefore, ordered that the order of the court below striking out the fourth paragraph of plaintiffs' complaint be vacated, and that so much of the judgment herein as denies the right of the plaintiffs to recover damages be reversed, and that upon due notice to the defendant plaintiffs' damages for the withholding of the possession of the demanded premises be assessed, and that plaintiffs have judgment therefor.

SMITH v. SMITH et al. (Sac. 740.)

(Supreme Court of California. March 20, 1901.)

DIVORCE—JUDGMENT—COMMUNITY PROPERTY—SALE—ALIMONY—APPEAL—DEATH OF PARTY—CONVEYANCE BY WIFE.

1. Where, pending an appeal from a judgment for a wife in divorce proceedings, involving community property rights, the wife conveys the property secured to her by the trial court's judgment, and dies before the affirmation thereof by the supreme court, the interests of the wife pass to the grantees under her deed.

2. Where a wife dies pending an appeal from a judgment of divorce in her favor, together with an adjudication as to certain rights to community property, and the supreme court affirms the trial court's judgment, such decision will govern in a subsequent action brought by the husband to recover such community property on the ground that the action abated on the death of the wife.

3. Where no appeal was taken from an order for an execution sale of community property to satisfy costs and alimony on judgment of divorce in favor of a wife, the purchaser of such property acquired a good title thereto, though an appeal was taken from the judgment and the wife died before the supreme court's affirmation thereof.

Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by Thomas R. Smith against E. F. Smith and others to determine conflicting claims to real property. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Elliott & Elliott, for appellants. J. G. Swinnerton, for respondent.

VAN DYKE, J. September 2, 1897, in a certain action then pending in the superior court of San Joaquin county, wherein Mary E. Smith was plaintiff, and the respondent herein, Thomas R. Smith, was defendant, it was ordered, adjudged, and decreed that the bonds of matrimony then existing between said parties be dissolved, and by said decree the said plaintiff therein, Mary E. Smith, was assigned an undivided two-thirds of the community property of the parties to said action, which property was the same as that set forth in the complaint herein, and was

at that time the homestead of the parties to said action. Thereafter the defendant in said action, the respondent in this, appealed from said judgment, and after said appeal was perfected, to wit, on the 30th day of September, 1897, said superior court gave and made an order that the defendant in said action pay to said Mary E. Smith, the plaintiff therein, the sum of \$750 costs and alimony, and that execution for said sum be issued if the same was not paid. Execution was thereupon issued and levied upon the property in question, and the same thereafter was sold to the defendant herein L. W. Elliott, and, the same not having been redeemed, a sheriff's deed afterwards was executed and delivered to him for the interest of said defendant in said action, respondent in this, to the premises in question. Pending the appeal in this court, in the month of January, 1898, the respondent in said divorce suit, Mary E. Smith, died, and such proceedings were had therein in this court that the defendants herein E. F. and Estrella Smith were substituted in her place upon said appeal. Respondent herein commenced this action May 23, 1898, and in his complaint alleges that he "now is, and at all times since the 1st day of February, 1898," has been, the owner and in possession of the premises in question, and that defendants claim to own or have some interest in said property; in other words, an action to determine conflicting claims to real property, under section 738, Code Civ. Proc. Defendants answered denying title in plaintiff, and admitting that they claim an interest in the property in question, setting forth the divorce proceedings and the judgment therein rendered, the execution sale upon the order entered after judgment therein, and alleging that on the 4th day of December, 1897, the said Mary E. Smith, in whose favor judgment had been entered in said divorce proceedings, executed and delivered to the defendants Estrella and E. F. Smith a conveyance in fee of and to all her title in said property.

The theory of the plaintiff in bringing this action, and of the court below in the trial thereof, seems to be that, upon the death of Mary E. Smith pending the appeal from the judgment in her favor in the divorce suit, the action abated, and that the homestead survived to her husband, the plaintiff and respondent herein. After the judgment in the present action was entered in the court below, the decision was rendered by this court in the divorce suit of Smith v. Smith, 124 Cal. 651, 57 Pac. 573. It is said in the opinion: "Plaintiff having died pending the appeal, her heirs at law have been substituted as parties plaintiff, and the litigation continued, certain property rights being involved;" and it is held that: "Upon this cause of action, and upon the findings and judgment made and entered therein, the court had the power to deal with the property as was done. The property here in,

volved is a homestead created upon the community property. By virtue of subdivision 1, § 147, pt. 3, Civ. Code, the trial court may divide the community homestead between the parties. Its discretion in such matter is of the widest, and there is no ground in this case upon which to disturb that discretion,"—and the judgment was affirmed. On the trial of this case the deed executed by Mrs. Smith to the defendants Estrella and E. F. Smith, which was admitted in evidence, was subsequently, on motion of plaintiff, stricken out. This was error. The decision of this court on that appeal governs this case. As to property rights the action survived, and the affirmance of the judgment in Smith v. Smith relates back to the date of the entry of that judgment in the court below, and the interest of the plaintiff Mrs. Smith in the property in question passed by her deed to the said defendants. That disposes of the two-thirds interest of the property in question in favor of said appellants Estrella and E. F. Smith. The other third claimed by appellant Elliott was acquired under an execution sale upon the order made after the judgment in the divorce suit, and, as there was no appeal taken from that order, the sale thereunder cannot be disturbed. Judgment and order denying new trial are reversed.

We concur: HARRISON, J.; GAROUTTE, J.

132 Cal. 324

DEVLIN v. RYDBERG et al. (S. F. 2,662.)
(Supreme Court of California. March 25, 1901.)
INJUNCTIONS—DISSOLUTION—ORDER—AP-
PEAL AND ERROR.

The court signed an instrument adjudging that an injunction restraining defendant was no longer in force. This was not filed with the clerk or entered in the minutes of the court, but a certified copy thereof was filed by plaintiff's attorney, and defendant appealed. *Held*, that the appeal should be dismissed, since the instrument was not an "order" dissolving the injunction, from which an appeal lies under Code Civ. Proc. § 939, an order being defined by Code Civ. Proc. § 1003, as a "direction" of a court made and entered in writing.

Department 1. Appeal from superior court, city and county of San Francisco; Frank J. Murasky, Judge.

Action by A. J. Rydberg and others against F. J. Devlin. From an order decreeing that an injunction restraining defendant from certain acts was no longer in force, defendant appeals. Dismissed.

Kierce & Gillogley, for appellant. H. A. Massey, for respondents.

HARRISON, J. Motion to dismiss the appeal. The superior court granted an injunction in the above-entitled cause January 8, 1900, restraining the defendant from doing certain acts therein specified, and on January 12, 1901, the Honorable F. J. Murasky, judge of said court, signed a written instrument, wherein, after reciting the granting of the injunction, and that more than 12 months had elapsed since it was granted, and that the action had never been set for trial or tried, and that the defendant had not consented to the continuance of said injunction, it was "ordered, adjudged, and decreed that said injunction is no longer in force." This instrument was not filed with the clerk, or entered in the minutes of the court, but on January 25th the plaintiff's attorney filed a certified copy thereof in the clerk's office, and on February 5th, at his request, it was copied by the clerk into the minutes of the court. February 6th the defendant gave notice of an appeal from this order. The plaintiff now moves to dismiss the appeal upon the ground that the entry by the clerk upon the minutes

of the court of a certified copy of an order is not an order of the court, and the further ground that an order declaring that an injunction is no longer in force is not an appealable order.

Section 1003, Code Civ. Proc., defines an order to be a "direction" of a court or judge, made or entered in writing, and not included in a judgment; and section 939 provides that an appeal may be taken from an order "granting or dissolving an injunction." The order appealed from is not a "direction" of the court, nor does it purport to dissolve the injunction previously granted, or by its terms have any effect upon that injunction. It is a mere declaration by the judge that the injunction is no longer in force. That it was not the intention of the judge that it should be considered as an order of the court may be inferred from the fact that he did not cause it to be entered upon its minutes or filed with the clerk. It also appears upon the face of the writing that he erased from the form presented for his signature the words, "and the same is hereby vacated and dissolved"; and it is clear from this fact that he did not intend that the injunction previously granted should be dissolved by reason of this order. No authority has been cited in support of the authority of the clerk to enter upon the minutes of the court a certified copy of an instrument without any direction of the court therefor.

Section 527, Code Civ. Proc., as amended in 1895, provides: "No injunction granted prior to the actual trial of the cause wherein it is granted, shall continue in force for a longer period than twelve months from the time such injunction was granted, except by consent of the parties, or unless the cause be set for trial upon its merits." Whether, upon establishing these facts, the defendant in the injunction suit may show in excuse of his conduct that the injunction has ceased to be operative, although it has not been formally dissolved, or whether these facts authorized the court to dissolve the injunction, is not involved upon this motion. The court did not make any order dissolving the injunction, and, as it is only from such an order that an appeal can be taken, the motion must be granted. The appeal is dismissed.

I concur: VAN DYKE, J.

GAROUTTE, J. I concur in the judgment upon the ground that an appeal cannot be taken from the entry of a certified copy of an order.

132 Cal. 312

BLEDSON et al. v. DECKROW et al. (L. A. 745.)

(Supreme Court of California. March 22, 1901.)

WATERS AND WATER COURSES—NEW TRIAL—
CONDITIONAL ORDER—RIGHT TO OBJECT
—INVALIDITY OF CONDITION.

1. Where a new trial is granted on the ground that the evidence is insufficient to support a

finding that certain defendants are entitled to a certain amount of water, the order will not be disturbed on appeal, though the evidence would have been sufficient to sustain a judgment on the findings, since the granting of a new trial lies in the sound discretion of the trial court.

2. An order granting a new trial is not rendered void by the addition of an invalid condition authorizing its denial on the performance thereof.

3. Where a condition is attached to an order granting a new trial, providing that it will be denied on the performance of the condition by defendants, but they make no attempt to perform such condition, they cannot insist that the order granting the new trial is invalid by reason of the illegality of the condition.

4. A new trial of a suit to determine certain water rights was granted on the ground that the evidence was insufficient to show that certain defendants were entitled, as prior appropriators, to the amount of water as provided in the finding; but it was provided that if certain defendants would consent to take a certain amount of water delivered to them in lieu of their rights of appropriation, or if other defendants would consent to take all the water for certain days except enough to supply the defendants mentioned, in lieu of their right of appropriation, the new trial would be denied. *Held*, that the condition was invalid, since the court had no right to allow plaintiffs to give the defendants a less amount of water than that to which the evidence showed that they were entitled.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; J. L. Campbell, Judge.

Action by J. B. Bledson and others against George W. Deckrow and others to determine disputed water rights. From a judgment in favor of the plaintiffs, defendants appeal. Affirmed.

Rolfe & Rolfe and John Brown, Jr., for appellants. James Hutchings and Bledson & Bledson, for respondents.

COOPER, C. This action was brought by plaintiffs for the purpose of having it adjudged that they are the owners of the right to take and divert, at the point described in the complaint, the waters of the Mojave river to the extent of 600 inches, measured under a 4-inch pressure, and that defendants have no right, title, or interest to said 600 inches. The defendants, by their different answers, claimed by prior appropriation certain portions of the waters of said river. The court filed findings of fact, upon which judgment was entered for plaintiffs for the amount of water claimed, with certain exceptions and reservations. It was found that defendants Julius E. Meyer, Jr., Henry Meyer, Charles Meyer, and Julius Meyer, Sr., are the owners, as against the plaintiffs, of the right to 175 inches of the waters of said river to be taken at the point designated in their answer. This finding is not attacked, and there is no appeal by plaintiffs as to said defendants Meyer, and no appeal by them. The court found that defendants Davidson, Bemis, and Lane have a prior and superior right to divert, at the intake of their ditch where it is now situated, 230

inches, measured under a 4-inch pressure; that defendants Deckrow and Van Horn have a prior right to divert from said river, at the intake of their ditch where it is now situated, 400 inches, measured under a 4-inch pressure. The plaintiffs made a motion for a new trial, as to said defendants Davidson, Bemis, Lane, Deckrow, and Van Horn, upon the ground, among others, of insufficiency of the evidence to justify the decision. The motion was granted, and this appeal is from the said order.

The rule is well settled that a motion for a new trial, on the ground of the insufficiency of the evidence to justify the verdict or other decision, is addressed to the sound legal discretion of the court, and that an order granting a new trial on this ground will not be reversed on appeal, unless it appears that there was a manifest abuse of such discretion. *Bjorman v. Redwood Co.*, 92 Cal. 501, 28 Pac. 591, and cases cited. We cannot say there was such abuse of discretion in this case. The case was one of great importance. The credibility of the witnesses, the expert testimony applied to the locality, the surroundings, and local influences were all matters upon which the judge of the court below was much more competent to pass than we could be from a mere examination of the record. The court found that defendants Deckrow and Van Horn and their grantors, in the year 1879, by a ditch known as the "Deckrow and Snodderly Ditch No. 5," converted and conveyed, and have since continuously, to the winter months of 1884, converted and conveyed, from said river, by means of said ditch, 400 inches of water, measured under a 4-inch pressure. There is evidence tending to support this finding, and we would, perhaps, have to hold, in case of an appeal here on the ground of the insufficiency of the evidence to support the finding, that there is sufficient evidence to support it. But the question here is whether the evidence was such that the court below, exercising its sound discretion, was justified in setting aside the finding. The witness Clark testified that he knew the ditch, and further said: "I suppose it was two foot on the bottom, and may be three feet on top and a foot and a half deep, and, from my knowledge of the ditch and water measurements, I should say the ditch would carry 100 inches." The witness Bledsoe, speaking of this ditch, said: "The ditch was probably two feet wide on the bottom and two and a half on top, and possibly a foot deep, but my recollection of it is that when I saw it there wasn't over a foot of water in it." The witness Finkle, a civil engineer, testified that he made an accurate measurement of the size and grade of the ditch, and that the capacity of the ditch is only 85 inches. He also testified that a ditch of a larger size, as described by some of the witnesses, would only carry 173 inches. The court found that Davidson, Bemis, and Lane have

a prior right to divert, at the intake of their ditch, 230 inches measured under a 4-inch pressure, through what is known as the "Pioneer Ditch"; that they and their predecessors in interest appropriated said 230 inches in the year 1879, and have ever since continuously used and appropriated the said amount for irrigating purposes during the irrigating season of each year. The defendant Bemis testified that the first year he ever irrigated on his place was in 1885; that he never claimed any water of his own until 1889; that they changed the place of diversion of the water from where it was taken out by the Pioneer ditch, in 1889, to about a mile and a half or two miles below; that this change was made in 1890; that the ditch was made smaller, and the water put into the "Hill Ditch." Defendant Lane testified that the first irrigation that was done on his place was in 1885; that he used the water out of the old Pioneer ditch from 1885 to 1889, but never claimed the right to it; that from 1874 to 1885 he was not engaged in farming.

It would serve no useful purpose to give the evidence more in detail. It is sufficient to say that the evidence was such that the court might well grant a new trial because of its insufficiency to support the findings. If the new trial was properly granted for any reason, the order will be affirmed here. In the order the court inserted certain conditions, and provided that, in case defendants complied with the conditions named in the order, the motion would be denied. It is claimed that the court had no right to insert the conditions, that they were not justified in law, and that the order for this reason was void. To this view we cannot accede. The plaintiffs made the motion for a new trial upon the reasons therein stated, and, if the motion was granted for any valid reason, it would not become void because certain conditions not warranted in law were stated as terms upon which defendants could avoid the order. The appellants made no attempt to comply with the conditions, and hence are not in a position to claim the order was void on account of such conditions. But, as the case will have to be retried, it may be well to express our views as to the conditional order. The order provided that, if defendants Deckrow and Van Horn would stipulate or consent that plaintiffs take judgment, they are entitled to the prior right to perpetually divert from the river at any point above plaintiffs' land the full flow thereof to the extent of 1,150 inches, provided they perpetually deliver to said defendants Deckrow and Van Horn, free of charge to them, the full amount of 90 inches of water at a certain point where there is now a measuring box on said Deckrow and Snodderly ditch, but that plaintiffs shall have 18 months after the entry of such judgment in which to construct conduits through which to deliver said 90 inches of water; that, in case defendants

should so consent to take said 90 inches instead of 400 inches, then, and in that case, the new trial would be denied.

As against the defendants Davidson, Lane, and Bemis, the order provided that, in place of the 230 inches continuous flow given them by the judgment, they might stipulate to take 1,150 inches for the first 3 days of every 15 days, commencing March 1, 1899, provided they at all times should allow to flow down the river sufficient water to enable plaintiffs to deliver 90 inches at the measuring box of defendants Deckrow and Van Horn. If the stipulation should be made as above set forth, then the order would be made denying a new trial as to Deckrow and Van Horn. We do not think the court had the right to have plaintiffs give defendants, or either of them, less water than the evidence shows they are entitled to. The court may have been correctly of the opinion that in taking the water from the river, and conducting it through open ditches, a large part of it was wasted by evaporation or percolation through the lands over which the ditches run, and that 90 inches furnished Deckrow and Van Horn would be fully as much as would ultimately reach their lands through the ditch. It may have correctly concluded that defendants Davidson, Bemis, and Lane would be benefited more by using 1,150 inches the first 3 days in every 15 than by a continuous use of 230 inches. But it is not for the court to prescribe such conditions. The findings should state correctly the rights of defendants, and, if they are the owners of part of the waters of the Mojave river by prior appropriation, the finding should show the correct number of inches so appropriated. The rights of the parties, as against each other, should be definitely settled. In a partition suit the court might be convinced that it would be best for one of the parties to give him a definite rental either in money or part of the crops, but the court could not do this in lieu of the rights of the party to his land. In this case, if the defendants waste water in conducting it through their ditches, it may be that, by pipes or otherwise, they can hereafter save it, and thus have the full benefit of all they own. The appropriation must be for some useful or beneficial purpose. It may be conducted through ditches, flumes, or pipes. It may even be turned into the channel of another stream, mingled with its waters, and then reclaimed, so long as the amount of water appropriated by another is not diminished. If defendants have appropriated more water than they use for beneficial purposes, or if they willfully waste it, the court has power to give proper relief, but to allow the plaintiffs to give to defendants a certain number of inches in lieu of the amount they have the right to as prior appropriators would be to introduce a new rule as to water rights in this state. The specifications as to the insufficiency of the evidence to justify the findings resulted in getting all the evidence in

the record. Counsel for appellant in their brief say: "They also specify that the evidence was insufficient to justify the finding of fact as to the appropriation of water by the defendants in 1879, and the quantity and continuance thereof, and the location of ditches, and the intake thereof." The specification seems to have informed defendants' attorneys as to the respects wherein the evidence was alleged to be insufficient. We advise that the order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(132 Cal. 289)

PEOPLE *ex rel.* FOGG v. PERRIS IRR. DIST. (HUTCHINGS *et al.*, Interveners. L. A. 743).¹

(Supreme Court of California. March 21, 1901.)
IRRIGATION—FORM OF DISTRICT—ORGANIZATION—PROCEEDINGS TO DETERMINE VALIDITY—CONCLUSIVENESS—COLLATERAL ATTACK—QUO WARRANTO.

1. Code Civ. Proc. § 387, provides that any person who has an interest in the matter in litigation may intervene at any time before trial, either by joining the plaintiff, and claiming what is sought by the complaint, or by uniting with defendant in resisting the claims of the plaintiff, and the intervention shall be made by complaint, setting forth the grounds on which it rests. *Held* that, where the court granted parties leave to intervene to resist plaintiff's claim, an appeal by them will not be dismissed because the judgment was against the defendant, and not against the interveners, since the leave to intervene entitled the interveners to any remedy available to the defendant.

2. Act March 16, 1889 (St. 1889, p. 212), provides that proceedings for the organization of an irrigation district may be examined and confirmed in the superior court. In quo warranto to forfeit defendant company's franchise, defendant introduced a certified copy of a judgment in the superior court of another county, in which all of the steps taken in the organization of the defendant company were declared legal and valid. *Held*, that the admission of evidence to impeach such judgment, as obtained by fraud, was erroneous, since, until set aside in a direct proceeding, the judgment was conclusive.

Department 1. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Quo warranto by the people, on the relation of one Fogg, against the Perris irrigation district, for a forfeiture of defendant's franchise, in which J. C. Hutchings and others intervened. From a judgment in favor of plaintiff, and from an order denying a new trial, interveners appeal. Reversed.

C. C. Wright, L. L. Boone, Wm. E. Cox, and Oscar A. Trippet, for appellants. Atty. Gen. Ford, Works & Lee, and John F. Crowe, for respondents.

HARRISON, J. The present action was brought against the defendant by the attorney general, under section 803, Code Civ. Proc., charging it with the usurpation and unlawful exercise of the powers of a legally

¹ For opinion on rehearing, see 64 Pac. 773.

organized irrigation district, and asking a judgment declaring that the proceedings under which it claimed to have been organized were illegal and void, and that its powers and franchise be forfeited. An answer denying the allegations of the complaint was filed by the defendant, and thereafter, with the permission of the court, certain persons claiming an interest in the controversy, by reason of having become bona fide purchasers for value of certain bonds that had been issued by the defendant, filed complaints in intervention, wherein the allegations of the complaint were denied, and certain defenses to the action of the plaintiff were also set forth. The cause was tried by the court, and upon its findings of fact judgment was rendered in accordance with the prayer of the complaint. A motion for a new trial was made on behalf of the interveners, and denied by the court. From this order, and also from the judgment, the interveners have appealed. No motion for a new trial or appeal was made or taken by the defendant.

1. The motion of the respondent to dismiss the appeal upon the ground that there is no judgment against the appellants, and that the district has taken no appeal, must be overruled. In the order of the superior court granting leave to intervene, it was determined that the interveners had an interest in the matter in litigation, and in the success of the defendant and against the plaintiffs; and under section 387, Code Civ. Proc., after the intervention had taken place they became parties to the action, "uniting with the defendant in resisting the claims of the plaintiff," and as such parties they are entitled to avail themselves of all the procedure and remedies to which the defendant would be entitled for the purpose of defeating the action or resisting the claim of the plaintiff. The defendant cannot by its inaction deprive them of the right to review the action of the superior court in rendering judgment against their claim or against the defendant. Upon the same principles the claim of the interveners that, as the plaintiff did not answer their complaints in intervention, the facts therein alleged are to be deemed admitted, must be overruled. Although their pleadings are termed "complaints," they are in effect answers to the complaint of the plaintiff. They were permitted to intervene upon the claim that they had an interest in the success of the defendants and against the plaintiffs, and, in addition to their denials of the allegations in the complaint, their pleadings contain only new matter in defense of the defendants' right, which, under section 462, Code Civ. Proc., is "deemed controverted" by the plaintiff.

2. The plaintiff offered certain evidence tending to show that the defendant had not been legally organized as an irrigation district, and rested. The interveners then offered a certified copy of certain proceedings in the superior court of San Diego county,

taken by virtue of the provisions of the act of March 16, 1889 (St. 1889, p. 212), for the examination and approval of the proceedings for the organization of the district, wherein that court made and entered its judgment December 13, 1890, that all the proceedings had and taken for the organization of the district were confirmed and declared legal and valid. They also introduced another decree of confirmation under the act aforesaid, wherein the same court on December 8, 1892, ordered, adjudged, and decreed that the said district had been duly organized. The plaintiff, against the objection of the interveners, was permitted to introduce evidence tending to show that the notice for the hearing upon the first petition for confirmation had not been given as prescribed by the aforesaid act, and also introduced testimony to the effect that, upon the application for the second decree of confirmation, an attorney who had been employed to defend certain owners of property within the district at the hearing upon this application had been paid \$100 by the president of the board of directors to be absent from the court room at said hearing, and that said attorney did not appear or in any way oppose the confirmation. In its findings of fact herein the court found that the notice for the hearing upon the application for confirmation in December, 1890, had been published for only one week, and that the judgment then given was without jurisdiction of the subject-matter or the parties, and was procured by fraud, and that the said proceedings were wholly void; that the judgment of December 8, 1892, was procured by the fraudulent bribery of the attorney for certain property owners in the district, and was therefore void and of no force and effect. The court also found that the original petition for the formation of the district was not signed by 50 or a majority of the freeholders within the district, and that no notice of the time or place for the presentation of any petition for the organization of the district was ever given. In *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86, it was held that the proceeding under the aforesaid act of March 16, 1889, is a proceeding in rem, and that the decree of confirmation entered therein is binding and conclusive upon the state, as well as others, and is a bar to a subsequent proceeding in quo warranto, where the state seeks to assail the validity or regularity of the proceedings for the organization of the district. Upon the rule thus declared, the judgments of the superior court of San Diego county, offered in evidence by the interveners, were judicial determinations that all the steps necessary for the proper organization of the district had been taken, and were conclusive evidence of that fact, and constituted a bar to any further investigation of the validity or regularity of the proceedings. The plaintiff could not by a collateral attack impeach the validity or force of these judgments. Whether invoked in sup-

port of a cause of action or as a defense, so long as they remained in force upon the records of the court wherein they were given their validity and correctness could be questioned only in a direct proceeding therefor. *Carpentier v. City of Oakland*, 30 Cal. 439; *Joyce v. McAvoy*, 31 Cal. 273; *Eitel v. Foote*, 39 Cal. 439; *Hodgdon v. Railroad Co.*, 75 Cal. 642, 17 Pac. 928. Certain authorities have been cited by the respondents in support of the action of the superior court, but in each of these cases the action was between the parties to the original judgment, and was brought for the express purpose of setting aside that judgment. The superior court, therefore, erred in admitting evidence for the purpose of impeaching these judgments, and in holding that it could enter upon an examination of the original proceedings for the organization of the district. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

132 Cal. 297

OLIVER v. AGASSE. (Sac. 719.)

(Supreme Court of California. March 21, 1901.)

EASEMENTS—NATURE OF SERVITUDE—ALTERATION.

Where, at the time plaintiff's mining claim was patented, the land was subject to a right on the part of defendant to convey water in an open ditch across the lands, defendant was not entitled to place a pipe line in the ditch for the conveyance of the water, such change being a substantial alteration of the method of enjoyment.

Department 1. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Suit by John K. Oliver against Jules Agasse. From a decree in favor of plaintiff, defendant appeals. Affirmed.

F. W. Street, for appellant. J. B. Curtin, for respondent.

VAN DYKE, J. This action was brought to have the defendant move off a pipe line which he had laid in an old ditch extending across the mining claim belonging to plaintiff. The Tuolumne County Water Company for many years past has been the owner of the water ditch crossing said plaintiff's mining claim, conveying water therein for sale for mining and irrigation purposes. Defendant is the owner of a tract of agricultural land adjoining said mining claim, and has been for many years purchasing water from the Tuolumne County Water Company, and during said time conveying the same from the ditch of the Tuolumne County Water Company across plaintiff's mining claim, by means of a ditch, to defendant's land and premises. On September 13, 1898, defendant entered upon plaintiff's mining claim, and laid a pipe line from the said company's ditch, along and in said defendant's ditch, across plaintiff's land to his (defendant's) land and premises. A patent to plaintiff's

mining claim was issued by the United States July 1, 1898, which was subject to defendant's easement as provided by section 2340 of the Revised Statutes, as follows: "All patents granted or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section." The court below gave judgment for the plaintiff, and the appeal is taken from said judgment, and from an order denying defendant's motion for a new trial.

In *Allen v. Water Co.*, 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93, the question, as stated by the court in its opinion, was whether an easement to run water over plaintiff's land in an open ditch is satisfied by carrying the water in a closed pipe laid on the bottom of such ditch, and then covered, provided that the change in the easement would benefit the servient estate and convenience the dominant estate, and it is said: "After a careful examination of many authorities, we are led to conclude that the allegation of the answer 'that the alteration in the mode and manner of using the easement will be less burdensome to the servient estate and more convenient to the defendant' adds no strength to defendants' position, and that such fact is never a material element in a case where it is insisted that the alteration is so substantial as would result in the creation and substitution of a different servitude from that which previously existed." Again: "If the owner of the servient estate is not allowed to materially alter the character of the servitude, although such alteration would not result in damage to the dominant estate, but might be a benefit thereto, we see no reason why the same principle would not apply to the owner of the dominant estate in making material alterations in the character of his easement." Citing the section from the Civil Code bearing upon the question, this court continues: "And it appears to be settled doctrine that both parties have the right to insist that so long as the easement is enjoyed it shall remain substantially the same as it was at the time the right accrued, entirely regardless of the question as to the relative benefit and damage that would ensue to the parties by reason of a change in the mode and manner of its enjoyment;" and it was held that the substitution of a pipe line for an open ditch as a means of conveying water was a substantial alteration in the mode of enjoyment of the easement. This case was referred to in *Joseph v. Ager*, 108 Cal. 517, 41 Pac. 422, with approbation, and it is said: "The general law applicable to this case is, therefore, well settled. * * * Such an easement does not give its owner the right to commit a trespass upon the servient tenement, or to exercise the easement after any manner which happens to suit his pleasure.

His right is measured by the terms of his grant, or, where the supposed original grant does not appear, by the prescriptive use. This, however, includes what are called 'secondary easements,' such as the right to enter upon the servient tenement and make repairs, and to do such things as are necessary for the full exercise of the right. But these secondary easements must be exercised only when necessary, and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement." But it is contended on the part of the appellant that the rule laid down in these cases does not apply to the present action, for the reason that "the appellant was the owner of this easement long prior to any right of respondent to the lands over which the easement exists; it was created and enjoyed while the lands of respondent were public lands, and when respondent's patent was issued it contained the usual reservation as to water rights"; and hence it is contended that the owner of the easement is not limited to the original mode of enjoying the same existing at the time of the patent. In *Smith v. Hawkins*, 110 Cal. 125, 42 Pac. 453, relied upon by appellant, it is said: "An appropriator of water under these circumstances, and while the land which he subjects to his necessary uses continued to be part of the public domain, is a licensee of the general government; but when such part of the public domain passes into private ownership it is burdened by the easement granted by the United States to the appropriator, who holds his right against this land under an express grant." The fee to the land in this case was conveyed by the United States to the plaintiff subject to this easement. But there can be no difference in this case from that of an easement acquired by grant of a private proprietor, wherein a conveyance of the fee by such proprietor is made subject to the burden of said easement. As every easement is a restriction upon the right of the property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant tenement, the effect of which will be to increase such restriction. The right must be limited by the amount of enjoyment proved to have been had. *Water Co. v. Edwards*, 121 Cal. 662, 54 Pac. 69; *Gale & W. Easem.* p. 237; *Jones, Easem.* § 888. Judgment and order appealed from affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

132 Cal. 309

In re DOW'S ESTATE. (S. F. 2,180.)

(Supreme Court of California. March 22, 1901.)

ADMINISTRATOR—RIGHT OF FORMER WIFE TO NAME—SECOND MARRIAGE.

Under Code Civ. Proc. § 1365, providing that the administration of an intestate's estate

must be granted to some one or more of the persons mentioned therein, and giving the right to the surviving husband or wife, or some competent person whom he or she may request to have appointed, and section 1370, giving a married woman a right to be appointed, the widow of an intestate, who was married again before the letters of administration were issued, had the right to have the administrator appointed whom she named in a written request.

Commissioners' decision. Department 1. Appeal from superior court, San Mateo county; George A. Buck, Judge.

Petition by Maggie J. Sullivan for the appointment of an administrator of the estate of William Dow, deceased. From a decree appointing James Crow administrator, James J. Dow appeals. Affirmed.

O. C. Pratt, for appellant. Henry W. Walker, for respondent.

COOPER, C. Appeal from order appointing administrator. William Dow died intestate in San Mateo county in 1882, being a resident of said county at the time of his death, and leaving estate therein. He left surviving him his wife, Maggie J. Dow, and a son, James J. Dow. Before any steps were taken to administer upon the estate, the widow married one Sullivan. Petitions were filed for letters by the son, James J., and by James Crow,—the latter at the written request of said Maggie J. Sullivan. An order was made appointing Crow administrator, and denying the petition of Dow. The question is as to whether or not the surviving wife, after her marriage with Sullivan, had the right to have Crow appointed at her written request. It is provided in section 1365, Code Civ. Proc., that administration of the estate of a person dying intestate must be granted to some one or more of the persons mentioned therein, and that, of the persons mentioned, they are entitled in the following order: "(1) The surviving husband or wife, or some competent person whom he or she may request to have appointed." It has been held, under the above section, that the surviving wife, although incompetent to serve on account of nonresidence, is nevertheless entitled to nominate a suitable person for administrator. In re *Cotter's Estate*, 54 Cal. 215. It was held in the above case that the written request was a right given by statute, and that it was the duty of the court to appoint the person so requested. In the case at bar, Mrs. Sullivan was entitled to be appointed and to administer upon the estate, although a married woman. Code Civ. Proc. § 1370. The policy of the law is to give the right to the surviving husband or wife, not only to administer, but to have a person appointed upon request. So fully does the law carry out this policy, that if letters have been granted to a child, father, brother, or sister of the intestate, the surviving husband or wife may assert his prior right, and obtain letters of administration, and have the prior letters revoked.

Code Civ. Proc. § 1386. In this case, if letters of administration had been issued to the son without objection, the surviving wife might have them revoked and be appointed herself. Her right to request the appointment of a competent person is given in the very same sentence of the same subdivision of the section which gives her the right to administer. It is argued that after her marriage she ceased to be the "surviving wife," within the meaning of the section. True, she is not the wife of deceased. She could not be the wife of her husband after his death. She was his widow. But she was during life his wife, and as his wife she survived him. When the legislature used the words "surviving husband or wife," it intended to designate the survivor of the spouses, and to give to such survivor the right to administer, or to name some person to administer. In speaking of the right to request, in *Re Bedell's Estate*, 97 Cal. 341, 32 Pac. 323, it is said: "The evident purpose of the provision is to give to the one entitled to administration the power to select some competent person to discharge the duties of the office, but to hold that his request is not to be considered when resisted by one who belongs to a class subsequent in rank to his own would be to confine his selection to some person falling within the class immediately after his own." In *re Allen's Estate*, 78 Cal. 581, 21 Pac. 426, is not in conflict with what we have said. The decision was made under the statute prior to the amendment of 1891, which provided that a married woman must not be appointed administratrix. It was held that, as she was expressly prohibited by the statute from being appointed administratrix, she did not have the right to give to one a greater right than she had herself. If the contention of appellant is correct, then Mrs. Sullivan would not be entitled to letters if she applied in person. If this is the law, then the amendment to section 1370, Code Civ. Proc., authorizing a married woman to be appointed administratrix, must have reference to estates of others than her deceased husband. We cannot think it was the legislative intent to allow a married woman to become administratrix of estates in which she has no interest, and to deprive her of that right upon the estate of her deceased husband, in which she is vitally interested. After the death of the husband or wife the survivor has the right to marry. Such marriage is not in contravention of any statute, nor is it against public policy. In the absence of a statutory provision, such marriage does not deprive the party so marrying from the right to hold property, administer upon an estate, or to do any other lawful act. The order should be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(132 Cal. 265)

YOLO COUNTY v. COLGAN, Controller.

(Sac. 745.)¹

(Supreme Court of California. March 19, 1901.)

STATUTES — VALIDITY — LEGISLATIVE PROCEEDINGS — JOURNAL — EVIDENCE — STATE REVENUES — COLLECTION — REPEAL — REVIVAL.

1. The validity of a statute which has been duly certified, approved, enrolled, and deposited in the office of the secretary of state cannot be impeached by a resort to the journals of the legislature.

2. Acts March 5, 1870, and March 1, 1871-72, authorized the county officers to collect and hold from the state the commissions for the collection of the revenue for the state. St. 1873-74 provided that all fees or commissions allowed to or received by county officers for such services should be paid into the county treasury, and apportioned to the salary fund. *Held*, that Act Feb. 23, 1893 (St. 1893, p. 5), abolishing all commissions or fees paid by the state to the officers of any county for services in the collection of ad valorem taxes, except the fees allowed under certain provisions of the Political Code, repealed the said acts of March 5, 1870, and March 1, 1871-72; the intention being to relieve the state of all fees except those under the Political Code.

3. Since the act of February 23, 1893 (St. 1893, p. 5), abolished General Revenue Act 1861, § 107, and Act March 5, 1870, §§ 13, 15, it is immaterial, as affecting such abolished statutes, whether or not the said act of February 23, 1893, was repealed by the county government act of 1893, as the repeal of an abolishing act does not revive the act abolished.

Temple and Harrison, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Petition by the county of Yolo to compel Edward P. Colgan, as controller of the state of California, to allow petitioner to retain certain money in the hands of its treasurer. From a judgment denying the writ, petitioner appeals. Affirmed.

E. R. Bush, Dist. Atty., and Devlin & Devlin, for appellant. Tiley L. Ford, Atty. Gen., and George A. Sturtevant, Dep. Atty. Gen., for respondent.

PER CURIAM. When this case was in department an opinion was prepared and submitted by the commissioners; and after oral argument in bank, and full consideration of the case, we are satisfied with that opinion, and the conclusion therein reached. The opinion is as follows:

"HAYNES, C. The county of Yolo petitioned the superior court for a writ of mandate to compel the respondent to allow the petitioner to retain out of any moneys belonging to the state of California which might be in the hands of the treasurer of said county at its settlement with the respondent in December, 1899, the sum of \$26,771.20, and such other sum as may have accrued to the county upon said December settlement, for commissions, charges, and fees directed and fixed by law to be allowed to it for services of its auditor and assessor in connection with the state taxes" for the fiscal year 1893-94, and for

¹ Rehearing denied April 19, 1901.

each successive fiscal year since that date. An alternative writ was granted, the respondent answered, and upon the hearing the writ was denied and the petition dismissed, and from the judgment of dismissal the petitioner appeals, upon the judgment roll.

"Said fees and commissions are claimed by the petitioner to have accrued to it under section 107 of the general revenue act of 1861 (St. 1861, p. 453), and under sections 13 and 15 of the act of March 5, 1870 (St. 1869-70, p. 148). The respondent contends that said statutes were superseded and rendered inoperative by the county government act of 1883, or, if not, that they were directly repealed, so far as said fees and commissions are concerned, by an act approved February 23, 1893 (St. 1893, p. 5), except as to commissions paid to the assessors of the several counties for services in the collection of personal property taxes, as provided by chapter 8 of the Political Code, and except, also, as to the mileage allowed the county treasurers in making settlements with the state under section 3876 of the same Code, and as to which there is no controversy. The petitioner—appellant here—contends that said repealing act never became a law, because it did not receive in the senate the number of votes required by the constitutional provision that 'no bill shall become a law without the concurrence of a majority of the members elected to each house.' The court found that the journal of the senate showed that the vote on said bill was: Ayes, 20; noes, 3; 21 being a majority of the senators elected. The question whether the validity of a statute duly certified, approved, enrolled, and deposited in the office of the secretary of state can be impeached by a resort to the journals of the legislature has been long controverted, and the conclusions reached in the courts of last resort of the different states are inharmonious and conflicting, and this want of harmony is frequently found in the different decisions in the same state; and this remark is not entirely inapplicable to the state of California. In *Fowler v. Pierce*, 2 Cal. 165, it was held that the court may go behind the record evidence of a statute, and inquire whether it was passed or approved in accordance with the constitution. The case of *Sherman v. Story*, 30 Cal. 253, decided in 1866, overruled *Fowler v. Pierce*; and it was held that 'neither the journals of the legislature, nor the bill as originally introduced, nor the amendments attached to it, nor parol evidence, can be received in order to show that an act of the legislature properly enrolled, authenticated, and deposited with the secretary of state either did not become a law in accordance with the prescribed forms, or did not become a law as enrolled.' The opinion of the court in that case was delivered by Mr. Justice Sawyer. It is too long to be quoted here, and any at-

tempt at condensation would weaken its force. In it will be found not only cogent arguments in support of the conclusions reached, but many authorities entitled to the highest consideration. In *Oroville & V. R. Co. v. Plumas Co. Sup'rs*, 37 Cal. 355, the invalidity of an act of the legislature was alleged, upon the ground that its passage was procured by fraud. The court, by Rhodes, J., said: 'An act of the legislature is not subject to attack on that ground, and it is sufficient on this point to refer to *Sherman v. Story*, 30 Cal. 266.' In *Harpending v. Haight*, 39 Cal. 189, the question was presented whether the motive of the mover of a resolution to adjourn the senate was to prevent thereby the executive from returning the bill with his veto; and Wallace, J., held the evidence incompetent, citing *Sherman v. Story*, supra. In *People v. Burt*, 43 Cal. 560, the court, by Belcher, J., said: 'If an act is properly enrolled, authenticated, and deposited with the secretary of state, it is conclusive evidence of the will of the legislature at the time of its passage;' citing *Sherman v. Story*, supra. In *Paving Co. v. Hilton*, 69 Cal. 480, 11 Pac. 3, a proposed amendment of the constitution was referred to in the journals of the senate and assembly as senate bill No. 10, but was not copied at large in the respective journals. It was held by Thornton, J., and McKee, J., that the failure to enter the proposed amendment at large in the journals was in violation of section 1 of article 18 of the constitution, and that the amendment never took effect. The opinion was written by Thornton, J., who said: 'There is nothing here in conflict with what is said in *Sherman v. Story*, 30 Cal. 256.' In *People v. Dunn*, 80 Cal. 211, 22 Pac. 140, it was contended by the respondent that 'every act not shown by the journals to have taken place must be presumed not to have been done.' The court said that this contention cannot be upheld by reason or authority, and that the question as to the power of the court to go behind the enrolled bill in order to determine from the journals whether the bill was properly passed was not presented. *Hale v. McGettigan*, 114 Cal. 112, 45 Pac. 1049, was similarly disposed of. It was said (pages 114, 115, 114 Cal., and page 1049, 45 Pac.): 'It is, however, unnecessary for us to determine in the present case whether the journals of either branch of the legislature may, under any circumstances, be examined for the purpose of impeaching the validity of an act that has been duly enrolled and deposited with the secretary of state, since we are of the opinion that it does not appear from those journals that the act in question was not constitutionally passed.'

"It is clear, even upon the authority of those cases which hold that the journals may be looked into to determine whether a bill has been passed in conformity to the requirements of the constitution, that the va-

lidity of the statute does not depend upon the failure or omission of the journals to show affirmatively that such requirements were in fact complied with, and hence the correctness of the decisions in *People v. Dunn* and *Hale v. McGettigan* cannot be questioned; yet it is equally clear that if the enrolled statute in the office of the secretary of state is conclusive, and unimpeachable by the legislative journals, that each of those cases could have been decided with equal propriety upon that ground. These cases have, therefore, been regarded as somewhat weakening the force of *Sherman v. Story* and *People v. Burt*.

"Weil v. Kenfield, 54 Cal. 111, is cited with much confidence by appellant. The report of that case contains no statement of the points or authorities of counsel; nor is any decision of this court, or any other, cited in the opinion. The question we are now considering is not even suggested in it. There was no controversy in that case as to what transpired in the assembly in relation to the passage of the act; it being conceded that only the title and the first few words of the bill were read; the question considered being whether such reading fulfilled the requirement of the constitution in that regard. Here what transpired in the senate is the very point in controversy; appellant contending that the journal contains the only competent evidence, while respondent insists that the enrolled act duly signed, approved, and filed with the secretary of state is the conclusive evidence that the bill did receive the vote of a majority of the members elected to each house. If it were here conceded that the bill in question received but 20 votes in the senate, Weil v. Kenfield would be in point. Indeed, in such case there could be no controversy. The learned justice (McKinstry) who wrote the opinion in Weil v. Kenfield, in a later case (*People v. Thompson*, 67 Cal. 628, 9 Pac. 833), though placing the decision upon a different ground, made some remarks tending strongly to sustain the proposition that the enrolled statute should be held conclusive. That was a petition for a writ of mandate directing the secretary of state to certify that the petitioners had been duly elected as members of congress in congressional districts created by the act of 1872, claiming that the act of 1883, under which the election was proclaimed by the governor, was invalid because of noncompliance by the legislature with certain formalities required by the constitution; the petitioners having received a few votes each in the old districts, while the great mass of the people observed the new law, and voted in the new districts. The decision was based upon the ground that the proclamation giving notice of the election according to the law must control, whether it was valid or not. It was there said: 'Courts of justice in this state take judicial notice, perhaps, of the

contents of the journals of the two houses of the legislature. The citizens at large are not required to take legal notice of the entries of the journals. The people had not been actually notified of such entries when the election was held. They had before them (let us assume) the statute of 1883, approved by the governor, and published, as statutes are required to be published, and the governor's proclamation. We are asked to decide that all the voters should have inquired whether the statute was invalid by reason of matters of which they had not been notified; that the duty was imposed upon them to make investigation into the history in the legislature of the bill for the act of 1883, and to consider questions as to the validity of the law arising out of the proceedings in the legislature which preceded its final passage.' Here is an actual case practically illustrating the confusion and uncertainty which must inevitably result from the doctrine contended for by appellant. Appellant also cites *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, and *Popper v. Broderick*, 123 Cal. 456, 56 Pac. 53. The first of these cases is distinguished by the court from those cases where it has been held that the court may look into the journals of the legislature for the purpose of determining whether a statute was in fact passed by the requisite vote required by the constitution, but the court said: 'While the courts have undoubted power to declare a statute invalid, when it appears to them, in the course of judicial action, to be in conflict with the constitution, yet they can only do so when the question arises as a pure question of law, unmixed with matters of fact, the existence of which must be determined upon a trial, and as the result of, it may be, conflicting evidence.' This proposition utterly destroys appellant's contention, since whether a bill was passed by a majority vote is a question of fact, which could only be established by evidence of what took place in the legislature. In the case of *Popper v. Broderick*, supra, no question here involved was presented or discussed.

"From this review of the cases in this court, it appears that the case of *Sherman v. Story* has not been followed in some cases where it might have been, the decision being reached upon other grounds; that it has been quoted and followed in two cases, and distinguished in another; and that, in the only case directly conflicting with it, the opposite doctrine was assumed without discussion, upon conceded facts, and without reference to that case or any other. We are referred by appellant to *San Mateo Co. v. Southern Pac. R. Co.*, 8 Sawy. 238, 294, 13 Fed. 722, 767, where the same learned justice who wrote the opinion in *Sherman v. Story*, afterwards, as United States circuit judge, said: 'While we think the case of *Sherman v. Story* correctly decided under the constitution as it then was, we are of

the opinion that the change in the constitution requires a change in the rule, and such seems to be the view of the supreme court of California in *Weil v. Kenfield*, 54 Cal. 111,' and cites *Spangler v. Jacoby*, 14 Ill. 297, and *Prescott v. Board*, 19 Ill. 323, saying that California adopted the said provision in its present constitution substantially as found in the constitution of Illinois. But this change in the constitution does not affect the rule that the record consisting of the enrolled statute in the office of the secretary of state cannot be impeached by evidence of any fact outside of such record, as was clearly shown in the opinion of the same justice in *Sherman v. Story*. If it could be, then, before it can be determined what the law is in any given case, resort must be had to the journals of the legislature, which are often imperfect and erroneous; and different courts might readily differ in their conclusions as to whether the evidence obtained from the journals did or did not show that the requirements of the constitution had been complied with. We are not bound, however, by this decision of a federal court, not only because our conclusion upon the question cannot be reviewed by that court, but because the supreme court of the United States has reached a different conclusion.

"In *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, it was said (page 668, 143 U. S., page 496, 12 Sup. Ct., and page 302, 36 L. Ed.): 'The contention of the appellants is that this enrolled act, in the custody of the secretary of state, and appearing upon its face to have become a law in the mode prescribed by the constitution, is to be deemed an absolute nullity in all its parts, because—such is the allegation—it is shown by the congressional record of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by authority of congress, and having reference to house bill 9416, that a section of the bill, as it finally passed, was not in the bill authenticated by the signatures of the presiding officers of the respective houses of congress, and approved by the president.' After quoting the alleged omitted section, the opinion proceeds: 'The argument in behalf of appellants is that a bill, signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the president of the United States, and delivered by the latter to the secretary of state, as an act passed by congress, does not become a law of the United States if it had not in fact been passed by congress. In view of the express requirements of the constitution, the correctness of this general principle cannot be doubted. There is no authority in the presiding officers of the house of representatives and the senate to attest by their signatures, nor in the president to approve, nor in the secretary of state to receive and cause to be published, as a legislative act, any bill

not passed by congress. But this concession of the correctness of the general principle for which the appellants contend does not determine the precise question before the court; for it remains to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill originating in the house of representatives or the senate, and asserted to have become a law, was or was not passed by congress. It has received, as its importance required that it should receive, the most deliberate consideration. We recognize, on one hand, the duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extend. On the other hand, we cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of congress, and by the approval of the president, and been deposited in the public archives, as an act of congress, was not in fact passed by the house of representatives and the senate, and therefore did not become a law.' After quoting from article 1, § 5, of the constitution, the court proceeded: 'It was assumed in argument that the object of this clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was in fact passed by the two houses of congress. But the words used do not require such interpretation. On the contrary, as Mr. Justice Story has well said: "The object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures. Patriotism and integrity and wisdom obtain their due reward, and votes are ascertained, not by vague conjecture, but by positive facts." * * * The signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses, through their presiding officers, to the president, that a bill thus attested has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill thus attested

receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable. As the president has no authority to approve a bill not passed by congress, an enrolled act in the custody of the secretary of state carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by congress. The respect due to the co-equal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act so authenticated is in conformity with the constitution.' The court in that case cited *Sherman v. Story*, and quoted extensively from it, and also cited and approved *Pangborn v. Young*, 32 N. J. Law, 29, and *State v. Swift*, 10 Nev. 176. The opinion in the latter case was delivered by Mr. Justice Beatty, now chief justice of this court. In it the question here under consideration was very fully discussed, and numerous authorities cited and reviewed. It is true, the supreme court of the United States, in the case above cited, referred to the case in 8 Sawy., and 13 Fed., supra, quoting the remark of Judge Sawyer that the constitution had been changed since *Sherman v. Story* was decided; but that court did not specify or comment upon the change. It is also true that the court said: 'In regard to certain matters, the constitution expressly requires that they shall be entered on the journal. To what extent the validity of legislative action is affected by the failure to have those matters entered on the journal, we need not inquire.' The reasoning of the court, however, in *Field v. Clark*, is equally conclusive in the case at bar, as under the facts there stated. The mandate of our constitution that the yeas and nays shall be entered on the journal, in the absence of a further provision making the journal higher evidence of the due passage of a bill than the approved and enrolled statute, does not affect the question. Such provision would, in effect, empower the courts to correct the journals of the legislature, and declare that a bill certified by it to have been passed was not passed,—a power that is nowhere in the constitution either expressly or impliedly given to the judicial department. The lawmaking power of the state is vested by the constitution in the legislature; and, while the constitution has prescribed the formalities to be observed in the passage of bills and the creation of statutes, the power to determine whether these formalities have been complied with is necessarily vested in the legislature itself, since, if it were not, it would be powerless to enact a statute. The constitution has not provided that this essential power thus vested

in the legislature shall be subject to review by the courts, while it has expressly provided that no person charged with the exercise of powers properly belonging to one of the three departments—the legislative, executive, and judicial—into which the powers of the government are divided shall exercise any functions appertaining to either of the others. In *Pangborn v. Young*, 32 N. J. Law, 29, the constitution provided, as to the form of enacting bills, 'that the yeas and nays of the members voting on such final passage shall be entered on the journal,' and is therefore directly in point here. For a citation of numerous authorities for and against the rule laid down in *Sherman v. Story*, see 2 Notes Cal. Rep. p. 573.

"It is further contended by appellant that said act of 1893 'does not purport to abolish the fees and percentages allowed to the county by section 15 of the act of March 5, 1870 (St. 1869-70, p. 166), or the commissions allowed to the treasurer for the disbursement of public money by section 107 of the act of 1861 (St. 1861, p. 453).'

"Under the acts of March 5, 1870, and March 1, 1871-72, the county officers were authorized to collect and hold from the state the commissions for the collection of the revenue; but a later act (St. 1873-74, p. 420) provided that all fees or commissions allowed to or received by these county officers for these services in collecting the revenues of the state should be paid into the county treasury, and apportioned to the salary fund; so that while the counties, and not the officers, received the benefit of these fees and commissions (except those provided for in the Political Code, and which are not affected by the repealing act), the moneys thus accruing to the counties were the 'fees and commissions allowed to or received by the auditor, assessor, collector or treasurer.' The intention of the repealing act, when considered in connection with the prior statutes, is, therefore, to relieve the state from the payment of all fees and commissions except those allowed by the Political Code.

"It is further contended by appellant that, 'assuming that the "abolishing act of 1893" became a law, it was repealed by the county government act of 1893.' The act in question was approved February 23, 1893, and took effect the first Monday in May of that year. The county government act of 1893 was approved March 24, 1893. It is not claimed that the first-mentioned act was expressly repealed by the second, nor that the second expressly provided for the payment by the state of the fees and commissions here in controversy, but the contention is that the first act was repealed by implication. We see no ground upon which a repeal by implication can be sustained; but a repeal of the 'abolishing act,' if it were repealed by the county government act, whether expressly or by implication, would not revive the acts repealed by the abolishing act.

and, if the county government act re-established these fees and commissions, it must have done so by express enactment. The case of *San Luis Obispo Co. v. Felts*, 104 Cal. 60, 37 Pac. 780, cited by appellant, referred only to fees or percentages allowed by the Political Code, and which were expressly excepted from the operation of the abolishing act; nor does the case of *Goodwin v. Buckley*, 54 Cal. 295, have any application, since the county government act did not provide for the fees and commissions which appellant here seeks to recover.

"In appellant's brief we find a statement of the amounts directed by the legislature to be raised for state purposes for five fiscal years there named, ending with that of 1897-98, and of the amounts actually collected and paid into the state treasury for the same years, from which it appears that the amount collected exceeds the amount directed to be raised by \$1,244,847.54; and the question is asked, 'Does not this surplus money belong to the counties?' Whether it does or not is immaterial in this proceeding, as it was not included in petitioner's demand.

"Appellant also refers to 'an act authorizing the allowance, settlement and payment of claims of counties against the state,' approved March 9, 1893 (St. 1893, p. 109). This statute did not create or fix any fees or charges against the state, but provided for the allowance of fees and commissions which, having been paid into the state treasury, might be allowed in the next settlement. There is no inconsistency between this act and the abolishing act previously passed, since claims which had accrued to the counties prior to the repeal were not affected by it; and, besides, 'the abolishing act' expressly excepted from its operation certain fees or commissions therein named, to which the later act might properly apply.

"Respondent refers to an act approved February 16, 1899 (St. 1899, p. 9), to prevent the maintenance of any action for the recovery of the fees and commissions such as are here in question, which provides that 'all such actions and proceedings heretofore commenced and now pending, and all such actions or proceedings that may hereafter be instituted, shall be dismissed by the court in which the same may be pending, upon its own motion'; but this act excepts the fees and commissions which were excepted by the said abolishing act. In view of the conclusion reached as to the validity of said abolishing act, this act need not be considered. We think the court below did not err in denying the writ, and advise that the judgment appealed from be affirmed.

"We concur: **CHIPMAN, C.; COOPER, C.**"

We dissent: **TEMPLE, J.; HARRISON, J.**

(6 Cal. Unrep. 666)

FEENEY v. HINCKLEY et al. (S. F. 1,485.)
(Supreme Court of California. March 22, 1901.)

JUDGMENT—LIMITATION OF ACTION—STATUTES.

Under Code Civ. Proc. § 336, limiting the time within which an action on a judgment or decree must be brought to five years, no recovery could be had in an action on a judgment brought more than five, but less than six, years after judgment was entered; Code Civ. Proc. § 1049, providing that an action is pending from its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied, not giving additional life to the judgment.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; S. P. Hall, Judge.

Action by Bridget Feeney against H. G. Hinckley and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

B. McFadden, for appellant. Wm. H. H. Hart and Cotton & Cotton, for respondents.

CHIPMAN, C. Action to recover an unpaid balance due on a judgment rendered in an action of unlawful detainer. Defendants had judgment on demurrer to the complaint, from which plaintiff appeals.

The complaint showed that on August 22, 1891, plaintiff recovered judgment for possession of certain real property, and for \$1,500 damages and \$20.30 costs, and under a writ issued thereon September 1, 1891, and returned November 3, 1891, there was realized on the judgment \$63.30, and that there is now unpaid on the judgment \$1,457, with interest, etc.; and judgment is demanded against defendants for the amount. The action was commenced August 17, 1897,—more than five, but less than six, years after the judgment was entered. Defendants demurred to the complaint for insufficiency of facts, and because the action is barred by section 336, Code Civ. Proc., which provides that an action on a judgment or decree must be brought within five years. Appellant contends that the judgment was not a final determination as to the rights of the parties until the time for appeal had passed. Appellant lays much stress upon section 1049, Code Civ. Proc., which provides that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." This section has no bearing upon the construction to be given section 336. For many purposes the action should be deemed to be pending until the right of appeal has elapsed, but it was competent for the legislature to prescribe the time within which an action might be brought to enforce the judgment, whatever might be the rights of the parties under section 1049. Appellant would read into the statute by construction a year's

additional time, although the statute plainly says that the action must be brought within five years. The court said in *Rowe v. Blake*, 99 Cal. 167, 33 Pac. 864: "The provisions of section 681 of the Code of Civil Procedure, limiting the issuance of an execution for the enforcement of a judgment to the term of five years, is but a limitation upon a certain mode for its enforcement, and does not purport to limit or qualify the right to its enforcement in any other mode. The right to bring an action upon a judgment or decree is recognized by that Code as the subject of a civil action, and may be brought within five years. Code Civ. Proc. § 336. The provisions of this section are applicable to domestic judgments. *Mason v. Cronise*, 20 Cal. 211. And the time thus limited begins to run from the entry of the judgment. *Trenouth v. Farrington*, 54 Cal. 273." See *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218. If it be true, as claimed by appellant, that the question has never arisen in the precise form as in the present case, we think it beyond doubt that the judgment creditor who would seek to enforce his judgment by an action brought for that purpose must do so within the time limited by section 336, or the action will be barred. The judgment has no additional life given to it by section 1049, so as to enlarge the time within which he may have execution under section 681, nor within which he may bring his separate action as limited by section 336. The judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

132 Cal. 316

HARRIS v. SMITH et al. (L. A. 750.)

(Supreme Court of California. March 22, 1901.)

REPLEVIN—PLEADING—ALLEGATIONS OF PETITION—WRONGFUL ATTACHMENT—DAMAGES.

1. Where, in replevin, the complaint alleged that on a date named plaintiff was the owner and entitled to the possession of the property, and that he was in possession, and that defendant on that day, without plaintiff's consent, and against his will, unlawfully came into possession of the property, and that it was taken from his possession, the complaint was not objectionable on the ground that it failed to allege ownership or right of possession at the commencement of the action.

2. Where plaintiff sued to recover personal property taken, or its value, and for damages for ruining his business, an objection by demurrer that several causes of action were improperly united became immaterial after a judgment limiting the relief to the recovery of the possession of the property or its value.

3. Where an attachment had been issued against an owner of goods, and between 12 and 1 o'clock a. m., in consideration of a bona fide indebtedness of more than the value of the property, the goods were sold to plaintiff, and the attachment was levied and the property taken after the hour of 5 p. m. the same day,

in an action for the recovery of the property, a finding that plaintiff, after delivery, remained in sole and exclusive possession of the property, was not contrary to the evidence, because the leasehold of the premises was not assigned, and the former owner retained the key to the store, and the goods were not removed.

4. Where there is a judgment for plaintiff in replevin, plaintiff is not entitled to damages because of expenditures for attorney's fees.

Department 1. Appeal from superior court, San Diego county; J. W. Hughes, Judge.

Action by W. O. Harris against A. F. Smith and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Sam F. Smith, for appellants. L. E. Dodmun and Eugene Dovey, for respondent.

PER CURIAM. The plaintiff had judgment in the court below for the recovery of the possession of the personal property described in the complaint, or for the sum of \$350, the value thereof, and \$100 as damages and costs. The defendants appeal from the judgment and from an order denying a new trial. The grounds urged for reversal are insufficiency of the complaint, misjoinder of causes of action, insufficiency of evidence to justify the findings, and the allowance of attorney's fees as damages.

1. The complaint, it is contended, fails to allege ownership or right of possession at the time of the commencement of the action, and hence, under the decisions in this state, is insufficient. *Affierbach v. McGovern*, 79 Cal. 268, 21 Pac. 837; *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466; *Truman v. Young*, 121 Cal. 490, 53 Pac. 1073. In the cases cited the only allegations of the complaint were, in each case, that at a day named prior to the filing of the complaint the plaintiff was the owner and entitled to the possession of the property sued for, and that the defendant now wrongfully detains the same, etc. In this case the complaint alleged not only that on the day named the plaintiff was the owner and entitled to the possession of the property, but also that he was in possession of it, and that the defendants on that day, without the plaintiff's consent, and against his will, wrongfully and unlawfully and by force came into possession of said personal property; and, in effect, that it was thus taken from his possession. The difference is that in the cases cited no cause of action is alleged as existing either at the time of the commencement of the suit or at any other time. But in the case at bar a complete cause of action is alleged as arising at the day named; and it may be contended that, the obligation of restoration having been created by the wrongful act of the defendants, it continues, with the action founded on it, until it is affirmatively shown to have been extinguished.

2. The objection by the demurrer that several causes of action are improperly united in the complaint has become immaterial by

reason of the judgment being limited to the recovery of the possession of the property or its value. No judgment was given upon the plaintiff's claim for damages for ruining his business.

3. The plaintiff deraigned title to the goods in controversy under a sale of date October 11, 1898, from one Bowdish, who was then admittedly the owner of the property, and against whom an attachment had been issued. The sale was made between 12 and 1 o'clock, and was in consideration of an indebtedness to the plaintiff of \$450, which was more than the value of the property. It is found that possession was immediately delivered to Harris, who remained "in the sole and exclusive possession thereof continuously thereafter"; and that the sale was made in good faith, and not with the intent to hinder, delay, or defraud creditors. The attachment was levied and the property taken from his possession after the hour of 5 p. m. of the same day. The specifications of insufficiency of the evidence are, in effect, that the leasehold of the premises was not assigned, that Bowdish retained the key or a key of the store, and that the goods were not removed. But there is nothing in the facts specified inconsistent with the findings.

4. The court rendered judgment in favor of the plaintiff for the possession of the property described in the complaint, or the value thereof in case delivery cannot be had, "together with one hundred dollars as damages." This portion of the judgment rests upon the finding of fact that the plaintiff had expended the sum of \$300 as attorney's fees in pursuit of said personal property, but that any part of said amount over \$100 could not be recovered. The action is not for the conversion of personal property, and the provisions of section 3336, Civ. Code, do not apply. The action is brought for a recovery of the possession of the property described in the complaint, or for the value thereof in case delivery cannot be had. In such an action, if the plaintiff recovers judgment, section 667, Code Civ. Proc., authorizes the court to give judgment for "damages for the detention." No damages are claimed herein for the detention of the property, and there is no authority in the statute by which the plaintiff may recover attorney's fees incurred in the action. *Kelly v. McKibben*, 54 Cal. 192; *Redington v. Nunan*, 60 Cal. 632. In *Arzaga v. Villaba*, 85 Cal. 191, 24 Pac. 656, the question of the right to attorney's fees was not presented. The decision in that case was given under section 3294, Civ. Code, and upon the ground that there had been shown such oppression on the part of the defendant as to justify an award of exemplary damages. The superior court is directed to modify the judgment appealed from by striking out that portion thereof which adjudges that the plaintiff recover "one hundred dollars as damages," and, as thus modified, the judgment shall stand affirmed.

132 Cal. 320

SIDDALL v. HAIGHT. (S. F. 1,789.)

(Supreme Court of California. March 23, 1901.)

HUSBAND AND WIFE—TITLE BY ADVERSE POSSESSION—COMMUNITY PROPERTY—SEPARATE PROPERTY—ATTORNEY AND CLIENT—NEGLIGENCE—JUDGMENT LIEN—OWNERSHIP BY JUDGMENT DEBTOR—DEFENSE.

1. Where a married woman and her husband acquired possession of real property by a gift to the wife from her sister, and occupied it together for more than 20 years, after which time she was decreed to be the owner by adverse possession in a suit to quiet title brought by the administratrix of the sister, the title so perfected by adverse possession was not, in effect, a purchase with community funds, so as to give the husband a half interest in the land, but operated as a purchase by the wife, so as to make the land her separate property.

2. Where a client sued his attorney for negligence in failing to have an execution levied on the property of the judgment debtor before the judgment lien expired, the fact that no property belonged to the judgment debtor is a complete defense to the action.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by Henry Siddall against George W. Haight. From a judgment in favor of defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

C. M. Jennings, for appellant. John B. Mhoon, for appellee.

CHIPMAN, C. Action for neglect of professional duty as attorney for plaintiff. Defendant had judgment on motion for nonsuit, from which, and from the order denying his motion for a new trial, plaintiff appeals.

Defendant was the attorney for plaintiff in an action against one Robert Thompson, against whom plaintiff recovered judgment for \$879.99 on May 18, 1891. The lien of this judgment expired May 18, 1893. Plaintiff testified that he employed defendant on April 1, 1893, to cause levy of execution to be made on certain real property (admittedly the only property in which Thompson had any alleged interest, and out of which alone the judgment could be collected, if at all), being a lot situated in the city of San Francisco. On April 20th plaintiff paid defendant \$20, of which \$10 was to go on account of his fees and \$10 to pay sheriff's fees for levying execution. Execution was sued out the next day, April 21st, and put in the sheriff's hands, but for some unexplained reason was returned to defendant, and was by him again given to the sheriff April 25th, and levied. There would have been time to advertise the sale before the expiration of the lien had the notice been published promptly, but here again, for reasons not clearly appearing, but apparently because the cost of publishing the notice was not prepaid, the publication did not begin until

about May 25th, and the day of sale was fixed for June 19th. On the 19th of June, before the hour of sale, Mrs. Thompson filed a declaration of homestead on the lot in question. On account of this homestead being filed, and because of defendant's absence at the time, the sheriff adjourned the sale for a day, and what afterwards took place does not appear. It seems to be conceded by both parties—what is undoubtedly the law—that the execution and levy did not extend the judgment lien, and hence no enforceable judgment lien existed at the time the sale was advertised to take place, the property being then exempt from forced sale by virtue of the homestead. Civ. Code, §§ 1240, 1241. It was admitted that, if Thompson had no interest in the lot in question, he was insolvent. It follows that, if this lot belonged wholly to Mrs. Thompson as her separate property, it becomes immaterial whether defendant was negligent in failing to have it sold on execution; and this would be true regardless of the homestead. Plaintiff introduced in evidence the complaint, answer, and judgment in a certain action brought by the administratrix of the estate of Jane Peebles, deceased, against Elizabeth M. Thompson, who was the wife of Robert Thompson, but he was not made a party defendant. The action was to quiet plaintiff's title, as administratrix, to the lot in question; and it was alleged that defendant, Mrs. Thompson, claimed some interest therein. The complaint was filed November 14, 1891. Answer was filed January 11, 1892, on which day the cause was tried. The court found in that action that for more than 20 years last past defendant has been in the actual and continual and exclusive occupation of the premises under claim of title, and has claimed title for that time adversely to all the world; that she maintained a substantial inclosure around the lot, and had paid all the taxes levied or assessed upon the land during all said time; and "that the defendant [Mrs. Thompson] is the owner and entitled to the possession of said land and premises"; and decree was accordingly entered. At the trial of the present action, plaintiff called Robert Thompson, husband of Elizabeth, as a witness. He testified that he had been married for 30 years, and had resided, with his wife, on the lot in question, since 1862. He testified that he "never owned it," and never had a lease of the premises; that his wife paid the taxes with money she got from her sister, Jane Peebles, the deceased person referred to in the action against Mrs. Thompson. He testified: "I lived with my wife there all this time on those premises. That property was her sister's. Her sister died, and gave it to her. I do not know that my wife's claim to that property was based upon adverse possession." Upon cross-examination he testified: "My wife's sister, Jane Peebles, gave her the property, and put her in possession of

it; and we have lived there together under that possession." It is contended, however, by appellant, that a verbal gift is impossible; citing section 1091, Civ. Code, and section 1971, Code Civ. Proc. But there may be an executed parol gift of land (*Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806), and as the evidence was that Jane Peebles gave the lot to Mrs. Thompson, and put her in possession, I do not think the fact that her husband lived on the lot with his wife "under that possession," as he testified he did, could affect his wife's right to perfect her title by adverse possession. There is no evidence to show that Mrs. Thompson did not reside on the premises before marriage, but we do not think this essential.

Respondent makes the point that the judgment by which Mrs. Thompson was decreed to be the owner of the lot was, in effect, a conveyance, within the meaning of section 164, Civ. Code, as amended in 1889 (St. 1889, p. 328), and that the presumption is that the title was "thereby conveyed in her as her separate property." We do not think it necessary to pass upon this question. There is evidence of an executed parol gift to Mrs. Thompson, her sister, and, so far as anything appears, the adverse possession under which Mrs. Thompson was decreed title was the possession thus given, and whether it was before or after her marriage makes no difference. Thompson claimed no interest in the lot, and he testified that he never owned the property. According to plaintiff's view, a wife could never perfect a title in herself by adverse possession which had originated in a gift or devise to her, either before or after marriage, because, as he claims, the joint adverse possession of husband and wife would be, in effect, a purchase with community funds. We cannot agree with appellant. All property owned by either spouse before marriage and that acquired afterwards by gift, bequest, devise, or descent is separate property. Civ. Code, §§ 162, 163. All property otherwise acquired after marriage is community property. *Id.* § 164. Here, however, the right to possession was by gift to the wife, and if, when later the administratrix of her sister's estate set up a claim to the premises, Mrs. Thompson could defend by showing subsequent adverse possession, and because the decree adjudged the title in her by adverse possession, it does not follow that the premises became community property. As Thompson had no interest in the property, plaintiff suffered no injury by defendant's alleged negligence. Appellant claims that whether or not Thompson had any interest in the land ought to have been left to be determined by future litigation after sale on execution. We do not think so. The complaint is framed on the theory that Thompson owned the premises sought to be levied upon and sold, and, before plaintiff could show damage, it was incumbent on him to prove his allegations. This he failed

to do, and the nonsuit properly followed.
The judgment and order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in
the foregoing opinion, the judgment and order
are affirmed.

132 Cal. 63

SUTLIFF v. SEIDENBERG et al. (S. F. 1,660.)

(Supreme Court of California. March 30, 1901.)

In bank. On rehearing. Denied.

For opinion in department, see 64 Pac. 131.

PER CURIAM. The petition for rehearing in bank is denied. Upon further examination of the record, we think, however, that it does not sustain the statement in the opinion hereinbefore given that "the issue as to whether plaintiff was discharged in May becomes immaterial in view of the reduced verdict, which limited recovery to commissions earned prior to May"; but there was sufficient evidence to warrant a submission to the jury of the question whether or not the respondent was discharged in May, upon which question they found that there had not been such discharge.

BEATTY, C. J., dissenting.

132 Cal. 346

Ex parte MORTON. (Cr. 748.)

(Supreme Court of California. March 28, 1901.)

CRIMINAL LAW—SEPARATE CRIMES—CONVICTION—CUMULATIVE SENTENCES—VALIDITY—IMPRISONMENT—DISCHARGE.

1. Pen. Code, § 670, provides that, when any person is convicted of two or more crimes before sentence has been pronounced on him for either, the imprisonment to which he is sentenced on the second must commence at the termination of the first term of imprisonment. Defendant was convicted of an assault with intent to kill, and sentenced to 10 years' imprisonment on July 19, 1890, and in the following month was found guilty of burglary, and sentenced to 5 years' imprisonment, to commence at the expiration of the term under his former sentence. *Held*, that after a service of 10 years in the state's prison defendant was entitled to his discharge, since the second sentence was invalid, because accused was not convicted before the sentence under the first conviction.

2. Pen. Code, § 105, providing that every prisoner confined in the state's prison for a term less than for life, who escapes therefrom, shall be punishable by imprisonment for a term

equal in length to the term he was serving at the time of such escape, the second term of imprisonment to commence from the time he would otherwise have been discharged, being limited to escapes, does not warrant imposing a cumulative sentence on defendant for burglary after a sentence had already been pronounced on him under a former conviction for an assault to commit murder.

In bank. Appeal from superior court, city and county of San Francisco; F. W. Van Reynegom, Judge.

Habeas corpus by James Morton to secure his release from the state's prison. Prisoner discharged.

N. S. Wirt, for petitioner. Atty. Gen. Ford, for the State.

BEATTY, C. J. The prisoner was convicted of the crime of assault with intent to commit murder, and on the 19th of July, 1890, was sentenced to be imprisoned at Folsom for a term of 10 years. Subsequently, on the 7th day of August, 1890, he was found guilty of burglary in the second degree, and on the 9th day of the same month was sentenced to be imprisoned at Folsom for a term of five years, "to commence at the expiration of the term of imprisonment defendant is now serving in the state prison at Folsom for assault to commit murder." Ever since the second sentence he has been continuously in the custody of the warden at Folsom, and he claims that, without regard to the credits he has earned by his good conduct, his imprisonment, since the expiration of 10 years from the date of his first sentence, had been and is now unlawful, and this because the superior court had no power to include in the second sentence the provision above quoted, to the effect that the 5-year term of imprisonment thereby imposed should commence at the expiration of the term of imprisonment which he was then undergoing.

Whether our courts have the power to impose cumulative sentences is a question which must be answered by the statutes. A term of imprisonment commences to run when the defendant is actually delivered at the place of imprisonment. Pen. Code, § 670. This is the rule, but it has some exceptions. First, "When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be." Pen. Code, § 669. This section prescribes one exception to the rule, but it does not cover the present case, because the prisoner was not convicted of the second offense until after sentence on the first conviction. There would seem to be no rational ground for a distinction between this case and the case provided for,

but the distinction is clearly drawn in the statute, and we cannot hold that the provision quoted warrants the sentence under which alone the prisoner can now be held. The only other statutory provision for cumulative sentences called to our attention is contained in section 105 of the Penal Code, which applies exclusively to escape from the state prison. These exceptions seem to prove and establish the rule that in all other cases the term of imprisonment commences to run from the delivery of the convict at the prison. It must, therefore, be held that the direction in the second sentence of the prisoner, making it cumulative upon the first, was invalid, and that the lawful term of his imprisonment has expired. This conclusion does not involve the inconveniences apprehended by counsel for the people. The prisoner here could have been punished, as the court designed he should be punished, by simply postponing judgment on the first conviction until after the verdict in the second case; and so can all persons in his situation be subjected to successive and cumulative terms of imprisonment by simply observing the terms of the statute. Pen. Code, § 669. The prisoner is discharged.

We concur: GAROUTTE, J.; VAN DYKE, J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.

6 Cal. Unrep. 662

SPRINGER v. SPRINGER et al. (L. A. 756.)
(Supreme Court of California. March 21, 1901.)

CANCELLATION OF DEED—UN SOUND MIND—EVIDENCE—SUFFICIENCY—PRESUMPTION—HUSBAND AND WIFE—CONSIDERATION—LOVE AND AFFECTION—APPEAL—FINDINGS—CONFLICTING EVIDENCE—NEW TRIAL—STATEMENT—AMENDMENT.

1. Plaintiff deeded a lot to her son, retaining a life estate therein. In an action by her to cancel the deed, the attorney drawing it testified that at the time of executing it her mind was sound. There was no evidence that she was of weak intellect, though she was old and in feeble health. *Held*, that a finding that she was of sound mind will not be reversed.

2. Where the evidence was conflicting, a finding for defendants will not be disturbed on appeal.

3. Where plaintiff conveyed a lot to her son, and he conveyed it to his wife, in an action by plaintiff to cancel her deed to the son findings that his deed to the wife was for a valuable consideration, and also for love and affection, were not prejudicial to plaintiff; the court having refused to cancel plaintiff's deed.

4. Love and affection are a good consideration for a conveyance of land by a husband to his wife, and will support the conveyance.

5. Where the statement on a motion for a new trial certified by the judge contained a summary of the evidence, but made no mention of any exceptions to evidence or other errors of law alleged to have occurred at the trial, and excepted to by plaintiff, plaintiff's remedy is not by motion to the trial court to amend the statement, but by petition to the appellate court.

6. Where, on appeal from an order denying a new trial, the statement as certified by the

trial judge contained a summary of the evidence, but made no mention of any exceptions to evidence or other errors of law alleged to have occurred at the trial, and excepted to by plaintiff, such exceptions and errors cannot be considered.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Maria C. Springer against A. J. Springer and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

See 58 Pac. 1060.

W. W. Holcomb and W. T. Williams, for appellant. Geo. P. Adams, for appellees.

CHIPMAN, C. Action to have certain deeds declared void and canceled, and for the reconveyance of the property to plaintiff. Defendants had judgment, from which, and from an order denying her motion for new trial, plaintiff appeals.

1. Plaintiff contends that the evidence does not support the finding that she was of sound mind when she executed the deed sought to be set aside, and that she knew that she was making a deed when she executed it. Plaintiff is an elderly widow, and is the mother of defendant Andrew J. Springer and of Edward Springer. Defendant Rosa Springer is the wife of Andrew. The court found that on May 11, 1895, and for some time prior thereto, plaintiff was the record owner of lot 22 of the Aurora tract, in the city of Los Angeles, but that her son Andrew had an equitable interest therein; that, at the time the lot was purchased, her two sons, Andrew and Edward, purchased said lot 22, and also lot 31 in the same tract, but the title to lot 22 was taken in plaintiff's name and the title to lot 31 was taken in Edward's name; that the purchase price was contributed by each of said plaintiff's sons and by plaintiff, and thereafter and prior to May 11, 1895, plaintiff and her said sons built a house on said lot 22, and each contributed to pay therefor. Defendant Rosa was not the wife of Andrew until some time after plaintiff had conveyed to Andrew. The court found that on May 5, 1895, plaintiff was, and had been for some time, sick and in feeble health; that she stated to her son Andrew "that she was about to die, and informed him that she desired to make her last will and testament to said lot 22 to and in his favor." The court further found that subsequently, to wit, on May 11, 1895, plaintiff and defendant Andrew went "to the office of a notary public who was also an attorney at law, and plaintiff and her said sons, Andrew and Edward, thereupon agreed upon a settlement of and settled their respective interests in and to all the said real estate, as follows, to wit: Said defendant A. J. Springer transferred said lot 31 to said Edward Springer in full of all the latter's interest in all of said property. Plaintiff reserved to herself a life estate in said

house and lot known as lot 22, in full of all her interest in all of said property; and she transferred to defendant A. J. Springer, subject to her said life estate, in full of all his interest in all of said property, the said house and lot known as said lot 22, and in pursuance thereof she executed and delivered to defendant A. J. Springer a deed thereto, which is * * * the deed sought to be set aside in this action; that at the time plaintiff executed and delivered said deed * * * she was of sound mind; that she did not read said deed, but that said notary public who drew it read portions of it to her, and explained to her that she was thereby conveying by deed to defendant A. J. Springer the absolute title to said property, subject only to her said life estate, and she then and there fully understood, and ever since has understood, the same, and that she was so conveying it to her said son A. J. Springer, and that it was not a will nor a testament." The court further found that no mistake was made by plaintiff, and none was discovered; that on August 1, 1897, plaintiff asked defendant A. J. "to return said property, and he promised to, but did not, do so; that on August 4, 1897, for a valuable consideration, defendant A. J. Springer executed and delivered to his wife, Rosa M. Springer, his co-defendant, a deed conveying said lot 22 to her." These deeds were duly recorded. The court also found that the conveyance to Rosa was "in consideration of the love and affection of her said husband, without notice of any equity or interest in favor of plaintiff, except said life estate." The testimony given by the sons was that they deliberately deceived their mother, pursuant to a previous understanding between the sons to do so, and they testified that they made her believe she was executing her will, and not a deed. She testified that she understood she was signing a will. Andrew testified that he explained to his wife, when the latter asked him to convey the property to her, that he could not do so, as it belonged to his mother; but this, his wife testified, was not true. At the trial defendants were living separate and apart. Plaintiff and her two sons testified that they did not know the difference between a will and a deed. Friend E. Lacey, the notary who prepared the deeds, a practicing lawyer at the Los Angeles bar, testified fully to the transaction. Having explained that the brothers came to him to prepare a deed from Andrew to Edward for lot 31, and to prepare a deed similar in form, but reserving a life estate in plaintiff from her to Andrew of lot 22, the witness stated with much particularity what took place at his office when afterwards the brothers and their mother came to execute the deeds. It would serve no useful purpose to quote at length this testimony. The facts narrated by this witness were sufficient to justify the finding that plaintiff understood perfectly what she was doing

when she signed and acknowledged the deed, for Lacey carefully explained its contents and meaning to her. He also testified that he had known plaintiff well for several years, and had attended to business for her, and that at the time she executed the deed her mind was sound. There is no evidence that plaintiff was of weak or of impaired intellect, and the only reason now urged to show that she was of unsound mind is that the court found her to be advanced in years and weak in body. No presumption of impaired intellect can arise alone from impaired bodily health, and besides all the direct evidence was against any such presumption. There is a clear conflict in the evidence. The court manifestly believed the witnesses Lacey and Rosa Springer, and disbelieved the witnesses for plaintiff; this the court had a right to do, and with its conclusions upon this branch of the case we cannot interfere.

2. It is claimed that the finding that the deed to Rosa was for a valuable consideration is unsupported. The evidence was that the consideration was love and affection alone, and the court also so found. Appellant was not injured by these findings, inasmuch as the court found on sufficient evidence that plaintiff's deed to Andrew conveyed plaintiff's interest in the property. Andrew could and did convey whatever interest he acquired for the consideration of love and affection, which was a good consideration, and it is immaterial whether the consideration was valuable. The court found, on sufficient evidence, that plaintiff was not imposed upon in making her deed, but understood what she was doing, and intended to do just what she did. The finding that the deed was for a valuable consideration was without injury.

3. Much of the record is taken up with matter which the court refused to place in the statement on motion for new trial, and error is claimed on account of the refusal of the court to amend the statement as originally settled by the court. As we understand the record, this appeal is from the order denying plaintiff's motion to have certain facts set forth in the statement, alleged to be material, and which it is alleged were omitted or refused by the judge to be placed in the statement after his attention was called thereto, and before the final settlement. A counter affidavit of defendants' counsel disputes the correctness of some of the facts alleged by plaintiff to have occurred at the trial. The statement on motion for a new trial, as certified by the judge, is a summary of the evidence as shown by plaintiff's affidavits to have been adduced at the trial; but it makes no mention of any exceptions to evidence or other errors of law alleged to have occurred at the trial, and excepted to by plaintiff. The purpose of the proposed amendments seems to be not so much to enlarge the statement of facts, as to bring these exceptions to the attention of the ap-

pellate court for consideration. In effect, the purpose is to review the action of the trial judge in refusing to make the statement to fully and fairly represent the facts as they occurred at the trial. Plaintiff's remedy was by petition to this court. *Hudson v. Hudson*, 129 Cal. 141, 61 Pac. 773, and cases there cited. This court can, on appeal, look only to the statement as certified by the judge. In *re Gates*, 90 Cal. 257, 27 Pac. 195. The judgment and orders should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(132 Cal. 301)

PEOPLE v. FINDLEY. (Cr. 668.)

(Supreme Court of California. March 22, 1901.)

EMBEZZLEMENT—CHANGE OF JUDGES—PREJUDICE—REDUCTION OF BAIL—DEFENSES—INSANITY—PRESUMPTION OF CONTINUANCE—JUDGE'S STATEMENT BEFORE JURY—DENIAL OF FOREIGN SUBPOENA—EVIDENCE—APPEAL—INSTRUCTIONS—INTOXICATING LIQUORS—MISCONDUCT OF JURORS—VERDICT—RESORT TO CHANCE—PROOF BY AFFIDAVIT—HEARSAY STATEMENTS.

1. Under Code Civ. Proc. § 170, providing that, when it appears from affidavits on file that either party cannot have a fair and impartial trial before any judge of a court of record about to try the case by reason of the judge's prejudice or bias, the judge shall forthwith secure the services of some other judge to preside at the trial of such case, an affidavit alleging that affiant believed that he could not have a fair and impartial trial was insufficient, in absence of facts showing that a fair trial could not be had.

2. Under Code Civ. Proc. § 170, declaring that, when it appears from affidavits on file that either party to a case before a certain judge cannot have a fair trial by reason of the latter's prejudice, such judge shall forthwith secure the services of another judge, the judge's decision on the question of fact as to whether such showing was made would not be disturbed on appeal unless plainly contrary to the evidence.

3. An allegation in the affidavit of a party on trial for embezzlement before a certain judge that defendant was a successful candidate for office against a relative of the judge was insufficient to show a bias on the part of such judge, within Code Civ. Proc. § 170, authorizing a change of judges for prejudice.

4. That a judge consented to reduce the bail of one charged with embezzlement, which was not excessive, and then withdrew such consent without giving a reason therefor, did not show prejudice in the judge, within Code Civ. Proc. § 170, authorizing a change of judges on that ground, since such withdrawal merely amounted to a refusal to reduce the bail.

5. The mere statement that the judge, in a trial for embezzlement, said in the presence of the jury that he never had any doubt as to the defendant's sanity, the latter relying on insanity as a defense, was insufficient to show bias, within Code Civ. Proc. § 170, authorizing a change of judges for prejudice, in the absence of a statement of the full proceedings in reference to the matter, since the circumstances under which the alleged statement was made

might show that it was called for by the remarks or demands of defendant's counsel.

6. The fact that the judge in a prosecution for embezzlement denied defendant a foreign subpoena while granting the prosecution one, was insufficient to show prejudice in the judge, within Code Civ. Proc. § 170, authorizing a change of judges for prejudice, in absence of a showing that defendant had taken the requisite steps to entitle him to such subpoena.

7. Where checks executed by the sureties of a tax collector to the county treasurer were admitted in a prosecution for embezzlement as tending to show the amount of the embezzlement by showing that a certain amount had been paid to the treasurer on the tax collector's account, and not by him, the admission could not be complained of on appeal on the ground that it must have raised a presumption that defendant was short in his accounts, in the absence of an objection on such ground at the trial.

8. Where a defense to a prosecution for embezzlement was insanity at the time of the offense, caused by long-continued overindulgence in intoxicating liquors, and there was evidence tending to support it, an instruction that settled insanity, produced by such use of liquor, affected responsibility in the same way as insanity produced by any other cause, but that it must be settled insanity, and not a mere temporary condition, was not improper as misleading and inapplicable to the evidence.

9. An instruction that, when temporary or spasmodic insanity was proved to have existed prior to the commission of a criminal act, there was no presumption of its continuance to the specific time of such act, was proper.

10. Where the rule as to the degree of proof required in criminal cases and the doctrine of reasonable doubt were fully stated and explained in instructions in a prosecution for embezzlement, a requested instruction that the jury had a right to consider that innocent men had been convicted, and the danger of convicting innocent men, was properly refused.

11. Under Code Civ. Proc. § 657, providing that, when any of the jurors have been induced to assent to any verdict or finding by a resort to a determination by chance, such misconduct may be proved by the affidavit of any of the jurors, the misconduct of a juror, in a prosecution for embezzlement, other than a resort to chance, could not be proved by the affidavits of jurors.

12. The alleged misconduct of jurors in a prosecution for embezzlement could not be proved by hearsay statements of jurors regarding such misconduct.

13. The alleged misconduct of jurors in a prosecution for embezzlement could not be proved by defendant's affidavits, founded on information and belief.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

Samuel M. Findley was convicted of embezzlement, and he appeals. Affirmed.

C. A. Palmer and E. M. Emmert, for appellant. Atty. Gen. Ford, for the People.

GRAY, C. The defendant was convicted of embezzling \$8,000, public money in his hands as tax collector of San Luis Obispo county, and sentenced to eight years in the state prison. He appeals from the judgment of conviction. We will consider the points urged for reversal in the order in which they appear in appellant's brief.

1. When this case was called for trial, defendant's attorney, pursuant to the provi-

sions of section 170, Code Civ. Proc., moved the court to secure the services of some judge other than the regular judge of the court to preside at the trial and in the subsequent proceedings. The affidavit of the defendant was filed, and read in support of this motion. The affidavit of the district attorney in rebuttal was also filed, and read on the motion. The court denied the motion. In his affidavit defendant alleges five acts of the judge of the trial court as tending to show his prejudice against defendant. These acts are as follows: (1) The said judge, in December 1897, advocated the candidacy of his brother-in-law for tax collector, as against defendant's candidacy for the same office, before the board of supervisors, and defendant received the appointment, much to the displeasure of said judge. (2) That said judge had consented to a reduction of defendant's bail from \$10,000 to \$6,000, and then withdrew said concession without assigning any reason therefor. (3) That after a former trial of this case, and a disagreement of the jury, the Evening Breeze, a newspaper of San Luis Obispo, published an editorial criticising and deriding the defendant and the disagreeing jury, and intended to prejudice the public mind against defendant. Defendant says he verily believes that a bias exists in the mind of said judge against defendant, or otherwise the proprietor, editor, or manager of said paper would have been cited to show cause why he should not be punished for contempt. (4) That at a former trial of the case, after defendant's counsel had made his opening statement to the jury, said judge, "in an audible voice, and within hearing of the jury, said substantially that he had never had any doubt as to the sanity of the defendant, to which remark defendant's counsel then and there duly excepted." (5) That prior to the first trial said judge, at request of the prosecution, issued a foreign subpoena for one John C. Fraser, and, notwithstanding the failure of service in this state on said Fraser, he was served in Denver, Colo., and attended as a witness; and said judge illegally ordered a warrant drawn on the county treasurer in Fraser's favor for \$184.45 in payment of his traveling expenses from Denver, Colo., to San Luis Obispo and return. That defendant requested a foreign subpoena for one Berry, the auditor of the Fidelity & Deposit Company, a material witness for defendant, and said judge refused the order.

It is not sufficient, in a case of this kind, to allege in the affidavit simply that the defendant "believes that he cannot have a fair and impartial trial," etc., but it must be made to appear by the affidavit or affidavits on file that a fair trial cannot be had before the judge about to try the case by reason of the bias and prejudice of such judge. Section 170, subd. 4, Code Civ. Proc. The affidavit or affidavits must not only

state facts, but the facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice that will in all probability prevent him from dealing fairly with the defendant. We are unwilling to think that a trial judge would be prejudiced, within the meaning of the statute cited, against one on trial before him, on account of his successful candidacy for office against a relative of such judge.

The withdrawal of the consent to reduce bail without giving any reason therefor simply amounted to a refusal to reduce the bail. We cannot say that the bail was excessive, under all the circumstances of the case; and on the question under consideration no importance can be attached to the action of the court in this regard.

Insanity being set up as a defense, if the judge had wantonly and without any occasion for it announced in the presence of the jury that he had never had any doubt as to defendant's sanity, this might indicate that he was not disposed to give the defendant a fair trial. But the affidavit does not give us the full proceedings in reference to this matter. It does not state what was said by defendant's counsel in his opening statement or elsewhere to call forth any remark from the court as to the sanity of defendant. The exact language of court and counsel was undoubtedly taken down by the court reporter at the time, and this, or its substance, should have been presented at the hearing of the motion. In the absence of a showing to that effect, it will not be presumed that the court made the remark without any call for it. The only proper occasion, that occurs to us, that the court would have to announce that he never had any doubt as to defendant's sanity, would be in response to a suggestion on the part of defendant's attorney that his client was then insane, and a demand that the question of his then present sanity be tried before a jury called specially for that purpose in accordance with the provisions of section 1368 of the Penal Code. It would be no evidence of prejudice in the judge for him to declare, in response to a demand of this nature, that he had no doubt as to the sanity of defendant; and, if counsel desired that the declaration should not be made in the presence of the jury, he should not call for the ruling in their presence, but should request the court to direct them to retire.

As to the denial of a foreign subpoena, there is nothing in defendant's affidavit to show that he ever filed with the judge an affidavit, or took the requisite steps to entitle him to a foreign subpoena. Pen. Code, § 1330. A mere request was not sufficient to entitle the defendant to a foreign subpoena.

The other allegations of defendant's affidavit are not of sufficient importance to require special notice. We deem it sufficient under this head to say in conclusion that the statute (section 170, Code Civ. Proc.)

leaves the hearing upon a motion of this kind to the judge in whose court it is made, and consequently his decision on the questions of fact before him should be treated the same as the decision of a court on any other question of fact, and we can interfere with it on appeal only when it is plainly contrary to the evidence. After a careful consideration of the affidavits used on the hearing, we cannot say that the trial court was not warranted in denying the motion. *Higgins v. City of San Diego*, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209 (at page 312, 126 Cal., and page 703, 58 Pac.).

2. It appears that the Fidelity & Deposit Company of Maryland was surety on defendant's official bond as tax collector, and at the trial the prosecution introduced evidence in the way of checks and the indorsements thereon to show that said surety had paid to the county \$8,246.50, presumably on account of defendant's defalcation. The defendant objected to these checks as evidence on the ground that they were "incompetent, immaterial, and irrelevant for any purpose in the case." The prosecuting attorney said, "We will show its connection." The overruling of the objection is assigned as error. It appears subsequently in the trial that the expert accountants who figured out the the shortage in the tax collector's office found and testified that there was a shortage of \$3,040.49 after crediting the \$8,246.50 which was paid into the county treasury by the bond company. The defendant having been indicted for embezzling \$8,000, to prove the crime as charged it was proper to show how this item of \$8,246.50 got into the treasury, and that it was not paid in by the defendant. For this purpose, at least, the evidence objected to was pertinent and proper. But the defendant now urges that this evidence of transactions between third parties could not bind the defendant; and its admission must have raised a presumption in the minds of the jury that, because this money was paid in by the bond company, therefore the defendant was short in his accounts with the county. At the trial no objection of this nature was made. If such an objection had been made, it would have been in order for the court to limit the admission of the evidence to its legitimate purpose, and, in the absence of any request that it be in any way limited, on appeal the defendant cannot be heard to complain that it was not limited. The other exceptions of appellant to the rulings of the court in receiving and rejecting evidence are without merit, and are not of a nature to require further discussion.

3. The theory of the defense seems to have been that defendant was insane at the date of his alleged offense, November 18, 1898, and that such insanity was due, in part, at least, to a long-continued overindulgence in intoxicating liquors. Defendant's wife testified as follows: "During October and November, 1898, he would often bring home a

quart of liquor daily for days at a time, and he would frequently use a quart in one day. During July, 1898, he drank some liquor, but not so bad as in August; and in August, 1898, he drank less liquor than in October and November. After October 1, 1898, I do not think he was ever sober. Before he went away he had acted very strangely several days. His talk was silly, and he seemed to be in great mental distress. I was afraid he would carry out threats of suicide if not watched carefully." There was much other testimony given on behalf of defendant as to his drinking habits for many years before the date of the alleged crime, as well as immediately prior to said date. In this condition of the evidence the court instructed the jury as follows: "Settled insanity produced by a long-continued intoxication affects responsibility in the same way as insanity produced by any other cause. But it must be settled insanity, and not merely a temporary mental condition, produced by recent use of intoxicating liquor." "When temporary or spasmodic insanity is proved to have existed prior to the commission of a criminal act, there is no presumption of its continuance down to the specific time of the criminal act. To establish the basis of a presumption that insanity, once shown to have existed, continues to exist, it must appear to have been of such duration and character as to indicate the probability of its continuance, and not simply the possibility or even probability of its recurrence." The contention of defendant that these instructions were misleading, confusing, and inapplicable to any evidence in the case cannot be upheld. The first instruction quoted is copied from the opinion of the court in *People v. Travers*, 88 Cal., at page 239, 26 Pac. 91, and in speaking of it further in said opinion the court expressly approves of it as an instruction when there is evidence to which it will apply. In the case at bar it applies to the evidence already quoted. The second instruction quoted is equally free from error. The last sentence of it is quoted from *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204 (at page 54, 106 Cal., and page 206, 39 Pac.), wherein the principle set forth in the instruction is clearly approved. The instruction is also applicable to the facts presented in evidence on behalf of defendant.

It was proper for the court to give the instruction as to the law making it the duty of the tax collector to settle with the auditor on the first Monday of each month for all moneys collected, and to pay the same to the county treasurer. This instruction did not stand alone, but was accompanied by other instructions, one of which was to the effect that a felonious intent was a necessary element of the crime of embezzlement.

The rules as to the degree of proof required in criminal cases were fully stated in the instructions, and the doctrine of "reasonable doubt" was fully elucidated to the

jury. It was not necessary, therefore, that the court should give to the jury defendant's requested instruction No. 23, which reads as follows: "In weighing the evidence to determine whether there is a reasonable doubt as to the defendant's guilt, you have the right to consider that innocent men have been convicted, and to consider the danger of convicting innocent men." Besides, the instruction contains matter more appropriate to the argument of counsel than to the instructions of the court.

4. It is the settled law of this state that the verdict of a jury cannot be impeached by the affidavits of jurors showing misconduct on the part of any member of the jury, except where the verdict is reached "by a resort to the determination of chance." Section 657, Code Civ. Proc. Nor can a verdict be impeached by the hearsay statements of jurors regarding such misconduct. *People v. Azoff*, 105 Cal. 632, 39 Pac. 59. It is equally clear that defendant's affidavit as to the misconduct of the jury, based, as it is, solely on information and belief, is entitled to no weight. There was no competent or proper evidence of misconduct of the jury laid before the court, and the court very properly refused to grant a new trial. The judgment should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

132 Cal. 342

BOWERS' CALIFORNIA DREDGING CO.
v. SAN FRANCISCO BRIDGE CO.
(S. F. 1,722-1,724, 2,888-2,291.)

(Supreme Court of California. March 26, 1901.)

CONTRACTS—CONDITIONS PRECEDENT—PLEADINGS—EVIDENCE—JUDGMENT—APPEAL—PRESUMPTIONS.

1. Where a complaint alleges a written contract with defendant containing certain specified conditions, plaintiff's performance of the conditions and defendant's default, the written agreement is admissible in evidence, though it contain conditions not alleged, but not inconsistent with the allegations, over defendant's objection that it is not in accordance with the complaint, and at variance therewith, since such additional conditions do not constitute a variance, but should be disregarded.

2. Where the contract recites that plaintiff is the owner of the right to use a certain patent for dredging machines, and "hereby grants" an exclusive license to defendant to use such patents in certain government work if defendant obtains the contract, for a certain consideration, which defendant agreed to pay, in a suit to recover such consideration after defendant had performed the work, using such machines, plaintiff need not prove that it owned the patents, since the acceptance of the grant by defendant was an admission of plaintiff's title and right to make the grant, and, if defendant claimed that nothing passed thereby, it must establish that fact.

3. Where plaintiff, in consideration of certain

payments, promised by defendant, granted to defendant licenses to use certain patents in the prosecution of certain dredging for the government, and also the right to use a dredging machine of which plaintiff was half owner, if defendant obtained the consent of the other joint owner the obtaining such consent by defendant and use of such machine were not conditions precedent to plaintiff's right to recover such payments.

4. Where an issue was tried before the court, and findings were waived, and there was no bill of exceptions, it must be assumed on appeal that the evidence was sufficient to sustain the judgment.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Bowers' California Dredging Company against the San Francisco Bridge Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

R. Percy Wright, for appellant. Albert C. Aiken, for respondent.

HARRISON, J. The parties hereto entered into a written agreement July 21, 1897, wherein, after reciting, among other matters, that the plaintiff was the owner of the right to use certain patents in the state of California, and was also the owner of a one-half interest in a dredging machine, the defendant agreed that, if it should secure from the United States government a certain contract for dredging at Mare Island, or if its dredging machine should be used on said work, it would pay to the plaintiff 7 per cent. of the total gross amount paid by the government for the work on said contract, said payments to be made monthly within five days after the defendant should receive its monthly estimates on account of said contract. Immediately following the above agreement on the part of the defendant was the following: "In consideration of said agreement to pay the amount and in the manner above specified, and the further consideration of one dollar to it in hand paid, the receipt of which is hereby acknowledged, the party of the second part hereby grants an exclusive license to the party of the first part to use the aforesaid patents, or any or all of them, on said dredging, and further agrees to give to it the free use on said contract of its one-half interest in the certain Von Schmidt dredging machine hereinbefore mentioned, until the completion of said contract, provided the other half can be obtained from A. W. Von Schmidt; it being understood that the party of the first part, if it desires to use said Von Schmidt machine, must, at its own expense, arrange for the use of the other one-half interest of said dredger with A. W. Von Schmidt." The defendant thereafter obtained from the government the dredging contract referred to in the agreement, and performed the dredging required thereby, and employed on said work the dredging machine referred to in said agreement, and received from the govern-

ment monthly payments on account of said contract, but did not pay to the plaintiff any of the sums agreed by it to be paid. The plaintiff has brought the present actions for the recovery of these several monthly payments. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

In the appeals numbered as above, 1722, 1723, and 1724, the complaints alleged the execution of the contract between the parties; that the defendant had obtained the contract from the government; that it had received certain amounts from the government for the work done under the contract, and had not paid any part thereof to the plaintiff. The defendant answered the complaint, and denied therein that the government had paid it any sum of money whatever, and the cause was tried upon this issue. At the trial the plaintiff offered the written agreement in evidence, to which the defendant objected upon the ground that it is not in accordance with the allegations of the complaint, and is at variance with the contract therein alleged, and on the further ground that it was irrelevant, immaterial, and incompetent. The court overruled the objection, and admitted the instrument in evidence, and the defendant excepted thereto. The plaintiff also offered evidence in support of its allegation that the government had made the payments to the defendant, and rested. The defendant then moved for a nonsuit upon the grounds that there was no evidence that the plaintiff had ever fulfilled the conditions of the contract alleged in the complaint; nor any evidence that it had ever granted to the defendant a license for the use of any patent; nor any evidence that it ever owned any patent, or any interest therein, or ever had any authority to grant a license for its use. The motion for a nonsuit was denied. No evidence was offered by the defendant, and the case was submitted to the jury, who rendered a verdict in favor of the plaintiff. From the judgment entered thereon, and from an order denying a new trial, the defendant has appealed.

1. The agreement between the parties was properly admitted in evidence. Although it contained matters which were not included in the complaint, it contained evidence both relevant and material in support of the allegations therein. To the extent that it tended to establish these allegations, there was no variance. No objection was made by the defendant on the ground that it contained other matters than those which were relevant to the allegations in the complaint. If the defendant had desired to exclude them from consideration, he should have so requested when the instrument was offered in evidence, and the court would have limited it accordingly. It does not appear that they were in any respect considered by the jury.

2. The agreement does not contain any condition precedent to be performed by the plaintiff before it became entitled to receive

the money which the defendant agreed to pay to it. By its terms the plaintiff "hereby grants an exclusive license to the defendant to use the patents referred to." This was a present grant, and was made in consideration of the previous agreement on the part of the defendant, and was in no respect executory, but became effective at the execution of the instrument. It cannot be held that the grant thus made was ineffective merely because the parties had recited in a previous part of the agreement that the plaintiff was the owner of the right to use the patents. Such recital was not inconsistent with its right to grant a license for such use to another, and there is no presumption that the plaintiff did not have such right. The acceptance of the grant from the plaintiff was an admission by the defendant of the plaintiff's title and right to make the grant. If it would claim that nothing passed thereby, it was incumbent upon it to establish that fact by competent evidence. Neither was the agreement by the plaintiff to give to the defendant the free use of its interest in the Von Schmidt dredging machine a condition precedent to the right to receive the percentage. This was an executory covenant on the part of the plaintiff, and its performance was conditioned upon the defendant obtaining from Von Schmidt the right to use the machine. The plaintiff would not be in default upon this covenant except it should fail to comply therewith after the defendant had obtained Von Schmidt's consent. The defendant could not put the plaintiff in default until this preliminary condition on its part had been performed, and such performance must be affirmatively shown by it. As the performance of this covenant on the part of the plaintiff was not a condition precedent, a failure to perform it might give to the defendant a cause of action, but would not prevent the plaintiff from enforcing its claim against the defendant.

3. In the appeals numbered as above, 2288, 2289, 2290, and 2291, the agreement is set forth at length in the complaints, and its sufficiency is raised by demurrer thereto, upon the ground that no cause of action is stated; but under the construction given above to the terms of the agreement it must be held that a cause of action in favor of the plaintiff is sufficiently stated. In its answers in these cases the defendant denied that the plaintiff had granted to it any license to use the patents. The issues thus presented were tried before the court, and judgments rendered in favor of the plaintiff. Findings were waived, and there is no bill of exceptions in the record. In the absence of the evidence which was offered at the trial, it must be assumed that it was sufficient to sustain the judgments. The judgments and the orders denying a new trial are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(132 Cal. 340)

CITY OF LOS ANGELES v. POMEROY et al.
(L. A. 831.)

(Supreme Court of California. March 25, 1901.)

EMINENT DOMAIN—CONDEMNATION OF PROPERTY—FINAL ORDER—APPEAL—STAY.

1. A final order for the condemnation of land, made after an alleged payment of damages awarded therefor, is a special order after a final judgment, from which an appeal may be taken under Code Civ. Proc. § 939, subd. 3.

2. The giving of a bond on an appeal, under Code Civ. Proc. § 941, from a final order for the condemnation of land, made after an alleged payment of damages therefor, stops all proceedings thereunder till the appeal is determined.

In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Proceedings by the city of Los Angeles against A. E. Pomeroy and another for the condemnation of property. From a final order of condemnation, defendants appeal. Application by defendants for a stay of proceedings pending the appeal. Stay granted.

R. H. F. Variel, John Garber, John G. North, and J. S. Chapman, for appellants. W. B. Matthews and Lee & Scott, for respondents.

PER CURIAM. The plaintiff brought this action to condemn the lands described in the complaint for the purpose of constructing head works for its domestic water supply. Such proceedings were had that a judgment of condemnation was made and entered in April, 1896, in favor of plaintiff, and awarding defendants the sum of \$25,000 as damages for the land. Upon appeal this judgment was affirmed by this court. 124 Cal. 597, 57 Pac. 585. Upon the remittitur being sent to the court below, plaintiff made a motion for a final order of condemnation, alleging that the damages and costs awarded to defendants had been fully paid. This motion was supported by affidavits on behalf of plaintiff. Defendants opposed the motion, claiming that the amount of damages had not been paid. At the same time, defendants asked leave to file affidavits in opposition to the motion, and to be permitted to file a motion to set aside the judgment and decree that had been entered. The court refused to hear defendants' motion, or to receive or hear the affidavits in opposition to plaintiff's motion. Thereupon, on the 12th day of July, 1899, the court made an order that a final order of condemnation be entered as prayed for, and as provided in Code Civ. Proc. § 1253, which order was accordingly entered. This was a special order made after final judgment. California S. R. Co. v. Southern Pac. R. Co., 67 Cal. 63, 7 Pac. 123. It was appealable. Code Civ. Proc. § 939, subd. 3. Within due time defendants appealed to this court from the said order, and gave an undertaking in due form in the sum of \$300, which appeal is now pending.

The defendants claim that the court erred

in making the final order without allowing them to offer evidence as to the fact of the damages not having been paid, and they claim that the judge was disqualified, and therefore had no authority to make the order. As these matters go to the merits of the appeal, they need not be here discussed.

This is an application for a writ of superseas. The undertaking mentioned in section 941, Code Civ. Proc., stays all proceedings in the court below upon the order appealed from, except in those cases specified in sections 942-945, 949. The order appealed from is not one of the cases mentioned in either of said sections. The undertaking, therefore, stayed all proceedings. Code Civ. Proc. § 946; *In re Woods' Estate*, 94 Cal. 567, 29 Pac. 1108; *Root v. Bryant*, 54 Cal. 183.

The motion for a stay of proceedings is granted, and the plaintiff is restrained from using the lands described in the complaint, and constructing head works for its water system thereon, pending this appeal, and until the final termination thereof.

(132 Cal. 334)

PEOPLE v. COL. (S. F. 2,657.)¹

(Supreme Court of California. March 25, 1901.)

ELECTIONS—COUNTY OFFICES—VACANCIES—APPOINTMENT TO FILL—UNEXPIRED TERM—NEXT GENERAL ELECTION—GUBERNATORIAL ELECTION—ELECTION AT IMPROPER TIME.

1. Acts 1897 (St. 1897, p. 474) § 58, provides that all elective county officers shall be elected at the general election at which the governor is elected, and shall take office in January next succeeding their election. Section 25, subd. 19, authorizes the board of supervisors to fill by appointment all vacancies that may occur in any elective county office; the appointee to hold office for the unexpired term, or until the next general election. *Held*, that the words "next general election" mean the next general election for the particular office so filled by appointment, and one appointed by the board of supervisors to fill a vacancy in the office of county auditor is entitled to that office till the next gubernatorial election.

2. Under Acts 1897 (St. 1897, p. 474) § 58, declaring that all elective county officers shall be elected at the time of the gubernatorial election, an election of a person at another time to fill the office of county auditor for the unexpired term of a former auditor was void, in the absence of other statutory provision for the election of county officers, and could not oust one regularly appointed to fill such vacancy.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; A. L. Rhodes, Judge.

Action by the people of the state of California, on the complaint of Martin Murphy, against Al. G. Col. From a judgment in favor of plaintiff, defendant appeals. Reversed.

S. F. Leib, for appellant. Atty. Gen. Ford and D. W. Burchard, for respondent.

COOPER, C. This appeal is from a judgment declaring the relator, Murphy, county

¹ Rehearing denied April 22, 1901.

auditor of Santa Clara county. At the general election held in November, 1898, one Veuve was elected county auditor of Santa Clara county for the ensuing term. On August 6, 1900, Veuve having died, and the office being vacant, the defendant was duly appointed by the board of supervisors to fill such vacancy, and qualified and entered upon the discharge of his duties. On October 22, 1900, the said board made an order and issued a proclamation that at the election to be held in November, 1900, an auditor of said county be elected to fill the unexpired term of Veuve. At the November election in 1900 the relator received a majority of all the votes cast for said office, and the question as to whether or not he is now county auditor of said county depends upon the questions as to whether there was a vacancy in the office at the time of his election, and whether the election was authorized by law. The principal, if not the only, question that need be discussed is as to whether the term of defendant under his appointment expired at the November election, 1900. It is provided in the county government act of 1897 (St. 1897, p. 474, § 58) that all elective county officers (with certain exceptions) "shall be elected at the general election at which the governor is elected, and shall take office at twelve o'clock meridian on the first Monday after the first day of January next succeeding their election. All officers elected under the provisions of this act shall hold office until their successors are elected or appointed and qualified." The official term of Veuve, if he had lived, would therefore not have expired until the first Monday after the first day of January, 1903. His successor would have been elected at the "general election at which the governor is elected" in November, 1902. When the vacancy occurred the board of supervisors had the power to appoint defendant to fill it; and the question is as to the term of the defendant after having been so appointed. The said county government act provides, in subdivision 19 of section 25, that the board shall have power "to fill, by appointment, all vacancies that may occur in any office filled by the appointment of the board of supervisors and elective county or township officers, except in those of judge of the superior court and supervisor, the appointee to hold office for the unexpired term or until the next general election." Id. p. 463. What is meant by "the next general election"? The section specifies the unexpired term or the next general election as the extent of time to which the appointee shall hold. If the sentence had omitted the words "or until the next general election," it would be plain as to its intent. It is provided in section 17 of the same act that, when the governor appoints a member of the board of supervisors to fill a vacancy, "in such case the election of a supervisor shall be held at the next general election to fill

the vacancy for the unexpired term." The constitution provides that, in case a vacancy occurs in the office of superior judge, the governor shall appoint the appointee to hold until the election and qualification of a judge to fill the vacancy, "which election shall take place at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term."

The meaning of the county government act, as to filling the office of supervisor for the unexpired term by election, and of the constitution, as to filling the office of judge of a superior court for the unexpired term by election, is plain. The county government act of 1883 and the county government act of 1893 each provided that, in case of vacancies in county offices filled by appointment by the board of supervisors, the appointee "shall hold for the unexpired term." We think the phrase "next general election," used in subdivision 19, § 25, refers to the general election for filling the particular office to which the person is appointed, or, in other words, to the general election provided for as to all the county officers in section 58. This was plainly the intent of the legislature, for in the very same act express provision is made in section 17 for filling the unexpired term of a supervisor by election at the next general election. There is no provision in the act for filling the unexpired term of any other county officer by election. We cannot believe that, if the legislature had intended to provide for filling the unexpired term of all county officers at the next general election, it would have made express provision for such election as to supervisors, and not as to any other county officer. Section 58 says, "All elective county and township officers, and city justices of the peace, except otherwise provided for in this act, shall be elected at the general election at which the governor is elected." The auditor of Santa Clara is an elective county officer. There is no other provision in the act for the election of such county officer. The logical conclusion would be that, when the words "until the next general election" were used, reference was made to the general election referred to and provided for in section 58. It is claimed that the construction herein given leaves the words "for the unexpired term" without meaning. If "the unexpired term" and "the next general election" refer to precisely the same period of time, it was not necessary to use both expressions. But there may arise cases in which the unexpired term would not mean until the next general election. In cases where the board of supervisors have the sole right to fill an office by appointment, such as county physician or game warden, in case of vacancy the appointee might hold until the expiration of the term only. So after a general election for county officers in November the newly-elected officers do not take

office until the first Monday after the 1st day of January following. A vacancy might occur after the election, and before the beginning of the term of the newly-elected official. In such case the appointee would only hold for the unexpired term.

We think the case of *People v. Budd*, 114 Cal. 170, 45 Pac. 1060, 34 L.R. A. 46, is directly in point, and conclusive of this case. There the elected lieutenant governor, Millard, died soon after his election, and the governor appointed William T. Jeter to fill the vacancy. It was sought, by writ of mandate, to compel the governor to include in his election proclamation for the coming election of 1896 the office of lieutenant governor for the unexpired term of Millard. The provision of the constitution as to the commission of the governor in filling the vacancy by appointment states that the commission "shall expire at the end of the next legislature, or at the next election by the people." In the opinion it is said: "An office has become vacant, and there is no other mode provided by the constitution or laws to fill it. 'The next election by the people' does not mean the next general election, or the next election held by the people, but it must mean that the appointee shall hold until some one has been elected to fill that office. * * * If, however, the phrase 'the next election by the people' is equivalent to the phrase 'the next election,' and we assume that it was intended thereby to indicate the election at which such vacancy would be filled, we would feel compelled to hold that the next election is that which the constitution has provided for filling that particular office; that is, the next gubernatorial election." The above decision was rendered prior to the election of the legislature that prepared the county government act of 1897. We must presume that the legislature and its judiciary committee knew of the interpretation given by this court to the phrase "the next election by the people" when they used the words "until the next general election." The same legislature had provided for the time of holding the general election for all county officers. Where it used the phrase "until the next general election," it meant the next general election for county officers for which it had made provision. The construction in *People v. Budd* and that herein given is in accord with the rule in other jurisdictions. In *People v. Wilson*, 72 N. C. 157, the governor had appointed to fill a vacancy in the office of judge of the Eighth judicial district. The language of the constitution of the state provided that in case of such appointment "the appointees shall hold their places until the next regular election." The supreme court, after a careful consideration of the question, said that the meaning was, "The appointees shall hold their places until the next regular election for the office in which a vacancy has occurred." In *State v. Philips*, 30 Fla. 590, 11 South. 922, in which the title to a municipal

office was involved, the charter provided that the city council might appoint to fill all vacancies "until the next regular election." The court, in construing the phrase, said: "When it is declared that the city council shall fill vacancies until the next regular election, it means until the next regular election provided by the charter for electing the officer whose term has become vacant." In *Matthews v. Commissioners*, 34 Kan. 607, 9 Pac. 765, the governor had appointed one Webb as judge of the superior court. The constitution of the state provided that in case of such appointment the appointee shall hold "until the next regular election that shall occur more than thirty days after such vacancy shall have happened." The court in the opinion said: "In the case of *State v. Cobb*, 2 Kan. 32, 54, 55, it is held that the exact literal signification of the phrase 'next regular election' is the next election held conformable to established rule or law, and that the next regular election is the one next occurring at which the particular class of judicial officers is to be chosen. These definitions we think correct." To the same effect are *State v. Gardner*, 3 S. D. 553, 54 N. W. 606; *State v. Cobb*, 2 Kan. 32. The case of *People v. Babcock*, 123 Cal. 308, 55 Pac. 1017, is not in conflict with what has been said. In that case section 14 of the consolidation act contained the clause, "In case of a vacancy in the office of superintendent, the board of education may appoint a person to fill the vacancy until the regular election then next following when the office shall be filled by election of the people." St. 1863, p. 605. In construing the above clause this court correctly held that it was not in the contemplation of the legislative mind that the appointee of the board of education should hold for the remainder of the unexpired term after a general election.

The judgment in this case must be reversed for another reason. There is no provision, other than in section 58, for electing a county auditor. The election was not the election at which the governor was elected. If the office of defendant expired at the general election held in November, 1900, that did not, in the absence of other authority, authorize an election to fill the office. *People v. Budd*, supra; *Same v. Mathewson*, 47 Cal. 446; *Sawyer v. Haydon*, 1 Nev. 75. It follows that the judgment should be reversed, and the court below directed to enter judgment upon the findings in favor of defendant, and that he is rightfully entitled to the office of auditor, and is the auditor of Santa Clara county.

We concur: CHIPMAN, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to enter judgment upon the findings in favor of defendant, and that he is rightfully entitled

to the office of auditor and is the auditor of Santa Clara county.

GAROUTTE, J. I concur in the judgment upon the second ground stated.

(132 Cal. 21)

BARKER v. HURLEY et al. (S. F. 2,332.) (Supreme Court of California. March 28, 1901.)

In bank. Modified.

For opinion in department, see 63 Pac. 1071.

PER CURIAM. The judgment heretofore rendered herein is modified by striking therefrom the words, "with direction to the lower court to dismiss the action."

(132 Cal. 363)

PUCKHABER et ux. v. SOUTHERN PAC. CO. (Sac. 633.)¹

(Supreme Court of California. April 2, 1901.)

RAILROADS—ACCIDENT ON TRACK—NEGLIGENCE OF COMPANY—PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE—PRESUMPTIONS.

The mutilated body of plaintiff's intestate, who was a stranger in the village in which he was killed, was found on a side track in defendant's yard, near the body of another stranger, on a certain morning, and it was shown that an engine of defendant had backed over such track, without a light on the tender, at about 5 o'clock on the same morning. There were no eyewitnesses of the accident. Held not sufficient to show that defendant's negligence was the proximate cause of the death of deceased.

In bank. Appeal from superior court, Placer county; J. E. Prewitt, Judge.

Action by Herman F. Puckhaber and another against the Southern Pacific Company for the negligent killing of plaintiffs' son. From a judgment in favor of the plaintiffs, the defendant appeals. Reversed.

John M. Fulweiler and Foshay Walker, for appellant. Henley & Costello and Pullen & Wallace, for respondents.

GAROUTTE, J. This is an action for damages by the parents, based upon the death of a son, alleged to have been caused by the negligence of defendant. The facts of the case are of the most meager character. Upon a dark and foggy morning, about half-past 5 o'clock, the mutilated dead body of this young man, a total stranger in the village, was found lying upon a side track in the railroad yards of defendant, at Rocklin. His body was discovered near the dead body of another man, also a stranger to the village. There were no witnesses to any accident. It is claimed by plaintiffs that deceased was killed by a backing engine and tender, which passed over the particular spot to the roundhouse about 5 o'clock of the same morning. The negligence of defendant is then claimed to be established by showing

that the tender of this engine had no light upon the rear end thereof. It thus appears that the case in its facts is the merest skeleton; and inference, presumption, and conjecture necessarily play a prominent part in the search for evidence sufficient to support the verdict for plaintiffs.

For present purposes, it will be conceded that the aforesaid engine and tender in backing to the roundhouse caused the death of deceased. It will be further conceded that defendant was guilty of negligence in backing this engine and tender to the roundhouse without a light upon the rear end thereof. Yet, after making these concessions, the case is still too weak to support a verdict and judgment. This is so, for the reason that there is a total lack of evidence showing any causal connection between the absence of a light upon the tender and the death of the deceased. It is a basic element in every right of recovery that a defendant's negligence must contribute to the injury,—must be the approximate cause of the injury. By proving defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out. This is true, even though it be assumed that the law of this state is to the effect that in the absence of evidence upon the subject it will not be presumed that deceased was guilty of negligence; for, conceding negligence of defendant in the abstract was shown, and no negligence upon the part of deceased was shown, still a case may have arisen of *damnum absque injuria*. If the negligence of defendant in omitting to carry a light be simply abstract negligence,—that is, negligence having no relation whatever to the injury done,—then such negligence is a matter foreign to any issue in the case. And unless the negligence is connected with the injury the case stands exactly as if no negligence had been proven. Plaintiffs insist that the jury had a legal right to infer as a fact that the absence of the light upon the tender was the cause of the death. While, as before suggested, it may not be presumed against deceased that he became drunken and slept upon the track, or deliberately stood upon the track in front of the backing engine, the laws of self-preservation denying any inference of such conduct upon his part, still, as is said in some of the cases, the deceased may have fallen insensible upon the track in a fit, and thus have been killed without fault upon his part, and under such circumstances that the absence of the light in no way tended to his death. Tested by this illustration, a dozen lights upon the tender would not have saved his life. Neither do we consider the fact that another man was killed at the same time sufficient evidence to create a presumption that the want of the light upon the tender was the approximate cause of death. To this point it may be said there is not a scintilla of evidence that the other man was

possessed of a single one of the five senses. It follows, therefore, that there is an absolute dearth of evidence to the point that the absence of the light upon the tender added the weight of a hair to the cause which occasioned the young man's death. No inference of fact justified by the law declares that the want of a light had any connection with the cause of death. It would be a guess pure and simple upon the part of the jury to so find as a fact, and a verdict and judgment cannot rest upon a foundation created upon a guess. It is as necessary for the plaintiffs to show that defendant's negligence caused the injury as it is for them to show that defendant was guilty of negligence or that the party was injured.

While there appears to be no authority in this state upon the question just discussed, we find authority elsewhere directly to the point. In *Welsh v. Railway Co.*, 181 Pa. 461, 37 Atl. 513, in discussing this principle, the court said: "Assuming, then, as to the general public, that the company was negligent in not operating the gates at night, or in not maintaining a flagman at night, or in not keeping a sufficient light, this negligence must be so connected with the injury to deceased as to afford a presumption that the negligence caused the injury. But how can we presume the negligence caused the injury when there is no necessary connection between the alleged negligence and the injury? * * * In this case the jury were permitted to presume negligence on the part of defendant, then to presume that deceased was lawfully on the railroad track, and then to still further presume that defendant's negligence caused his death. The plaintiff was bound, not only to prove negligence as to the general public using the crossing, but to go further, and show that this negligence was the proximate cause of a particular individual's death, or, as in this case, of Welsh's death. A presumption must be based on a fact or facts, not on a presumption." In *Railroad Co. v. Schertle*, 97 Pa. 450, it is said: "There was not a particle of proof that either the track or step had anything to do with his death. For aught that appears, he may have fallen in a fit, or for some cause wholly disconnected from either. The case was submitted to the jury without evidence, and the verdict has no better foundation than a guess." In *Stringert v. Ross Tp.* (Pa. Sup.) 36 Atl. 345, we find the court using the following language: "But, in order to recover, it must be further shown that the negligence of the defendant in this regard was the producing cause of the death. If, taking all the facts together, a justifiable inference could be drawn that the negligent condition of the road was the cause of the death, then there was enough to carry the case to the jury. * * * Now, if all these things had been proven by testimony, there would have been sufficient evidence to carry the case to the

jury, because a verdict could then be founded upon proof, and not upon mere inference. But there was no testimony upon any of these subjects, and the question then arises whether the inference that the death was caused by the negligence of the defendant is the only inference that can be drawn from the facts that are in evidence. If it is not, and other inferences may be drawn from the same facts, then there is nothing for the jury but mere guesses or conjectures, and upon these no verdict can be founded."

Section 1835 of the Code of Civil Procedure declares: "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence." The evidence in this case upon the point under discussion falls far short of filling the measure furnished by this section of the Code. Here there is not even slight evidence that the absence of the light to any degree contributed to the death of deceased. For a jury to so declare could only be done by the indulgence of the merest conjecture. It would be a guess upon the part of the jurors, and would not rise to the dignity of an inference.

In arriving at the conclusion declared, the court has considered but one branch of the evidence; the remaining branches of it, going to establish other elements of the case, are afflicted with almost the same degree of weakness. The only theory advanced by plaintiffs in their brief as to the circumstances surrounding the death, is as follows: "The only rational explanation of the simultaneous killing of these two men is that this monster engine of death, bearing no light and giving no warning of its approach, suddenly came down upon them in the darkness, and ground them into fragments, while they were on their way to become passengers on the train of defendant then preparing to move out of the depot." It may be suggested that we find no word of evidence in the record indicating, directly or indirectly, that these two men contemplated being passengers on defendant's train. For the foregoing reasons, the judgment and order are reversed.

We concur: McFARLAND, J.; VAN DYKE, J.; HARRISON, J.; HENSHAW, J.

132 Cal. 326

PEOPLE v. METHEVER. (Cr. 639.)

(Supreme Court of California. March 25, 1901.)

HOMICIDE—INSANITY—DELIRIUM TREMENS—INSTRUCTIONS—EVIDENCE OF DRUNKENNESS—ADMISSIBILITY—DEGREE OF INSANITY—HARMLESS ERROR.

1. Pen. Code, § 26, subd. 5, providing that persons committing a crime without being conscious thereof shall not be responsible, applies to cases of somnambulism and the like, and not

to a defense, in a trial for murder, of insanity induced by delirium tremens.

2. A charge that an insane person was incapable of committing crime, and that if the jury were satisfied beyond a reasonable doubt that defendant, when he killed deceased, was either a lunatic or an insane person, he should be acquitted, was properly modified by eliminating the words, "beyond a reasonable doubt."

3. Where defendant, who was charged with murder, pleaded insanity as a defense, it was proper, in a charge respecting the responsibility of insane persons, to insert after the words "insane persons" the words "as 'insanity' is defined in these instructions."

4. A charge that the plea of insanity is sometimes resorted to where aggravated crimes have been committed under circumstances which render hopeless all other means of evading punishment, and while such proof, when satisfactorily established, should be viewed as a full and complete defense, yet it should be examined into with great care, while not prejudicial to defendant, is purely abstract, and should not have been given.

5. Where there was no evidence that defendant was drunk when he committed the murder, an instruction as to the effect of drunkenness, while unnecessary, was not prejudicial to defendant.

6. Under Pen. Code, § 22, providing that no act committed by a person while in a state of voluntary intoxication is less criminal therefor, but whenever the actual existence of any particular motive is a necessary element to constitute any particular degree of crime the jury may consider the fact that accused was drunk at the time, it is proper to charge in a trial for murder that evidence of drunkenness can only be considered for the purpose of determining the degree of crime.

7. Where defendant pleaded insanity as an excuse for the crime, an instruction that if defendant's mind was so affected that he had not sufficient will power to abstain from killing the deceased he should be found not guilty was properly refused.

8. An instruction that the value of the testimony of defendant's expert witnesses depended largely on the truth or falsity of the facts given them, while unnecessary, and not involving any principle of law, was not prejudicial to defendant.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

E. V. Methaver was convicted of murder, and he appeals. Affirmed.

Davis & Morrison, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant has been convicted of murder, and the death penalty adjudged. The homicide occurred at the village of Long Beach, Los Angeles county, July 25, 1899. Dorothy McKee, an attractive young woman of about 24 years of age, lived with her mother in a small house, and they were engaged in conducting a bakery business in the front part thereof. This house was divided by a partition, and in the other part lived the defendant, who there carried on a small shoe-store business, and as a cobbler worked at his trade. The relations between these three people were of the most friendly character. Defendant received his food from the table of the McKees, and their daily intercourse was continuous. On the morning of July 25th, Dorothy McKee and a friend,

Mrs. Scudder, went for a bicycle ride at about 6 o'clock. Soon thereafter defendant mounted his bicycle, followed the course the two women had taken, and, meeting them returning, directed his bicycle against that of deceased, Dorothy, and the moment both were dismounted he fired either two or three pistol shots at her, which resulted in her immediate death. He then inflicted a serious wound upon himself by a shot from the same pistol. The defendant relied upon the plea of insanity, claiming that this insanity arose from several serious injuries received upon his head during the course of his past life, conjoined with an attack of delirium tremens, which he claims actually encompassed him at the time of the killing. There is but little evidence to support this claim. Indeed, there is hardly a circumstance to support the claim of delirium tremens, aside from defendant's own testimony, while the evidence to the contrary is almost overwhelming. Under this state of the case, it is most unfortunate if the penalty of the law for this otherwise most cruel murder cannot be promptly administered upon defendant. His reliance upon this appeal for an order giving him a second trial is based largely upon exceptions taken to the rulings of the trial court in the giving and refusing of certain instructions bearing upon the law of the case.

The court gave this instruction as modified: "The jury are instructed that the following persons, among others, are not capable of committing crime under the laws of the state of California: Lunatics and insane persons, *persons who commit the act charged without being conscious thereof, persons who commit the act charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence*; and if the jury are satisfied beyond a reasonable doubt by the evidence in this case that the defendant, when he killed the deceased, was either a lunatic or an insane person, [as 'insanity' is defined in these instructions], *or was not conscious of the act when he committed it, or that the same was committed from misfortune or by accident, and it also appears that there was no evil design, intention, or culpable negligence on the part of the defendant*, then the jury must acquit the defendant." The modification made by the court consisted—First, in eliminating all that portion of the instruction which we have identified as being in italics; and, second, by inserting that portion thereof as appearing in brackets.

The major part of the elimination is composed of portions of section 26 of the Penal Code, which section, among other matters, provides: "All persons are capable of committing crimes except those belonging to the following classes: * * * (2) Idiots; (3) lunatics and insane persons; * * * (5) persons who committed the act charged without

being conscious thereof; (6) persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence."

There is no claim whatever in this case that subdivision 6 of the section has any application, so we pass that portion of the elimination without comment. There is a claim that subdivision 5 has an application to this case, yet the court is fully satisfied that it has not. Section 21 of the Penal Code declares: "All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity;" and the court is entirely convinced that subdivision 5, § 26, does not contemplate cases of unsound mind,—that is, cases of idiots, lunatics, and insane persons,—but, upon the contrary, only contemplates cases of persons of sound mind, as, for example, somnambulists, or persons suffering with delirium from fever or drugs. There is no claim of the existence of any such conditions here, and if the claim were made there is an absolute dearth of evidence to support it. There is no reason why subdivision 5 should be given any broader construction; for, as to persons afflicted with unsound minds, subdivisions 2 and 3 include them all.

It may be further suggested, in answer to the claim that the defendant did the act while unconscious thereof by reason of his insanity, that instructions covering every phase of the question of insanity, including that of delirium tremens, were presented to the jury; instructions of which no complaint is here made; and, where the defense is insanity, that is all the defendant is entitled to at the hands of the court. If the law excuses him for his acts under these circumstances, it is not by reason of his unconsciousness at the time the act is committed, but by reason of his insanity. Delirium tremens is but a phase or kind of insanity. If defendant was unconscious at the time he committed the act, he was only unconscious by reason of his delirium tremens; that is, by reason of his insanity.

The elimination of the words, "beyond a reasonable doubt," was clearly proper, as the law does not demand that measure of proof in order that insanity may be established; and, in addition thereto, it may be further said that the elimination of this language from the instruction was strongly favorable to defendant. The language inserted by the court, as indicated by the brackets, was properly inserted.

The following instruction is assailed by appellant's counsel: "In prosecutions for crimes, defense of insanity is often interposed, and thereby becomes a subject of paramount importance in criminal jurisprudence. A due regard for the ends of justice and the peace and welfare of society, no less than mercy to the accused, require that it should be thoroughly and carefully

weighed. It is a plea sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While, therefore, it ought to be viewed as a not less full and complete, than it is a humane, defense, when satisfactorily established, yet it should be examined into with great care, lest an ingenious counterfeit of the malady furnish protection to guilt." While the statements contained in this instruction are true as historical facts, there is but little law involved in them. And, while we see no legal reason why the information therein contained should be given to the jury in the court's charge, yet, upon an examination of these statements, we find them made purely and entirely in the abstract. They are not directed towards the defendant and his case, and, assuming the jury to be an intelligent body of men, the instruction could have done him no prejudice. Yet in view of the later decisions of this court, wherein the rights of a defendant to have the facts of his case passed upon by the jury alone have been most zealously protected, and where argumentative instructions have been condemned, we would suggest that in the future this instruction be not given. At the same time it has been given so often in the past and approved by this court that it will not now be held prejudicially erroneous. In *People v. Dennis*, 39 Cal. 636, this instruction was carefully considered, and the court there said: "We are satisfied that the instruction as given was entirely proper, under the circumstances developed by the evidence in this case." We find the decision there laid down followed in *People v. Bumberger*, 45 Cal. 650; *People v. Pico*, 62 Cal. 55; *People v. Larrabee*, 115 Cal. 159, 42 Pac. 922; *People v. McCarthy*, 115 Cal. 264, 46 Pac. 1073; *People v. Allender*, 117 Cal. 83, 48 Pac. 1014.

The court instructed the jury: "It is a well-settled rule that drunkenness is no excuse for the commission of crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for, when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution." We are at a loss to understand why instructions as to drunkenness were given to the jury in this case. Upon examination of the record, we find no evidence whatever tending to indicate that defendant was intoxicated when he killed this young woman. No one had seen

him take a single drop of intoxicating liquor. No one testified that he looked like a drunken man, or acted like one. He rode his bicycle for a considerable distance immediately prior to the killing. He himself testifies that he had entirely abstained from liquor for a period of five days prior to the killing. Indeed, the whole theory of his defense is that he was afflicted with delirium tremens at the time of the killing, induced by his total abstinence from liquor for the previous five days. As against this evidence, we have the testimony alone of various parties to the effect that, immediately after the homicide, defendant's breath smelled of liquor. Upon this state of facts, there was no question of present intoxication in the case at the time of the homicide, and therefore no instructions to the jury upon the matter of drunkenness were demanded. Hence the law here involved contained abstract propositions; but, whether the instruction was legally sound or unsound upon its face, it shows that no injury resulted to defendant from the giving of it. It may be further added that this instruction has repeatedly met the approval of this court. *People v. Lewis*, 36 Cal. 533; *People v. Williams*, 43 Cal. 352; *People v. Ferris*, 55 Cal. 592; *People v. Jones*, 63 Cal. 169; *People v. Vincent*, 95 Cal. 428, 30 Pac. 581; *People v. Fellows*, 122 Cal. 239, 54 Pac. 830.

We are also satisfied the instruction is sound in declaring that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime." Section 22 of the Penal Code declares: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But, whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." This section simply means that, when a particular motive, purpose, or intent constitutes a necessary element going to make up a particular crime or degree of crime, then evidence of drunkenness at the time the act is committed may be shown as casting light upon defendant's mind, in ascertaining the purpose, motive, or intent with which he did the act. In a case of murder, drunkenness may be shown for the purpose of establishing the degree of murder, and for that purpose alone. This was the *Vincent Case*, supra. In the case of *People v. Phelan*, 93 Cal. 112, 28 Pac. 855, this court held that drunkenness might be shown in a case of burglary; for there the entry into the building must be made with a particular intent, in order that the crime may be made out, and that case comes directly within the purview of the aforesaid section 22. As a com-

plete review of the authorities covering this principle, and as supporting the conclusion of the court here declared, we cite *Flanigan v. People* (and the note found thereunder) 40 Am. Rep. 560.

An instruction was properly refused which intimates that, if defendant's mind was so affected that he had not sufficient power of will to abstain from killing the deceased, then he should be found not guilty. *People v. Hoin*, 62 Cal. 120; *People v. Ward*, 105 Cal. 343, 38 Pac. 945; *People v. Barthleman*, 120 Cal. 11, 52 Pac. 112.

The court instructed the jury that the value of the testimony of defendant's expert witnesses depended largely upon the truth or falsity of the facts given to them, and upon which their opinion was founded. Why the court did not include in this instruction the testimony of the expert witnesses for the people we are at a loss to know. If the instruction is ever to be given at all, certainly it should include the testimony of all expert witnesses, rather than those upon one side of the case. We see no principle of law involved in the instruction, and for that reason it should not be incorporated in the charge to the jury, yet it is apparent that no possible prejudice resulted to the defendant from the giving of it. It was simply a declaration of a truism,—a declaration of a matter of everyday, ordinary, common sense. In *People v. Barthleman*, supra,—a case tried in the same court where the present case was tried,—this same instruction was under consideration by this court, and it was then held not to be prejudicial error to give it. At the same time the trial court was advised to refrain from giving it in the future. We now reiterate what was said upon that occasion. The motion for a new trial upon the ground of newly-discovered evidence was properly denied. For the foregoing reasons, the judgment and order are affirmed.

We concur: McFARLAND, J.; VAN DYKE, J.; HARRISON, J.; HENSHAW, J.

(132 Cal. 113)

In re CARTER'S ESTATE. (S. F. 2,080.)

(Supreme Court of California. April 4, 1901.)
EXECUTORS—COMMISSIONS—APPROPRIATION
BEFORE FINAL SETTLEMENT—INTEREST.

Where, before final settlement of his accounts, an executor appropriated money of the estate as commissions, it was improper to charge him interest on the amount from the time of its appropriation to his final settlement.

In bank. Judgment modified. Rehearing denied.

For opinion in department, see 64 Pac. 123.

PER CURIAM. Judgment heretofore rendered herein is set aside, and the following judgment is now ordered: The superior court is directed to modify the order and decree of distribution by deducting therefrom the amount charged to the executor, Rogers,

for interest upon the sum of \$626.08 found to be due him for commissions, and as so modified the judgment and order will stand affirmed. Rehearing denied.

132 Cal. 260

In re DEGNAN. (S. F. 2,678.)

(Supreme Court of California. March 19, 1901.)

APPEAL—DISMISSAL—MOTION.

Where appellant's motion to dismiss her appeal is based on affidavits presented by respondent's counsel, but it is not contended appellant's attorney has any special contract or lien on the property in controversy so as to entitle him to continue the prosecution, the appeal will be dismissed, notwithstanding the unusual method of presenting the matter.

Department 2. Appeal from superior court, city and county of San Francisco.

Motion by Bridget Degnan to dismiss her appeal. Motion granted.

C. F. Callaghan and Leon E. Prescott, for respondent.

PER CURIAM. This is a motion to dismiss the appeal of Bridget Degnan, based upon her own and the supporting affidavits of others, and pressed before the court by respondent's attorneys. It may be conceded that the regular, orderly, and courteous method of procedure would have been for the client to give notice to her own attorney of her desire that her appeal should be dismissed, and, in the event of his refusal, after notice, to procure a substitution of attorneys, and through the new attorney bring the matter to the attention of the court. But the fact that the mode here adopted is unusual does not deprive the appellant of her right to a dismissal when it is made to appear to the court, as in this case it is, that such is her desire; it not being contended that her attorney has any special contract or lien upon any property in controversy entitling him to continue the prosecution. By way of intimation rather than accusation, it has been suggested that there has been some impropriety or unprofessional conduct upon the part of some one of the attorneys connected with this matter. If this be so, its consideration has no place in this determination, and the matter can receive attention only after the preferment of charges properly formulated. The appeal is therefore dismissed.

132 Cal. 389

WHELAN v. SWAIN et al. (S. F. 1,776.)
(Supreme Court of California. April 4, 1901.)

BILLS AND NOTES—CONSIDERATION—EVIDENCE.

1. A note given by a widow in lieu of a note given by herself and husband in his lifetime was surrendered at maturity, and a new note for the original sum, payable one day after date, was given in lieu thereof by the widow and her daughter, who had received all the property that the husband had transferred to the widow before his death to avoid probate proceedings. *Held*, that there was a sufficient consideration for the daughter's signature to the note.

2. Evidence that a mother had transferred all her property to her daughter, when the latter offered to and did sign a note with her mother in lieu of an outstanding note against the mother, was admissible, as against the daughter, to show a consideration for her signature.

Commissioners' decision. Department 2.
Appeal from superior court, Alameda county;
F. B. Ogden, Judge.

Action by J. F. Whelan against L. H. Swain and Emma Swain. From a judgment for plaintiff and an order denying a new trial, the defendant Emma Swain appeals. Affirmed.

Linforth & Whitaker, for appellant. A. Lewis (Chickering, Thomas & Gregory, of counsel), for respondent.

COOPER, C. Plaintiff recovered judgment on a promissory note. This is an appeal from the judgment and from an order denying appellant's motion for a new trial. The principal contention of appellant is that the finding that the promissory note was signed by her for a sufficient consideration is not supported by the evidence. The facts in connection with the matter are substantially as follows: In 1889 the defendant L. H. Swain and her husband borrowed \$400 from the plaintiff's assignor. In March, 1895, the husband died leaving the note unpaid, and leaving surviving him his widow, L. H. Swain, defendant, and his daughter, the appellant. Prior to his death he deeded all his property to his wife to avoid probate proceedings, trusting to her to care for the daughter, who was to receive all the property upon the mother's death. Soon after the husband's death the note was returned to the widow, and a new note signed by her alone taken for a like sum. After the execution of the

second note, the widow by deed transferred all the property to the daughter. About the 1st of July, 1897, the widow was having trouble with her creditors. Plaintiff's assignor had requested and appellant had offered to sign a joint note with her mother, and take up the old one, in order to satisfy the plaintiff's assignor, and to prevent an attempt being made to collect at that time. Accordingly, on July 18, 1897, the old note was delivered up, and the joint note of the mother and daughter given in lieu thereof. This note was payable one day after date, and was for \$400, the original sum. On April 25, 1898, the mother filed her petition in insolvency, and was duly adjudged insolvent, and proceedings against her stayed. The note has not been paid, and the only claim made by appellant is that she signed the note without consideration.

We think there was a sufficient consideration for appellant's signature. The old note was surrendered. The appellant had received the property that belonged to the father and mother when their note was outstanding, and that belonged to the mother alone when her note was outstanding. The new note was payable one day after date, and there was a forbearance implied for at least the one day. If there was a consideration, the law will not attempt to measure the amount thereof. As said by Justice Wilmet in *Pilans v. Van Mierop*, Langd. Cas. Cont. p. 177: "The law does not weigh the quantum of the consideration. The suspension of plaintiff's right to call upon White for a compliance with his engagement is sufficient to support an action, even if it be the suspension of the right for a day only or for ever so little a time." See *Westphal v. Nevills*, 92 Cal. 545, 28 Pac. 678. There was no necessity for an express agreement to delay. The taking of the new note, payable at a future day, imposed upon the payee the duty of waiting until the maturity of the new note. *Thompson v. Gray*, 63 Me. 230, and cases cited.

Certain questions were asked and answered under appellant's objection, tending to show that the creditors of defendant L. H. Swain were not harassing or annoying her at the time the note was given, that the husband deeded the property to her for the purpose of avoiding probate proceedings, and that defendant L. H. Swain afterwards conveyed the property to her daughter. The evidence was proper, under the circumstances. The appellant had signed the note, and had not paid it. She had claimed, and was claiming, that there was no consideration for her signature. The fact that the liability was changed when the title to the property was changed certainly tended to show a consideration for signing the note. If the defendant L. H. Swain had transferred all her property to her daughter, and the daughter offered to and did sign the note in lieu of the note outstanding against the mother, it tended to show a benefit conferred upon the

daughter. There is no merit in this appeal. The judgment and order should be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(132 Cal. 368)

PEOPLE v. GOODWIN. (Cr. 705.)

(Supreme Court of California. April 3, 1901.)
CRIMINAL LAW—SEDUCTION UNDER PROMISE OF MARRIAGE—EVIDENCE—LETTERS—WITNESSES—PROPER CROSS-EXAMINATION—INSTRUCTION.

1. On a prosecution for seduction under promise of marriage, the error in receiving evidence letters from the defendant to the prosecutrix without proper identification was cured by the subsequent admission of such proof.

2. On a prosecution for seduction under promise of marriage, a letter from the defendant to the prosecutrix, beginning, "My dear, beloved friend Mary," was relevant evidence, as showing the sentiment and feelings of defendant towards prosecutrix.

3. On a prosecution for seduction under promise of marriage, it was not error to allow the prosecutrix to testify that she got in a "family way" by the defendant two months after the alleged seduction, as this evidence tended to show, in connection with evidence of her previous chastity, that she had been seduced prior to that time.

4. On a prosecution for seduction under promise of marriage, it was not error to ask the defendant, on cross-examination, if certain letters were in his handwriting, where the identity of the letters as those of the defendant were fully established before such questions were asked.

5. It was not prejudicial to the defendant, on a prosecution for seduction under promise of marriage, to ask questions on cross-examination seeking to show that he began the correspondence between the prosecutrix and himself, where they had been answered in the negative.

6. Where an information for seduction under promise of marriage charged the defendant with having committed the crime at a certain time and place, and the defendant had testified that he was not at such place at the time alleged, questions as to where he was on other days in the same month were properly allowed on cross-examination to test the memory of the witness.

7. On a prosecution for seduction under promise of marriage, an instruction that, if the jury had a reasonable doubt as to whether the defendant was with the prosecutrix on the day on which the crime was alleged to have been committed, the defendant should be found not guilty, was properly refused, since the exact date of the offense was not material.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Charles Goodwin was convicted of seduction under promise of marriage, and he appeals. Affirmed.

Edwin M. Sweeney and H. H. Adams, for appellant. Tirey L. Ford, Atty. Gen., for the People.

GRAY, C. The defendant appeals from a judgment convicting him of the crime of seduction under promise of marriage, and

from an order denying his motion for a new trial.

1. In a case of this kind it is worse than useless for counsel to address long arguments to this court on mere questions of fact. The prosecutrix testified to every fact necessary to establish defendant's guilt as charged. The jurors were the sole judges of her credibility. They believed her, and found the defendant guilty. Therefore, he must be treated as guilty, and suffer the penalty of his crime, unless it is shown that for some reason he did not have a fair trial. *People v. Hough*, 120 Cal. 538, 52 Pac. 846.

2. The prosecution offered in evidence a number of letters purporting to be written by defendant to the complaining witness prior to the alleged seduction. Previous to the introduction of these letters the prosecutrix testified, as to each of them, that she recognized it as in the handwriting of defendant, "all of it, and signed by him," and that she received it through the mail. Counsel for defendant asked to be permitted to examine the witness as to her knowledge of the defendant's handwriting before the letters were admitted. The court replied, "You will have an ample opportunity to examine the witness thoroughly upon your cross-examination," to which counsel excepted. Counsel then objected to the introduction of the letter "upon the ground that it is incompetent, irrelevant, and immaterial, and upon the further ground that there is no proper evidence that the letter was written by the defendant. There is no proof of his handwriting, as required by the Code of Civil Procedure in such cases." The court overruled this and all other objections to the letters, to which ruling the defendant excepted. After the letters had all been received and read in evidence, it appeared on the cross-examination of the prosecutrix that while she had never seen the defendant write, yet he had in a conversation with her acknowledged writing to her one of the letters introduced in evidence. The brother of the prosecutrix was also subsequently called as a witness, and testified that he had seen defendant write, and, on the said letters being shown to him, he testified that they were each and all in the handwriting of defendant. It therefore appears that, if there was any error in any ruling of the court in connection with the admission of the letters, such error was cured by this subsequent competent evidence, showing without conflict that the letters were in the handwriting of defendant. In *Robinson v. Bank* 81 Cal. 106, 22 Pac. 478, it is held that error in admitting evidence without the requisite preliminary or connecting proof is cured by the subsequent admission of such proof. The record contains only the letter of defendant first written and first introduced in evidence. This letter begins with "My dear, beloved friend Mary." That it is relevant to the subject under inquiry in the case does not

admit of question. It was a part of quite an extensive correspondence between the prosecutrix and defendant, and this letter, as well as the rest of the correspondence, undoubtedly tended to show the sentiment and feelings of these parties, each for the other. *State v. Burns* (Iowa) 78 N. W. 681.

3. There was no prejudicial error in permitting the prosecutrix to testify that she got in a "family way" by defendant on September 28th (more than two months after the alleged seduction), as this tended to show, in connection with the evidence of previous chastity, that she had been seduced prior to that date. *State v. Wickliff*, 95 Iowa, 386, 64 N. W. 282; *State v. Robertson*, 121 N. C. 551, 28 S. E. 59; *Armstrong v. People*, 70 N. Y. 38; *People v. Rangod*, 112 Cal. 669, 44 Pac. 1071.

4. On cross-examination the defendant was asked if certain letters then shown to him were in his handwriting. Counsel for defendant excepted to the action of the court in overruling his objection to these questions. It does not appear that these letters were ever introduced in evidence except as we may infer that probably the inquiry related to the letters of defendant to the prosecutrix which had already been introduced in evidence. These letters, except the first one written, are not before us, but their identity as the letters of defendant were fully established before any questions were asked of defendant concerning them. It is, therefore, difficult to see how defendant could be injured by the questions, whatever the letters may have contained; and, without any knowledge of the contents of the letters, we must hold that no error is made to appear. As to the question asked of defendant on cross-examination, seeking to show that he began the correspondence between himself and the prosecutrix, his answer was in the negative, and of course he suffered no harm from that question.

5. The defendant was charged in the information with having committed the crime of seduction in Alameda county on or about July 15, 1899, and the testimony of the prosecution tended strongly to establish said July 15th as the date of the crime. The defendant testified on his direct examination, in substance, that he was not in Alameda county on July 15, 1899, but was in San Francisco all that day, and not with the prosecutrix. On cross-examination he was asked, "Were you in the county of Alameda on the 14th day of July, 1899?" This was objected to on the ground that it was not proper cross examination, and the court inquired, "For what purpose do you ask it?" to which the attorney for the prosecution replied, "I simply desire to test the recollection of the witness." The court then said, "It is allowed for that purpose." The defendant excepted, and the witness answered, "No, sir; I was not." Numerous other similar questions were asked concerning various other dates

in said month of July, all of which were objected to, and exception taken by defendant to the overruling of said objections. The answers of the defendant were in the negative as to some of the dates inquired about, and as to others he did not know. These questions having been allowed solely for the purpose of testing the memory of the witness, as to a matter about which he had testified on direct examination, there was no error in the ruling of the court.

6. There was no error in refusing to instruct the jury that if they had a reasonable doubt as to whether defendant was with the prosecutrix on July 15, 1899, they should find defendant not guilty. The exact date of the offense was not material. The jury might have been convinced that the prosecutrix was mistaken as to the exact date of her seduction, and yet have been satisfied that it occurred at some date very near said July 15th, and on this they would have been warranted in finding defendant guilty.

7. There was some friction between the attorney for the defendant and the court on the trial of the case, and in this connection the attorney noted an exception to the language of the trial court on several occasions. We have made a careful study of the language thus excepted to, and we find that in each instance it was addressed and referred expressly to the attorney personally, and did not in any way tend to cast any reflection upon the defendant, nor was it intended in any manner to prejudice the defendant's case.

There is no merit in the contention that the trial judge aided in the prosecution of the case. It is true that he made some suggestions as to a certain line of examination that might be pursued on the cross-examination of defendant, but the prosecution, after consultation, decided not to "consume any more time on that line." No exception was taken to the language or conduct of the court in this connection, nor do we see how an exception could have availed defendant had one been taken. The instructions were fair to the defendant, the law of the case was clearly stated to the jury, and the defendant had a fair trial. The judgment and order should be affirmed.

I concur: HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(132 Cal. 430)

PEOPLE v. KELLY. (Cr. 722.)

(Supreme Court of California. April 6, 1901.)
GRAND LARCENY — INSTRUCTIONS — POSSESSION OF MONEY — EVIDENCE — MOTIVE.

1. Where the court instructed on the subject of reasonable doubt, and the principles applicable to the case, and that the jury should bring

their intelligence to the consideration of the case, and let their common sense and best judgment control in its determination, it was not prejudicial to defendant, as giving the jury the impression that they could disregard the instructions previously given.

2. Where defendant was charged with grand larceny, evidence that defendant had no money just before the theft, but had considerable money for a man in his circumstances just afterwards, was properly admitted.

3. Where defendant made no attempt to show that the usual motive for committing larceny did not exist, a charge that the failure of the evidence to show motive on the part of the accused for the commission of the crime was a circumstance in favor of his innocence was properly refused.

Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Patrick A. Kelly was convicted of grand larceny, and he appeals. Affirmed.

Jas. E. Ennis and Thos. Scott, for appellant. Tiley L. Ford, Atty. Gen., for the People.

McFARLAND, J. Appellant was convicted of grand larceny, and appeals from the judgment and from an order of the court denying a motion for a new trial.

The position that the evidence did not justify the verdict is untenable. The evidence was circumstantial, but it tended strongly to show appellant's guilt, and there is no ground for holding that, as matter of law, it was insufficient to support the verdict.

After the court had correctly charged the jury on the subject of reasonable doubt, and had instructed correctly as to the general principles of law applicable to the case, and very favorably to appellant, it used the following language, which is claimed by appellant to have been erroneous: "But take this case, bring your intelligence to the consideration of it, and let your common sense and your best judgment control you in its determination." It is contended that this language would give the impression to the jury that they might "disregard the instructions as to the law." But this contention cannot be maintained. The fair meaning of the language was simply that the jury, having the evidence and the instruction of the court as to the law before them, should exercise their best judgment in coming to a conclusion. We see in this language nothing erroneous or prejudicial.

The larceny having been committed on the morning of June 8th, the prosecution asked the witness Lund the following question: "Did you, previous to the 8th day of June of this year, while the defendant was working for Mr. Hanna, transact any business with him on his account?" and, the witness Delmue having testified that he saw the defendant after the alleged time of the larceny, the prosecution asked him this question: "Did he have any money at that time?" Appellant objected to both of these questions, and, his objection having been over-

ruled, he excepted. The contention is that these questions had reference to the financial condition of the appellant at different times, and for this reason were irrelevant and incompetent. The answer of Lund to the question asked him was rather colorless, and of little importance. Delmue testified that on the occasion of which he spoke the appellant exhibited considerable money. But, assuming that the answers to both these questions tended to show that before the date of the larceny the appellant had no money, and that afterwards he had a large amount of money for a man in his circumstances, still the evidence was properly admitted. Generally, evidence of the wealth or poverty of a defendant is not admissible; but the sudden possession of money, immediately after the commission of a larceny, by one who before that had been impecunious, is clearly admissible as a circumstance in the case. 2 Bish. New Cr. Proc. § 748.

The court did not err in refusing to give the following instruction asked by appellant: "That, when the evidence fails to show a motive to commit the crime charged on the part of the accused, this is a circumstance in favor of his innocence." Generally, an instruction as to motive is not pertinent on a trial for larceny, for there is always an apparent motive for that crime, although there might, perhaps, be peculiar circumstances calling for such an instruction. But the instruction was certainly not applicable to the evidence in the case at bar, for there was no attempt on the part of the appellant to show any want of the usual motive which prompts the commission of the crime of larceny. There are no other points made by appellant. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(132 Cal. 382)

RIDER v. CLARK et al. (Sac. 774.)

(Supreme Court of California. April 4, 1901.)

LANDLORD AND TENANT—ENTRANCE TO BASEMENT—DOORS IN SIDEWALK—AUTHORITY TO CONSTRUCT—PROPER CONSTRUCTION—CONTROL BY LESSEE—INJURIES—LIABILITY OF LANDLORD.

1. The owners of a building constructed a 12-foot walk abutting it, and through such walk built an entrance into their basement, the opening in the walk being covered by iron doors protruding 2 feet above the walk when open, and leaving the surface level when closed. The doors were safely and properly constructed, and left 7 feet of sidewalk always unobstructed. The premises were in the occupation and control of a lessee, who opened such doors on one occasion to use the basement entrance. *Held*, that the owners were not liable for injuries sustained by a passer-by, who fell over one of the doors into the excavation.

2. An entrance through a sidewalk to a basement, and the iron doors thereof in the former, would be presumed to have been constructed and placed in position by proper authority, in absence of proof to the contrary.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Action by E. A. Rider against W. R. Clark and others. From a judgment for plaintiff, W. R. Clark and another appeal. Reversed.

Woods & Levinsky and Nicol, Orr & Nutter, for appellants. H. V. J. Swain and Jacobs & Flack, for respondent.

COOPER, C. Action to recover damages for personal injuries. Plaintiff recovered a verdict, and judgment was entered thereon. Appellants made a motion for a new trial, which was denied, and this appeal is from the judgment and order denying the motion.

The appellants were the owners of a three-story brick building on the east side of Sutter street, in the city of Stockton. The sidewalk in front of said building was of the latest improved concrete, over 12 feet in width. In the sidewalk on the east side of Sutter street, being the west side of the building, there is an opening for the use of tenants, so that they may get into the basement of the building. The opening is covered by two iron doors running east and west across a portion of the sidewalk next the street. The length of said doors is five feet, so that they leave a clear space of nearly seven feet between the building and the east end of the doors. The space covered by the doors is five feet east and west by four feet north and south, under which there is the excavation. The doors, when open, extend about two feet above the level of the sidewalk, and are held in a perpendicular position by stay chains and an iron rod hooked in an eyelet in each door; and, being thus open, and fastened, the excavation is surrounded on the north and south by the iron doors. These iron doors do not in any way obstruct the use of the sidewalk when closed. They fit into the frame to which they are fastened perfectly. When closed, the surface is as even and smooth as the other portions of the sidewalk. There is no question but that the sidewalk and doors were properly constructed, and no claim is made that the appellants were in any way guilty of negligence in their construction. On the 21st day of November, 1898, at the time of the injury to plaintiff, the premises and store on the ground floor of said building immediately east of the opening, and the basement into which the opening from the sidewalk led, were in the occupation, control, and possession of defendant Wood under a lease from appellants. As such tenant, defendant Wood had full control and charge of the iron doors covering the opening. On the evening of said day, defendant Wood opened said iron doors for the purpose of putting merchandise in the basement. Neither of the appellants was present, nor did either of them have any notice of the doors being so left open. About 6 o'clock

of said evening there was an alarm of fire sounded. Plaintiff, who was in the employ of the fire department, while running along the sidewalk in a southerly direction to catch the hook and ladder truck, fell over the iron door on the north side into the opening, receiving severe injuries. The plaintiff, owing to the excitement and hurry under which he was laboring, did not notice the doors nor the opening. The doors were opened by defendant Wood for his own uses and purposes, and had been open about an hour when the accident happened.

While there are many questions raised in the record as to rulings on evidence and giving and rejecting instructions, we will, at the request of counsel, discuss the main and important question,—as to whether or not the owners of the building are, under the circumstances, responsible in damages to plaintiff. The case was tried in the court below and given to the jury upon the theory that the owners of the building, having made the excavation and built the doors over the same, were, in all events, responsible for the injury caused to plaintiff by falling therein. This is apparent by the instructions given to the jury at plaintiff's request, to wit: "If you believe from the evidence that at the time of the injury complained of the defendants Clark and Henery owned the building at the corner of Market and Sutter streets, in the city of Stockton, and that said defendants Clark and Henery, prior to such injury, had built a sidewalk in front of the said building, and that under said sidewalk they had made an excavation, and through said sidewalk they had left an opening to connect with said excavation, and that over said opening they had built or placed a covering, and that prior to said injury they had rented a storeroom in said building to the defendant Wood, and that said renting carried with it the right by said Wood to use said excavation, basement opening, and the covering over the same, and that at the time of the injury complained of said Wood was so renting, as aforesaid, from said defendants Clark and Henery, and was at said time using said basement, excavation, opening, and the covering over the same as contemplated by said Clark and Henery in their said lease to said defendant Wood; and if you believe from the evidence that said excavation under said sidewalk, the opening through said sidewalk, and the covering to said opening, as so used by said Wood at the time of said injury, was in an unsafe condition to the public or dangerous to passers-by,—then I instruct you that the defendants Clark and Henery are liable in damages to the plaintiff, if he, while said defendant Wood was so using said excavation, opening, and the covering thereto, as aforesaid, not knowing that such obstruction then existed, tripped over said covering, and fell into said opening, thereby sustaining personal injuries." And by the re-

fusal to give the following instructions asked by appellant: "(2) Before the jury can render a verdict against defendants W. R. Clark and Samuel Henery, you must find from the evidence that in the construction of the sidewalk and basement doors they were guilty of negligence, and constructed them so that they were unsafe and insecure to travel over and upon them. (3) Before the jury can find a verdict in favor of plaintiff in this case and against the defendants Clark and Henery, you must find from the evidence that the said sidewalk and basement doors were defectively constructed and built, or thereafter left in an unsafe and insecure condition for travel over the same by the public by said defendants Clark and Henery, or either of them. (4) If the jury find from the evidence that in the construction of said sidewalk and doors the defendants Clark and Henery used good material, well and securely built the same, and that the said doors were well and safely constructed, and properly provided with guards,—such as the chains and rod,—and that they were in a safe condition when leased to defendant Wood, and that said defendants Clark and Henery were not thereafter guilty of any act or negligence concerning the same, then you should find a verdict in favor of the said defendants Clark and Henery."

We think the instructions as given to the jury were not correct, and that the instructions offered by appellants should have been given. When the tenant enters into possession under a lease, the landlord parts with all his right to and control over the premises, and is not liable to third persons, except for such defects in the premises or defective construction as existed in the premises when let to the tenant. 2 Wood, Landl. & Ten. § 355; Shear. & R. Neg. (5th Ed.) § 708, and cases cited; 1 Wood, Nuis. § 269, and cases cited; *Saltonstall v. Banker*, 8 Gray, 195; *Rich v. Basterfield*, 4 C. B. 783; *Kalis v. Shattuck*, 69 Cal. 597, 11 Pac. 346. In the latter case, following the rule which is laid down in the text-books, this court held that the landlord of a building which is in the exclusive possession and control of a tenant is not liable for injuries to a third person, caused by the fall of an awning belonging to the building, when the fall was occasioned by the negligent and improper conduct of the tenant in permitting it to be used as a standing place for a crowd of people. After a careful review of the authorities, the court said: "It is well settled that a landlord is not liable for such consequences unless: (1) The nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it; or (3) the landlord authorized or permitted the act

which caused it to become a nuisance occasioning the injury." In *Frassi v. McDonald*, 122 Cal. 404, 55 Pac. 141, it is said: "The owner of property fronting on the street is not an absolute guarantor that no opening may be found in his sidewalk. The law does not demand that he shall guard his sidewalk at night lest some evil doer shall make an opening therein to the great danger of the belated traveler. Before liability attaches to the owner in such a case, he must have known of its defective condition, or, as a careful, prudent man, should have known it." In *City of Boston v. Gray*, 144 Mass. 53, 10 N. E. 509, it appeared that the basement of a building extended under the sidewalk of the street on which the building abutted, and was lighted by a "Hyatt light," the iron frame of which was set in, and formed part of, the sidewalk. The first story and basement of the building were occupied by a tenant under a lease. The iron frame had worn smooth and slippery from long use, and by reason thereof a traveler fell, and was injured. It was held that the owner of the building was not liable. In the opinion the court said: "We think the lease of the store and basement included the excavation under the sidewalk and its covering, and that the tenant's covenant to keep in repair applied to it." In *McAlpin v. Powell*, 70 N. Y. 130, it is said: "To maintain an action for personal injury occasioned by the negligence or want of care of another, it must be made to appear that the defendant owed some duty or obligation to the party injured, which he failed to discharge or perform. Unless there is some contract, duty, or service which a party is bound to fulfill, there can be no negligence, fault, or breach of the obligation. The reported cases where parties are charged for injuries to another occasioned by accident have been decided upon the principle that there was negligence in doing or omitting to do some act by which a duty or obligation which the law imposed has been disregarded." Applying the rule above given, there can be no negligence imputed to appellants. It was not their duty to guard the open space in the sidewalk when the doors were open. They constructed the sidewalk and the iron doors in a proper and safe manner. When the premises were let to the tenant, they were in good condition. There is no pretense that the injury was caused by any defective construction of the doors or sidewalk. There is no claim that the premises were out of repair, and appellants did not even know that the doors were open.

It is claimed that the excavation and iron doors were a nuisance, and placed on the sidewalk without authority, and contrary to law. There is no such proof in the record. On the contrary, the plaintiff objected to all evidence tending to show that it was the usage or custom in the city of Stockton to allow such doors, and the court sustained the objections. But we may presume, for the

purposes of this case, that the iron doors were placed there by proper authority; for the court instructed the jury of its own motion: "If the defendants Clark and Henery were the owners of a building fronting on Sutter street, in the city of Stockton, they had the right to construct a good and substantial sidewalk on Sutter street, in the city of Stockton, adjacent to such building. They had the right to construct and to maintain a good and substantial passageway under said sidewalk to the basement of said building, so long as such passageway did not interfere with the free passage of persons on and along said sidewalk. They had a right to construct and maintain a good and substantial iron frame in said sidewalk, and good and substantial doors thereon, so long as the same did not interfere with the free passage of persons on and along said sidewalk." And it is generally the usage and custom to allow openings to be made in the sidewalks of cities in order to obtain entrance into the basement, such openings and the coverings thereof being subject to proper municipal regulation. 2 Dill. Mun. Corp. (4th Ed.) § 699; *McCarthy v. City of Syracuse*, 46 N. Y. 197; *Wolf v. Kilpatrick*, 101 N. Y. 147, 4 N. E. 188; *Fisher v. Thirkell*, 21 Mich. 1. The cases of *Van Praag v. Gale*, 107 Cal. 441, 40 Pac. 555, and *Barry v. Terkildsen*, 72 Cal. 258, 13 Pac. 657, are not in conflict with what has been said. In the former case the question as to the liability of a landlord when the premises were leased to and in the possession of a tenant is not referred to or discussed. In the latter case the wooden trapdoor was used and maintained by the owner, and not by a tenant, and was so maintained in direct violation of an ordinance of the city. It follows that the judgment and order as to appellants should be reversed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order as to appellants are reversed.

(132 Cal. 373)

FRITZ v. CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 2,377.)

(Supreme Court of California. April 3, 1901.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—PARK AND BOULEVARD ACT—SUPERSEDED BY CITY CHARTER—CONSTRUCTION—ISSUANCE OF BONDS.

1. Under the park and boulevard act (St. 1889, p. 362, § 6), providing that at special elections, wherein the question of the issuance of bonds is submitted to the voters, "if two-thirds of the qualified electors voting an assent" to such issuance, the proper authorities may provide for the issuance, only two-thirds of the votes cast at the election are necessary for the issuance of such bonds, since the insertion of the word "an" before "assent" was clearly a typographical error, and its elimination made the provision perfectly plain.

2. The park and boulevard act (St. 1889, p. 361) prescribes a complete scheme for the acqui-

sition of lands for park and boulevard purposes, by the issuance of bonds therefor, and the method of submitting such questions to the voters. San Francisco Charter 1900, art. 16, § 29, provides that, when the supervisors determine that the public interest requires "the construction or acquisition of any permanent municipal building or improvement" of a certain cost, they must submit the proposition to incur a bonded indebtedness for such purpose to the electors; and in other sections the plan set out for the acquisition of such property was complete, but different and inconsistent in many respects from the park and boulevard act in regard to the creation of the bonded indebtedness. *Held*, in an action against the city and county of San Francisco to enjoin the issuance of bonds under the park and boulevard act for the purpose of acquiring park lands, that the acquisition of lands for public park purposes comes within the charter provisions for permanent improvements, and hence the park and boulevard act was superseded by the city charter, under Const. art. 11, § 8, stating that a city or county charter shall become the recognized law thereof, and supersede any charter or other laws inconsistent therewith.

3. Where a special election on the question of issuing bonds for the purpose of park lands in San Francisco was held under the park and boulevard act (St. 1889, p. 361), which act was subsequently superseded by the adoption of the San Francisco county and city charter of 1900, before the bonds were issued, such bonds could not be issued under the charter, since they could only be issued on the procedure laid down by the charter, the scheme being complete in itself.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Eugene M. Fritz against the city and county of San Francisco and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Charles E. Naylor and Arthur H. Barendt (Theodore H. Hittell and W. B. Treadwell, amici curiæ), for appellant. Franklin K. Lane, City Atty., George W. Lane, and Garrett W. McEnerney (John Chetwood, Jos. Rothschild, Rosenthal & Wise, Freeman & Bates, and D. C. Murphy, amici curiæ), for respondents.

GAROUTTE, J. This is an appeal from a judgment of the superior court in and for the city and county of San Francisco sustaining the demurrer to a complaint filed by a taxpayer in a proceeding to enjoin the board of supervisors and the mayor of said city and county from taking any further action in pursuance of certain proceedings previously inaugurated, and having for their object the issuance of bonds of said city and county, and the purchase of lands for park purposes from the proceeds thereof. The proceedings leading up to the proposed issuance of these bonds are assailed at many places, but the court only finds it necessary to review the more important propositions of law involved.

The park and boulevard act (St. 1889, p. 361), under which the election was held submitting the question of the issuance of these bonds to the electors of the city and county of San Francisco, provides (section 6): "If at

such an election two-thirds of the qualified electors voting an assent to the issuance of the bonds, then the 'city and county' or 'city or town' having held such election, may, by ordinance, or in such manner as other municipal legislative acts are enacted under its charter, provide," etc. It is now claimed that the proper construction of this section demands that two-thirds of all the qualified electors of the city and county of San Francisco must vote in favor of the issuance of the bonds, or the proposition for their issuance is defeated. The statute cannot bear this construction. As it appears upon the page, it is apparent by a casual inspection that a misprint has occurred; for as it stands, literally, it is meaningless. But if we eliminate the word "an," the insertion of which is clearly a typographical error, then the section becomes grammatically correct and full of meaning, for it would read: "If at such an election two-thirds of the qualified electors voting, assent to the issuance of the bonds, then," etc. Standing upon the page in this form, it means exactly what it says, and says only one thing, namely, if two-thirds of the qualified electors voting, assent, etc. If any authority were needed to support this construction of the statute, it may be found in *Howland v. Board*, 109 Cal. 152, 41 Pac. 864. But the language of the section as it should appear upon the page is so clear and explicit that its meaning in no degree is doubtful.

The proceedings taken by the city leading up to the election here involved were had under a general law. St. 1889, p. 361. This election was held in the latter part of the month of December, 1899, and the present charter went into effect January 8, 1900. The question is now presented, what effect did the new charter have upon the general law under which these proceedings were inaugurated and conducted? In speaking of charters similar to that of this city and county, section 8, art. 11, of the constitution declares that it "shall become the organic law thereof, and supersede any existing charter, and all amendments thereof and all laws inconsistent with such charter." The second question is at once presented: Is the general law which may be termed the "Park and Boulevard Act" inconsistent with the provisions of the charter? If it is, then that act was superseded by the charter at the moment the charter went into force and effect, and is no longer applicable to this city and county. Condensing the matter into a nutshell, it may be said the park and boulevard act provided a complete scheme for the acquisition of lands for park and boulevard purposes by the issuance of bonds, the proceeds thereof to be used for that purpose. Do we find any complete scheme laid down in the provisions of the charter to accomplish the same results? The court is entirely satisfied that such a scheme is there found. Section 29 of article 16 of that instrument provides: "When the supervisors shall determine that

the public interest requires the construction or acquisition of any permanent municipal building or improvement, the cost of which in addition to the other expenses of the city and county will exceed the income and revenue provided for the city and county for any one year, they must, by ordinance passed by the affirmative vote of not less than fourteen members of the board, submit a proposition to incur a bonded indebtedness for such purposes to the electors of the city and county at a special election to be held for that purpose only. All the provisions of this charter providing for the acquisition of public utilities, so far as the same are applicable, shall apply to the manner of submitting such proposition to the electors, to the limitations of said bonded indebtedness, to the issuance and character of the same, and to the time when and the kind of money in which said bonded indebtedness shall be payable." Measured by the notice of election given in these proceedings, it appears that this bonded indebtedness was to be created "for the acquisition by purchase or by condemnation proceedings according to law, of the following lands for public park purposes": (1) Thirteen blocks, being for an extension of the Pan Handle of Golden Gate Park; (2) eight blocks for a connection between said Golden Gate Park and the Presidio military reservation; (3) two blocks for a public park in that part of the city and county known as the "Mission."

Chapter 2 of article 2 of the charter defines the powers of the board of supervisors, and subdivision 12 of section 1 thereof declares, "To purchase or acquire by condemnation such property as may be needed for public use." By this provision of the law the board of supervisors of the city and county of San Francisco is vested with power to purchase land for a public park. The question then remains, does this proposed acquisition of lands for public park purposes come within the provisions of the charter section which allow the supervisors to submit to the electors the question of the creation of a bonded indebtedness for the purpose of "acquisition of any permanent municipal building or improvement"? The court is satisfied that the acquisition of these lands for park purposes by the city would be an acquisition by the city and county of a permanent municipal improvement, within the spirit and intent of the charter. An extension of the Pan Handle to Van Ness avenue would be a permanent municipal improvement of the highest character. Likewise would be the acquisition of eight blocks of land for the purpose of connecting the park with the Presidio military reservation, and likewise the acquisition of two blocks of land in the Mission district for public park purposes. If Golden Gate Park may be designated as a permanent municipal improvement of the city and county of San Francisco, then the extension of that park by way of boulevards to the military

reservation and to Van Ness avenue are improvements of a like character. It is thus apparent that the acquisition of this property by the city and county is authorized by the section of the charter quoted, wherein the power to acquire permanent municipal improvements is granted. The scheme for the acquisition of this property, as set out in the provisions of the charter, is also perfect and complete. Section 29, previously quoted, declares that "all the provisions of this charter providing for the acquisition of public utilities, so far as the same are applicable, shall apply to the manner of submitting such propositions to the electors, to the limitations of said bonded indebtedness, to the issuance and character of the same, and to the time when, and the kind of money in which, said bonded indebtedness shall be payable." Upon turning to article 12 of the charter, we find there laid down a comprehensive scheme, perfect and full in all its details, providing for the acquisition of public utilities by the creation of a bonded indebtedness. As we have seen, the provisions of that article are made applicable to the provisions of said section 29, and thus we find within the provisions of the charter a complete and perfect scheme for the acquisition of permanent municipal improvements of the character now before us. The respective schemes of the charter and the park and boulevard act for the creation of a bonded indebtedness to acquire improvements are different in many respects, and therefore the park and boulevard act is inconsistent with the charter. The result declared by the constitution where such inconsistency exists must follow, namely, the park and boulevard act is superseded by the charter. That act being superseded by the charter, it is gone from the case. It went instantaneously the moment the charter took effect. It is no more a law applicable to the city and county of San Francisco, and its provisions can no longer be invoked to support this proceeding.

By reason of the foregoing conditions the remaining questions present themselves: May these bonds now be issued under the provisions of the charter? May the charter take up the work where the park and boulevard act left it, and continue it to the end? Our answers to these interrogatories must be in the negative. It cannot be done, for the charter only contemplates the issuance of bonds based upon the procedure laid down by the charter. As we have said, the scheme laid down is complete in itself, and it must be followed as a whole, or the attempt to create a bonded indebtedness will inevitably come to nothing. The bonds must be issued after the procedure marked out by the charter has been followed, or they cannot be issued at all.

By carrying out to greater detail the discussion of the proposition of law which has just received our consideration, the soundness

of the conclusion declared is even more apparent. In the creation of a bonded indebtedness under the charter, article 12, § 9, of that instrument thus declares what shall be specified in the notice of election: "Such notice shall specify the purpose for which the indebtedness is to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of the tax levy to be made for the payment thereof." It must be conceded that no bond issue can be had under the charter unless the notice of election shall specify the matters demanded in said section 9. By this provision of the charter the electors, prior to the election, must have notice of the facts there set forth; and, if they do not have such notice, no election held under any other notice can give the city and county authority to issue bonds. The notice of election here involved did not fill the measure furnished by the aforesaid section. Even if it be conceded that the number of bonds may be deduced by mathematical computation from the notice of election given, still the character of the bonds is not mentioned. Section 11 of the same article declares that those bonds shall be of the character known as "serials." No other kind of bonds can be issued under the charter. Yet this notice of election says nothing about serials, or possibly it may be said that the notice of election wherein it is provided that the bonds shall mature and become due and payable in 20 years from the date thereof is in effect a notice to the electors that they shall not be serial bonds. Does the city and county now propose to issue serial bonds (that is, bonds a certain number of which are payable each year), or does it propose to issue bonds all payable at the end of 20 years? But it cannot issue serial bonds, for the notice of election said nothing about serial bonds. Neither can it issue bonds payable in 20 years, for bonds of that character cannot be issued under the charter. It seems to follow that bonds cannot be issued at all. Again, it was demanded by said section 9 that the notice of election shall specify "the amount of the tax levy to be made for the payment thereof." In view of the fact that the bonds must be serial bonds, it is perfectly plain what this provision of the notice means. Yet there is nothing in the notice of election given in this case even looking towards the carrying out of this demand of the law.

We will not pursue further this investigation. The scheme provided by the charter for the creation of a bonded indebtedness being materially different from the scheme provided by the park and boulevard act for the creation of a bonded indebtedness, a proceeding inaugurated under the one scheme cannot be continued under the other. When the first scheme failed, the proceeding failed. When the law was superseded, that moment the proceeding fell. Again, it is plain that the notice to electors actually given for this election was not the notice demanded by the

charter, and no issue of bonds under the provisions of the charter can be valid which has not the support of an election held under a notice specifying, in substance, all matters designated in section 9 of article 12 of the charter. The notice relied on in this case did not comply with the provisions of that section, and therefore no issue of bonds by the city and county of San Francisco based upon an election held under some other notice will be valid. For the foregoing reasons, the judgment is reversed and the cause remanded.

We concur: HENSHAW, J.; McFARLAND, J.; VAN DYKE, J.; HARRISON, J.

TEMPLE, J. I concur in the conclusion reached in the principal opinion, but upon slightly different grounds. As I understand the opinion, it is determined that the park and boulevard act was abrogated by the adoption of the charter, because the charter itself contains a provision authorizing the supervisors to do the same thing authorized by that act. In other words, the purchase of lands for parks and boulevards, and the issuance of bonds, is a "municipal affair," because it is authorized by the charter itself. To sustain this proposition reliance is placed entirely upon section 29 of article 16 of the charter, which is an article entitled "Miscellaneous," and is made up of explanatory and supplemental provisions. Section 29, as I understand it, merely provides for a possible contingency, to wit, when, in pursuing its lawful authority, the board proposes to acquire permanent municipal improvements, it finds that the cost will exceed the annual revenue, it may issue bonds. Whether it may acquire the particular improvement or expend municipal funds for that purpose is not determined at all by that section. To answer this question, which was the main matter discussed by counsel, other charter provisions must be considered. Surely it was never doubted that, if these lands could be acquired under the charter, bonds could be issued therefor under section 29. As I understand the controversy, the park and boulevard act was relied upon because the city authorities were of the opinion that the municipal charter of itself did not authorize the purchase of the lands for that purpose. And since the charter specifies a great many public municipal improvements which the supervisors and the board of public works may acquire, and does not specify parks and boulevards, there is some ground for such belief.

Subdivision 12, c. 2, art. 2, certainly does not, of itself, unaided by other provisions, authorize the board of supervisors to purchase lands by condemnation for a public park. Surely it was not intended to confer power to purchase by condemnation, when the board could not purchase without condemnation if the owner would sell for a fair price. It does not authorize the board to purchase lands for

a purpose for which they could not have purchased without this authority. It only authorizes the proceeding to condemn when the owners are unwilling to sell or demand an exorbitant price. The public uses referred to are those defined in other sections. Can it be contended that it was intended to throw the door wide open, and authorize such purchase for any use which might be deemed public? To acquire lands for a race track or a beer hall, or perhaps for a hotel, might be deemed a public use. The reference emphasizes my proposition that the doctrine of this opinion is that the only limitation on the power of the board is that, in the opinion of the board, the public interests require the acquisition of the improvement. The professed policy of the advocates of the new charter was not to leave the gates ajar.

From my point of view, it is not necessary to determine whether the municipal charter authorizes the purchase of lands for park and boulevard purposes. If it does authorize such purchase, plainly, as determined by Mr. Justice GAROUTTE, the procedure there prescribed has not been followed. If such power is not found in the charter, it is my opinion no general law can add that provision to the charter. I do not comprehend how it can be said that a statute which confers upon a city council additional powers over affairs of the city,—powers which have always been deemed municipal, and only concern the city as such,—which authorizes the city to incur an indebtedness of \$4,000,000, and which makes necessary a large annual expenditure by the city forever thereafter, is not a municipal affair. If a general law having such effect is not prohibited by section 6, art. 11, of our constitution, then language has lost its force, and nothing has been accomplished by this long struggle and many amendments to the constitution for the purpose of preventing legislative interference with municipal affairs.

(132 Cal. 381)

McHUGH v. CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 2,378.)

(Supreme Court of California. April 3, 1901.)
MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENT ACT SUPERSEDED BY SAN FRANCISCO CHARTER.

Since the San Francisco city charter provides a complete scheme for the acquisition of "permanent municipal buildings and improvements," which include school houses, sewers, etc., by bonded indebtedness, the public improvement act, relating to the construction of such improvements in the same manner, is superseded by the charter, being inconsistent with the latter; and hence bonds issued for such purposes cannot be issued under such act, but must be issued under the charter.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Felix McHugh against the city and county of San Francisco and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Wm. T. Baggett, Charles E. Naylor, and Arthur H. Barendt, for appellant. Franklin K. Lane, City Atty., George W. Lane, and Garret McEnerney, for respondents.

PER CURIAM. This case in all essential particulars is the same as *Fritz v. City and County of San Francisco* (S. F. No. 2,377) 64 Pac. 566, this day decided. By the facts disclosed upon this appeal, there is no question whatever but that the bonded indebtedness is to be created for the purpose of acquiring "permanent municipal buildings and improvements." School houses, sewers, etc., come directly within that classification. This being so, the act termed the "Public Improvement Act" is inconsistent with the provisions of the charter; for by the charter provisions a complete scheme for the acquisition of this character of municipal improvements by the creation of a bonded indebtedness is provided. For this reason the improvement act is superseded by the charter, and, being superseded, it stands as to the municipality exactly the same as if it were repealed. No bonds can be issued under its provisions, for as a law it is dead to the city. The bonds, therefore, if they may be issued at all, must be issued under the provisions of the charter. Yet bonds cannot be issued under the provisions of the charter unless their issuance has been authorized by the provisions of the charter. While the notice of election in this case appears to have been in a similar form to that laid down in the charter, yet the other objections suggested to the proposed issuance of these bonds are fatal. For these reasons, and upon the authority of the decision in *Fritz v. City and County of San Francisco*, supra, the judgment in this case is reversed, and the cause remanded.

TEMPLE, J. I concur in the judgment.

(132 Cal. 404)

McCARTHY v. PHELAN. (Sac. 692.)

(Supreme Court of California. April 5, 1901.)

APPEAL—REVIEW—DISCRETION—NEW TRIAL—EVIDENCE—ADMISSIBILITY—OBJECTION—WAIVER.

1. The question whether the location of a mining claim had been distinctly marked, so that its boundaries could be readily traced, as required by Rev. St. U. S. § 2324, being a question of fact to be determined in each case by the trial court on the evidence presented, its action in granting plaintiff's motion for a new trial, in an action to quiet title tried to the court, on the ground that his notice of location was void for failure to contain a sufficient description, will not be reviewed on appeal, though the finding specified many particulars in reference to the manner in which the boundaries were marked, not supported by the evidence in the statement, which recited that it contained all the evidence, since the court's action was a matter within its discretion.

2. Where it was not objected on the trial that evidence was not admissible under the pleadings, such objection cannot be made on appeal.

In bank. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by J. W. McCarthy against Michael E. Phelan. From an order granting a new trial, defendant appeals. Affirmed.

F. W. Street and J. B. Curtin, for appellant. J. F. Rooney and Jas. H. Daly, for respondent.

HARRISON, J. Action to quiet title to a mining claim. The defendant is in the possession of the property, and the plaintiff alleges ownership and right of possession in himself. The defendant denies the plaintiff's allegations, and alleges his own ownership, setting forth also his location of the claim, under the laws of the United States. The cause was tried by the court, and findings of fact made by it to the effect that the plaintiff made a location of the claim October 14, 1895, giving the character of the location and of the notice thereof; that from the time of said location until the 1st day of January, 1897, there was not \$100 worth of work done upon the claim; that on January 18, 1897, the lands were public mineral lands of the United States, open to location, and that on that day the defendant entered thereon and located the same in sufficient compliance with the requirements of the United States laws. The court also found that on the 26th of March, 1896, the plaintiff again entered upon the claim for the purpose of relocating the same, and therein performed the acts required therefor under the laws of the United States. Upon these facts the court found that the defendant was the owner and entitled to possession of the claim, and rendered judgment in his favor. The plaintiff moved for a new trial upon the grounds of the insufficiency of the evidence to justify the decision, and for certain errors of law committed at the trial, specifications of which were set forth in the statement. The court granted his motion, setting forth in its order as the grounds upon which it was made—First, that the findings of forfeiture were outside of the issues raised by the pleadings; second, that the plaintiff's notice of location of October 14, 1895, is void for not containing a sufficient description of the claim; third, that said mine was not open to location January 18, 1897, in that the plaintiff had made a valid location of claim March 26, 1896. From this order the defendant has appealed.

In the statement upon his motion for a new trial the plaintiff specified as one of the grounds for granting the same that the evidence was insufficient to justify the finding of the court that in making his location of the mining claim, in October, 1895, the plaintiff marked off the boundaries thereof in such a manner that they could be readily traced, and the statement of the court, in granting the motion upon the ground that

the plaintiff's notice of location did not contain a sufficient description of the claim, is in pursuance of this specification. Section 2324, Rev. St. U. S., authorizing the location of mining claims, declares: "The location must be distinctly marked on the ground so that its boundaries can be readily traced." Whether the location of a mining claim has been distinctly marked on the ground so that its boundaries can be readily traced is a question of fact to be determined in each case by the trial court upon the evidence presented to it upon that issue. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1116; *Hammer v. Milling Co.*, 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; *Bennett v. Harkrader*, 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046; *Book v. Mining Co.* (C. C.) 58 Fed. 106; *Warnock v. De Witt*, 11 Utah, 324, 40 Pac. 205; *Golden Fleece Gold & Silver Min. Co. v. Cable Consolidated Gold & Silver Min. Co.*, 12 Nev. 312; *Gleeson v. Mining Co.*, 13 Nev. 442; *Howeth v. Sulenger*, 113 Cal. 547, 45 Pac. 841. In *Erhardt v. Boaro*, supra, the notice of location was as follows: "We, the undersigned, claim fifteen hundred feet on this mineral bearing lode, vein, or deposit;" and an instruction by the circuit court that the notice was deficient, and that under it the locators could not claim any more than the very place in which the stake was planted, was held to be incorrect, the court saying: The notice "informed all persons subsequently seeking to excavate and open the lode or vein that the locators claim the whole extent along its course which the law permitted them to do. It is, indeed, indefinite in not stating the number of feet claimed on each side of the discovery point, and must, therefore, be limited to an equal number on each side; that is, to seven hundred and fifty feet along the course of the lode or vein in each direction from that point. To that extent, as a notice of discovery and original location, it is sufficient." In *Gleeson v. Mining Co.*, supra, a notice of location, in which only its extent along the lode was given, was held sufficient, and that the width of the claim was to be determined by the boundaries marked upon the surface of the ground, under the limitations prescribed in section 2324. In *Hammer v. Milling Co.*, supra, the court said that stakes driven in the ground may be such permanent monuments as will satisfy the requirements of the statute.

The evidence in the present case of the plaintiff's location of the claim in October, 1895, was that of the plaintiff himself, who identified the copy of the notice which he posted upon the claim, and who testified as to the manner in which he had marked its boundaries. The court in its findings specifies many particulars in reference to the manner in which these boundaries were marked, which find no support in the evidence contained in the statement, and it is recited in the statement that it contains

all the evidence that was admitted in the case. If the court, upon a re-examination of this evidence, was of the opinion that it had erred in finding that the plaintiff did mark off the boundaries so that the claim could be readily traced, and that for this reason there was not a sufficient description of the claim, it was justified in setting aside its decision. Its action in this respect was so far a matter within its discretion as to preclude us from a review thereof.

As the order granting a new trial must be affirmed, it is unnecessary to determine whether in an action of this character it is incumbent upon the defendant to allege the facts constituting a forfeiture of the plaintiff's right to the possession of the claim. When the evidence upon this point was offered, the only objection thereto was the general one that it was irrelevant, immaterial, and incompetent. If the plaintiff would have objected thereto that the evidence was not admissible under the pleadings, he should have specified this ground of objection, and the defendant could then have asked leave to amend his answer. Having tried the cause without making the objection that the evidence was not within the issues, he ought not to be permitted now to make that objection. Upon the cause going down to the superior court, if the defendant shall be advised that an amendment of his pleadings in this particular is proper, that court will doubtless allow such amendment to be made. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.; McFARLAND, J.

132 Cal. 403

SOUTHERN PAC. CO. v. ROBINSON et al.
(S. F. 1,315.)¹

(Supreme Court of California. April 5, 1901.)
INJUNCTION—JURISDICTION—MULTIPLICITY OF SUITS—CONSPIRACY—RAILROADS—TICKETS—STOP-OVER PRIVILEGES—REFUSAL—PENALTY—PASSENGER—RECOVERY—STARE DECISIS.

1. Where, in an action to restrain defendants from prosecuting actions under Civ. Code, § 490, providing that every railroad corporation must furnish every person desiring a passage on their passenger cars a ticket entitling the holder to ride to his destination or any intermediate station, or from any intermediate station to his destination, within six months, and making the company refusing such ticket, or the passage therein called for, liable to the person refused in the sum of \$200, and the complaint alleged that defendants composed a confederacy of individuals formed to create and prosecute about 3,000 causes of action for penalties against plaintiff, equity has jurisdiction of the case, and can consolidate the actions, and dispose of it in its entirety.

2. Certain persons combined for the purpose of creating causes of actions for the penalty prescribed under Civ. Code, § 490, and demanded tickets with the stop-over privilege of a railroad company, and also demanded passage from an intermediate station, having stopped there, for the purpose of being refused

passage on a subsequent train, nearly 3,000 times. They did not desire the stop-over privilege, but in making their demands desired that they be refused. Held, that they could not recover the penalties provided by the statute, since it referred only to persons desiring the stop-over privilege.

3. A prior decision, in an action for refusal to carry a bona fide passenger, that though the face of the ticket says nothing as to stop-over privileges, yet Civ. Code, § 490, enters into the contract, and gives the holder of the ticket stop-over privileges, is not stare decisis in actions by members of the combination to recover the penalties allowed by the section.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the Southern Pacific Railway Company against W. H. Robinson and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Thomas V. Cator and C. M. Jennings, for appellants. Foshay Walker and Pierson & Mitchell (Wm. F. Herrin and John Garber, of counsel), for respondent.

GAROUTTE, J. This action was brought to restrain the appellants from prosecuting about 500 suits, which it was alleged in the complaint they had already commenced, and also from bringing any other actions based on claims for penalties of \$200 each, which they claimed were due them by reason of alleged violations by the respondent of the provisions of section 490 of the Civil Code, and further calling upon the appellants to submit to the court for adjudication all claims which they had of a similar character. It is alleged that they comprised a confederacy of individuals who had been seeking to extort money from the railroad company by laying apparent foundations for claims to penalties, bringing suits thereon, and prosecuting those suits severally to final judgment. Issue was joined, and upon the trial the court found as a fact that 674 of these actions were pending in various justices' courts, and also found that about 2,300 other alleged causes of action of the same general character were held by them. It thus appears that appellants held about 3,000 alleged causes of action against plaintiff, which they were either prosecuting or threatening to prosecute, and upon which they were claiming \$600,000 in penalties, or, as they term it, "liquidated damages."

This important litigation rests upon section 490 of the Civil Code, which grants a stop-over privilege to passengers holding a particular kind of railroad ticket. The section is as follows: "Every railroad corporation must provide, and, on being tendered the fare therefor fixed as provided in the preceding section, furnish to every person desiring a passage on their passenger cars a ticket which entitles the purchaser to a ride, and to the accommodations provided on their cars, from the depot or station where the same is purchased to any other depot or station on the

¹ Rehearing denied May 4, 1901.

line of their road. Every such ticket entitles the holder thereof to ride on their passenger cars to the station or depot of destination, or any intermediate station, or from any intermediate station to the depot of destination designated in the ticket, at any time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage which the same calls for when sold, must pay to the person so refused the sum of two hundred dollars."

The aforesaid section was construed by this court as granting stop-over privileges to passengers in the case of *Robinson v. Railroad Co.*, 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773. It was there strenuously contended that the section had no such effect, but this court determined that the railroad company was mistaken in its contention as to the law; and, pending the final decision of that case, these appellants most industriously engaged in the business of manufacturing the 3,000 alleged causes of action here involved. No case is found in the law books where an undertaking of this character ever assumed such proportions, and where the spirit of speculation was carried on daily for weeks, months, and even years, with all the method and system of a great business undertaking; and it may be well to suggest right here that the law and the facts should be very plain before any court would assist appellants in carrying out this questionable venture to a successful end.

Some objection is made to the form of the present action. Yet, while the proceeding is somewhat novel, it may be said that the facts upon which it is inaugurated are also somewhat novel, and we see no reason why equity will not take hold of this state of facts. In *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, 46 Pac. 142, 30 L. R. A. 182, the power of equity to deal with novel conditions was directly presented and discussed, and it was held that there were no fixed rules limiting the power of equity in dealing with subject-matters coming generally within its jurisdiction, and that the chancellor should not be cramped in the exercise of his powers by fixed and rigid rules of law. We leave this branch of the case with the declaration that this action is maintainable in a court of equity by reason of the claim of a confederacy and combination formed and existing between these appellants to create and prosecute the aforesaid 3,000 causes of action against the plaintiff; and upon the further ground that, in order to avoid a multiplicity of actions, equity will consolidate these 3,000 alleged causes of action into one action, and, thus having taken hold of the matter, will dispose of it in its entirety.

The evidence in this case is sufficient to support the material findings of fact made by the trial court, and we will not deal with it in detail. It shows that these appellants combined and concerted together to create these alleged causes of action, with the sole end in view of securing the penalties or damages pro-

vided for in the aforesaid section of the Code, and that fact is a vital point in the case. The findings further establish that these appellants did not desire the stop-over privilege, but, upon the contrary, in making their demands for such privilege, desired that those demands should be refused. It is further found that appellants stopped over in Oakland, in transit to Alameda, for the single purpose and object of securing a refusal upon a subsequent train of the stop-over privilege, and thus lay the foundation for a cause of action. There is some general evidence that, upon 20 of these occasions when stop-over privileges were denied, certain of these appellants had business in the city of Oakland. But the evidence to this effect is not clear and explicit, and, in view of the fact that 2,980 of the stop-overs were made when the parties had no business, did not desire to stop over, and demanded the privilege simply to lay the foundation for a suit based upon a denial thereof, we feel that the court was entirely justified in placing these 20 refusals in a common receptacle with the remaining 2,980.

Whatever rights these appellants have are purely statutory. Their entire right, whatever it may be, is found alone in the provisions of section 490 of the Civil Code. The tickets sold to appellants in all these cases are similar to the one which was involved in the *Robinson Case*, heretofore cited. While the face of the ticket says nothing whatever as to stop-over privileges, yet the court has held that section 490 enters into the contract made by the parties, and must be read as a part thereof, and from the language of that section it was held by construction that stop-over privileges were given to the holders of the tickets there described. That is the length and width of the *Robinson* decision, and it is in no way stare decisis upon the question now before the court. That question is this: Are these appellants within the scope, spirit, and intent of the law? That is, what is a fair and reasonable construction of this section of the Code? And we are greatly aided in arriving at that construction by a consideration of the objects and purposes of its enactment. That particular portion of it bearing upon this matter is essentially of a remedial character, and it was enacted solely for the benefit of the traveling public. It was enacted solely to enable passengers traveling upon railroad trains to stop over at intermediate stations for the purposes of business or pleasure, and then at any time within six months thereafter to resume their journey to the original point of destination, without the payment of an additional fare.

The first part of the section declares that the railroad corporation, upon being tendered the proper fare, must furnish a ticket to every person desiring a passage upon their passenger trains, which ticket entitles a passenger, etc. Now, let us assume that the section provided for the mulcting of the

corporation in damages or penalties to the amount of \$200 for any refusal upon its part to furnish such a ticket upon demand. Without question, a mere tender of the fare, and demand upon the corporation for the ticket, would not conclusively fasten the liability for a penalty upon it. This is true, for the reason that the section says the person demanding the ticket must be one "desiring a passage" on the corporation's passenger cars. Whether or not he be such a person is a pure question of fact, to be decided like any other question of fact, before a right of recovery would be established, and, if that question of fact be decided in the negative, no recovery could be had. A person desiring a ticket for any other purpose than for use upon the corporation's passenger cars would not be a person coming within the purview of the section, and therefore the corporation would not be liable in refusing him the ticket. If the law had been such as the illustration here shows, and these appellants had tendered the proper fare, demanded tickets, and had been refused, and had made the tender expecting and desiring to be refused tickets, and for the single purpose of creating a cause of action against the corporation, their efforts would have gone for naught in any court of justice; for they would not have been acting in good faith either towards the corporation or towards the law. They would have been mere pretenders, and not persons desiring a passage on the passenger cars of the railroad corporation. They would have placed themselves neither within the letter nor the spirit of the statute. Indeed, the proposition may be more broadly stated to this effect: The corporation, either with or without the section of the Code, owes no duty to furnish a ticket to any person, unless that person desires to put it to the use for which it was made and issued. It appears, therefore, by the provisions of the Code itself, that, as to parties entitled to tickets, this section was only dealing with, and treating of, persons who desired to become passengers upon its trains, and these persons do not come within that class.

When these appellants delivered up their tickets at the ferry gates, they demanded what they termed "Oakland Stop-Over Checks." Let us assume the statute fixed a penalty to be suffered by the corporation if it refused on demand to give Oakland stop over checks. If such were the law, we are satisfied appellants would not be entitled to recover the penalty fixed by the statute; for when they made their demands for the checks they did not desire them, but desired a refusal of them. If they made a demand purely and solely for the purpose of securing a refusal thereof, and thus laying the foundation for the future prosecution of an action to recover the penalty, then certainly they did not desire to exercise the stop-over privilege, and therefore did not desire a

stop-over check. These people, in effect, said: "I do not want to stop over in Oakland, but I demand that you give me a stop-over check." Or they said: "If you will give me a stop-over check for Oakland I do not want it, but if you will not give me the check I do want it." The law does not require the corporation to give checks to people of that kind. The whole spirit and intent of the law declare that persons of that class do not come within its provisions.

In the enactment of the section of the Code, the legislature only intended to give the stop-over privilege to holders of tickets desiring to exercise it. It would be a reductio ad absurdum to say that it was intended for any other purpose. That is the entire force and effect of the act; and it stands the same as if it had said, in plain and direct words, "A passenger holding a ticket and desiring a stop-over privilege is entitled to it by virtue of this ticket." But a desire to exercise the stop-over privilege, and a desire to lay the foundation for a cause of action by securing a refusal of the stop-over privilege, cannot exist in the mind at the same time. They are wholly irreconcilable, and cannot stand together.

It is claimed that these appellants were the holders of first-class, unlimited tickets furnished by the corporation, and by the contract thus entered into between them and the corporation—considering section 490 as a part thereof—they were entitled to stop-over privileges as a naked legal right. This contention is mainly sound, and, if these parties had desired to exercise that stop-over privilege, the right was theirs, and the corporation would have violated the law, and have subjected itself to the penalties therein named if that right had been denied to them. But the trial court has found, and the finding is clinched by the evidence, that these parties did not desire to exercise this right. Informing the conductor upon the train that they desired to exercise it, or testifying in court at the trial that they desired to exercise it, is not conclusive evidence of the fact. It may be prima facie evidence of the fact, but the daily conduct of these parties for months, and even years, indicates otherwise, and absolutely overwhelms all evidence to the contrary.

A person holding one of these tickets, and traveling from San Francisco direct to Alameda via Oakland, would have no right of action under this section, for the reason—First, that he did not desire a stop-over privilege at Oakland; or, second, if he did desire it, he did not demand it. Both of these things are equally necessary to support a recovery. If a person simply within his own mind desires to exercise the stop-over privilege at Oakland, but says nothing to the corporation about it, he has no right of action; yet he is in a position just as favorable to the law as one who does not desire to stop over, but in the loudest of tones

demands of the corporation the privilege of stopping over. A mere demand of that kind, without the desire to stop over, constitutes but words and noise,—nothing more. A person going direct to Alameda from San Francisco, with the unexpressed desire to stop over at Oakland, has no right of action, because he has not been deprived by the corporation of the stop-over right. Neither have these appellants been deprived of the stop-over right, although they demanded it; and this is true because they did not desire or want the right, and would not have exercised it if it had been given them. This section of the Code—be it construed strictly or liberally, narrowly or broadly,—does not contemplate a case where the stop-over privilege is denied to a person who does not want it, and who would refuse it if offered to him.

Let us look at this question from a slightly different angle. The tickets furnished by the corporation gave these persons a stop-over privilege; that is, the privilege of stopping over at Oakland, an intermediate station, and thereafter, within six months, the right to resume the journey to the original point of destination without payment of an additional charge. This was a privilege and right given by the contract of carriage. It was purely optional with the holder of the ticket whether or not he would invoke it. If he did not desire to make use of the right, he had that option. The beneficial and important element to the passenger in this stop-over privilege was the right to resume his journey without payment of an additional fare. This is plain, for he could stop at the intermediate station, regardless of the contract evidenced by his ticket. Now, when these appellants resumed their journey from Oakland to Alameda, and demanded of the conductor free passage to Alameda, they did not act in good faith, for they demanded some thing they did not want, and demanded it, not to get it, but to secure a refusal of it, and did this solely in order that a foundation for a cause of action might be laid against the corporation. For this reason the demand was not made in good faith, and their entire conduct was opposed to the spirit and purpose of the law; for the purpose and spirit of the law was to give passengers traveling upon the corporation's passenger trains the stop-over privilege, if, in fact, they desired to exercise it. These appellants do not come within that class, for they never desired to exercise the privilege. While it even may be said that they desired to stop over in Oakland, still it cannot be said that they desired to continue their journey without paying an additional fare. Upon the contrary, it may well be said they desired to pay the additional fare from Oakland to Alameda.

Considering these railroad tickets to constitute contracts giving stop-over privileges to all the holders thereof who desire to ex-

ercise them, then we have direct judicial authority for the conclusion to which we have arrived. In the case of *Meyers v. Railroad Co.* (Sup.) 41 N. Y. Supp. 798, the court there said: "The command of the statute is that the corporation shall carry for a single fare, between any two points on its road, 'any passenger desiring to make one continuous trip between such points,' and the plaintiff's whole case must rest upon the proof of his allegation that upon each of the occasions when he was refused a transfer ticket he desired to make a continuous trip from the point where he first boarded the car to a point on the line to which he demanded to be transferred. Unless he has established that fact, he is not within the protection of the statute, and no penalty has been incurred by defendant by refusing his demand. That he did not desire to make a continuous trip between two points on the connecting lines is too plain for argument. His whole purpose was not to be transferred at the point where he made his demand. He knew that the demand would be refused, and he had, when he boarded the car, no intention to proceed beyond the point where the two lines connected, and no desire to go beyond that point. His whole purpose was fulfilled when he reached the place where he could conveniently have his demand for a transfer ticket refused. * * * To call such a person a 'passenger' desiring to take a continuous trip between two points on the connecting lines would be to defeat the true purpose and intent of the statute." In that case, notwithstanding the passenger demanded a transfer, thereby asserting that he desired to continue his journey upon the corporation's road, the court found from the evidence that he did not desire to continue his journey, and therefore his demand for a transfer went for naught, and a refusal to issue it to him did not form the basis of an action. In other words, this passenger was not a person coming within the class with which the statute there involved was dealing. In this case, if section 490, as to stop-over privileges, only deals with holders of tickets who desire to exercise that privilege, then these appellants do not come within that class; for, according to the findings of fact, backed up by the whole history of the case, they never desired to exercise the stop-over right.

It is asserted that, "if appellants had a legal right to stop over, then the reasons why they stopped over were immaterial in this case." Or, in other words, it is claimed the motives of appellants in stopping over at Oakland are an immaterial matter. As before suggested, stopping over at Oakland, or desiring to stop over at Oakland, is not the exercise, or the desire to exercise, the stop-over privilege. The stop-over privilege is the right to stop over, and thereafter continue the journey, without the payment of an additional fare. Both of these elements are essential to the right. And, if these ap-

pellants did not desire to exercise both elements of the right, they did not desire to exercise the right. This is not a mere question of the motives which actuated appellants in traveling upon the corporation's trains, but it is the question: Were the appellants deprived of a right granted by the ticket, which right they desired to exercise? If they were not so deprived, they were not damaged, and do not come within the provisions of the statute; for the statute being remedial, and, as contended by counsel for appellants, designed to furnish compensation for damage suffered by the passenger, it could only have been intended to apply to cases where the passenger has suffered some damage, and therefore the appellants would not come within its terms.

Do the rules of statutory construction, as illustrated by the decisions of courts, justify the meaning that we have given to this statute, namely, "all holders of these tickets are entitled to exercise the stop-over privilege given by said tickets, if they so desire?" It is hardly necessary to go outside of the lids of appellants' brief in this case for authority to justify the aforesaid construction of the section. This same section uses the words, "every railroad corporation," and by its terms only attempts to deal with tickets issued by railroad corporations. Yet appellants find it necessary to construe this language, and, invoking statutory rules of construction for that purpose, declare the words "railroad corporation" are broad enough to include, "persons, partnerships, and associations." We are not concerned as to the soundness of appellants' position in this regard. But to support it they say: "Anything which is within the purpose and intention of the makers of the statute, is as much within the statute as if it were its letter." Again they say: "It is a cardinal rule of interpretation that a statute must be construed with reference to the objects intended to be accomplished by it." And again: "That construction will be given an act which will carry into effect the true intent of the legislature." And again: "An act induced by public considerations, the purpose of which is to protect the traveling public, should receive a liberal construction to effectuate the benign purposes of its framers, and every statute should be expounded, not according to the letter, but according to the meaning." These rules of construction are elementary, and appellants cite numberless authorities in support thereof. We now indorse those rules, and tried and tested by them, the construction we have given section 490 cannot be successfully assailed.

In the very recent case of *Ex Parte Lorenzen*, 128 Cal. 438, 61 Pac. 68, 50 L. R. A. 55, this court said: "But for the more substantial objection that the ordinance by its terms would oppress and lead to the conviction of persons guilty of no fraudulent act, it is to be remembered that the letter of a

penal statute is not of controlling force, and that the courts in construing such statutes, from very ancient times, have sought for the essence and spirit of the law, and decided in accordance with them, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope." And the court held that, notwithstanding the language of the ordinance was broad enough to include all passengers, as matter of construction it only included passengers who put the transfer to an unlawful use. For the foregoing reasons, the judgment and order are affirmed.

We concur: McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.; HARRISON, J.

132 Cal. 357

HEARNE v. DE YOUNG et al. (L. A. 733.)

(Supreme Court of California. April 2, 1901.)

LIBEL—PUBLICATION IN NEWSPAPER—MALICE—BAD REPUTATION OF PLAINTIFF—PRIOR PUBLICATIONS—EVIDENCE—REPUTATION—DAMAGES—INADEQUACY—NEW TRIAL.

1. Where a verdict for one dollar is returned in a libel case, the court may grant a new trial, if it deems such damages to be wholly inadequate.

2. An instruction in a libel suit that, if the libelous article was published without malice, only such actual damages may be recovered as are shown by the evidence, is erroneous, since actual damages may be recovered in the absence of actual proof.

3. An instruction defining "actual malice" in a libel case, which is not sufficiently full, is cured by another instruction giving a complete and satisfactory definition thereof.

4. Where the publisher of a newspaper has no actual malice in the publication of a libelous article, actual damages only can be recovered.

5. Evidence of the bad reputation of a plaintiff in libel before the publication of the libel complained of is admissible as bearing on the question of actual damages.

6. A newspaper publisher, who is defendant in a suit for a libel, may testify to his sources of information, for the purpose of showing his good faith in publishing the article.

7. A newspaper publisher, who is defendant in a suit for the publication of a libel, cannot introduce prior publications of the libelous article in other newspapers published in the vicinity of the place where the transaction spoken of in the libel was stated to have occurred.

8. Where a newspaper article charging the commission of a crime is the basis of a libel suit, the defendant cannot show a general report existing at the time of the publication that the plaintiff committed that or a similar crime.

9. Actual damage for a libel published without malice on the part of the publisher is not confined to actual pecuniary loss, but includes loss of reputation, shame, injuries to feelings, etc.

Department 1. Appeal from superior court, San Diego county; Lucien Shaw, Judge.

Action for libel by Joseph C. Hearne against M. H. De Young and others. Judgment for one dollar in favor of plaintiff, and from an order granting him a new trial the defendants appeal. Affirmed.

Lloyd & Wood, J. S. Callen, and Wm. J. Hunsaker, for appellants. E. W. Hendrick, Herbert Peery, and Works & Works, for respondent.

GAROUTTE, J. This appeal is taken from an order granting plaintiff a new trial. The case has once been before this court. 119 Cal. 670, 52 Pac. 150, 499. It is an action for damages based upon an alleged libelous publication in defendant De Young's newspaper. Upon the return of the case to the lower court for a second trial the complaint was amended, thereby counting alone upon that portion of the published article relating to the murder of one Dr. Stillwell, at Hannibal, Mo. A complete statement of the facts may be found in the opinion of the court rendered upon the former appeal. The jury rendered a verdict in favor of plaintiff, assessing the damages at one dollar, and a motion for a new trial was made upon the ground of the inadequacy of the damages found, and also upon the ground of errors of law committed by the trial court. A general order granting a new trial was entered, and defendants appeal from that order.

While it may be conceded that, if the lower court had denied the motion for a new trial based upon the ground that the damages awarded were not enough, then this court would have sustained the order, still it does not follow but that the court will affirm an order granting a new trial upon the ground of the inadequacy of the verdict. After the jury by its verdict has once placed the amount of damages, it will be an exceptional case where this court will interfere with the action of the trial court in reviewing an order either approving or rejecting the amount of the verdict. While in some cases this court has very properly held that the trial court should have granted a new trial by reason of the verdict being excessive in amount, still it has very rarely reversed an order of the trial court declaring the verdict too small. It is insisted that, as matter of law, the trial court declared the verdict inadequate. As far as we know from the record, the claim is not well founded, and it would seem that the verdict was declared too small as matter of fact. As to cases similar to the one at bar, it is said in *Childers v. Publishing Co.*, 105 Cal. 289, 38 Pac. 903, in speaking of that branch of actual damages not included in special damages: "The remaining branch of actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc., and, while special damages must be alleged and proven, general damages for outrage to feelings and loss of reputation need not be alleged in detail, and may be recovered in the absence of actual proof, and to the amount that the jury estimates will fairly compensate plaintiff for the injury done." While it thus appears that the jury has a wide discretion in assessing the amount of damages in cases of this character, still

it is the duty of the trial court to see that the jury do not abuse that discretion in its exercise. And here, if the court deemed this verdict wholly inadequate in amount, it was its right and duty to order a new trial, and that order will not now be disturbed.

The soundness of the law evidenced by the following instructions is at issue upon this appeal. Those instructions have been numbered for the convenience of the court: *

(1) "You are instructed that if you find the defendant De Young did not publish the article in question in this case with actual malice or ill will towards the plaintiff, and that the publication was made in the 'Chronicle' in the usual course of his business as a public journalist, you will, in estimating the damages, if you should find for plaintiff, confine yourselves to the actual damages sustained by plaintiff because of the publication of that portion of the article complained of, as shown by the evidence; and, if you find that the plaintiff has not shown by the evidence that he sustained any actual damages on account of that portion of said article, you will, in case you find for plaintiff, fix the damages at a nominal sum only."

(2) "The jury are instructed that by the term, 'actual or express malice,' when used in these instructions, is meant a spiteful or rancorous disposition, which causes the act to be done for mischief."

(3) "You are instructed that if you find the defendant De Young did not publish the article in question in this case with actual malice, and if you further believe that the defendant De Young had no actual malice or ill will towards the plaintiff, and made the publication in the usual course of his business as a public journalist, you will, in estimating damages (if you should find for plaintiff), confine yourselves to the actual damages sustained by plaintiff because of the publication of that portion of the article which relates to the murder of Amos J. Stillwell, as shown by the evidence."

(4) "If you find from the evidence that the alleged libelous article consisted wholly or in part of the repetition of current reports of long standing, by which plaintiff's reputation had already become and was then impaired, you may take such fact into consideration in estimating damages, should you find for the plaintiff."

(5) "And if you should find for plaintiff, but find De Young did not have actual malice as aforesaid, then in estimating damages you will be confined to the actual pecuniary loss or damage shown by the evidence to have been sustained by the plaintiff because of the publication of that portion of the article which is complained of."

It may be said as to instruction numbered 1 that there must be malice in fact before exemplary damages may be allowed. *Childers v. Publishing Co.*, supra. The term "actual damages," as here used, is broad enough to include damages for loss of repu-

tation, shame, feelings, etc. Again, if there was no malice in fact established by the evidence against defendants, thus eliminating the question of exemplary damages from the case, and the jury thought plaintiff had suffered no actual damages, a verdict for nominal damages was perfectly proper. It was said in the Childers Case, "General damages may be recovered in the absence of actual proof." If the instruction here means that direct evidence must be offered, establishing actual damages, before a verdict may be given the plaintiff for such damages, then it is opposed to the doctrine declared in that case. It would seem that the instruction in this regard is too narrow in its statement of the law.

As to instruction numbered 2, it may be said that, while the definition of actual or express malice there found is probably not sufficiently broad to cover the full meaning of the term, still a complete and satisfactory definition was given in another portion of the charge. It is there said: "Actual malice, in this connection, means personal hatred or ill will towards the plaintiff, or wanton disregard of the civil obligations of the defendants towards the plaintiff." It is unnecessary to decide whether or not these two instructions are contradictory.

There is no legal objection to instruction numbered 3, but instruction numbered 4 is wrong. If plaintiff's reputation was to any degree bad before the article here in question was published, that fact may be taken into consideration by the jury in fixing the amount of actual damages suffered. While defendant Blunt, as decided upon the previous appeal, had the right to explain in detail the reasons which actuated him in publishing the article, and the sources of information upon which he acted in framing the article for publication, for the purpose of showing his good faith, still the admission in evidence of the Missouri papers containing articles of the same general character as that here under consideration was error. If this article was libelous, evidence that other papers also libeled the plaintiff in the same manner is inadmissible. *Wilson v. Fitch*, 41 Cal. 385. It is said in *Newell, Defam.* p. 800: "Hence the fact that the plaintiff had a general bad character before the date of the libel or slander may be given in evidence in mitigation of damages; but the defendant may not go into particular instances, still less may he prove the existence of a general report that the plaintiff has actually committed the particular offense of which the defendant accuses him, or any similar offense." For this reason, the instruction given was erroneous.

Instruction numbered 5 is unsound. Conceding there was no malice in fact upon the part of defendants in this case, still plaintiff in his recovery was not confined to an amount which would compensate him for his actual pecuniary loss or damage shown by

the evidence. He was entitled to actual damages above and beyond any question of actual pecuniary loss; for he was entitled to damages for loss of reputation, etc. *Childers v. Publishing Co.*, *supra*. For the foregoing reasons, the order is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

132 Cal. 349

STORKE v. STORKE. (L. A. 767.)

(Supreme Court of California. March 29, 1901.)

NEW TRIAL—MOTION BARRED BY LACHES—ACCEPTANCE OF ALIMONY—BAR TO NEW TRIAL OF DIVORCE PROCEEDINGS.

1. Plaintiff secured a judgment of divorce, and a few weeks after defendant served notice of a motion for a new trial on a statement of the case, the court ordering plaintiff to pay defendant a certain sum to defray the cost of transcribing the testimony. Plaintiff failed to make the payment, and on the day for the settlement of the statement the order continuing the same recited that plaintiff had not complied with the previous order because of his inability to do so. No further proceedings were ever taken to settle the statement. *Held*, that the failure of plaintiff to make such payment did not excuse the laches of the defendant in prosecuting her motion, and it was error four years after to refuse to dismiss the motion for a new trial made on the ground of the laches of the defendant.

2. Defendant in a divorce proceeding against whom a judgment had been rendered is precluded from obtaining a new trial by the acceptance of the alimony paid in compliance with the judgment.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; M. T. Allen, Judge.

Action by C. A. Storke against Yda Addis Storke. From an order denying plaintiff's motion to dismiss defendant's motion for a new trial, plaintiff appeals. Reversed.

B. F. Thomas, for appellant. Yda Addis Storke, in pro. per.

COOPER, C. This appeal is from an order denying a motion made by plaintiff to dismiss the defendant's motion for a new trial. On the 16th of January, 1895, the court made, and caused to be entered, a final judgment dissolving the bonds of matrimony existing between plaintiff and defendant upon the ground of defendant's extreme cruelty. This judgment awarded defendant \$250 for alimony and \$200 for attorney's fees and costs. After the entry thereof, and before any notice of intention to move for a new trial had been given, plaintiff paid to defendant, and defendant accepted, the said \$450 so awarded to her by the judgment. On February 12, 1895, the defendant served a notice of intention to move for a new trial. The notice specified that the motion would be made upon a statement of the case. Thereupon the court, upon the application of the defendant, ordered that the plaintiff pay to the defendant on or before the 18th of February, 1895,

the sum of \$350 to defray the cost of transcribing the testimony in the case. On March 28th the defendant presented and served upon the plaintiff her proposed statement on motion for a new trial. After amendments were proposed by plaintiff, the judge designated May 8th as the day on which he would settle the statement. On that day the matter came on for settlement, and the judge continued the hearing until July 8th, reciting in his order of continuance the previous order requiring the plaintiff to pay \$350 for transcribing the testimony, and that "through his inability to comply with said order" the plaintiff had not paid the same. No further proceedings have ever been taken towards the settlement of said statement, nor does it appear that plaintiff has ever had the ability to pay the said \$350. On November 6, 1895, the defendant filed a petition setting forth the above facts, that she had not the means to pay for transcribing the testimony, and "that plaintiff is now, and at all times since the 18th day of February, 1895, has been, unable to pay her the money necessary to procure the said testimony," and asked that the said judgment be vacated and set aside. After notice and hearing, the court made an order setting aside the decree and judgment on account of the failure of the plaintiff to pay the \$350, which the court found he had not the ability to pay. On January 16, 1896, the defendant appealed from that portion of the judgment decreeing a divorce between herself and the plaintiff. This appeal was dismissed here upon the ground that, the judgment having been vacated on defendant's motion, she could not appeal from such vacated judgment. *Storke v. Storke*, 111 Cal. 514, 44 Pac. 173. The plaintiff appealed from the order vacating and setting aside the judgment, and the order was reversed by this court. *Storke v. Storke*, 116 Cal. 51, 47 Pac. 869, 48 Pac. 121. In the opinion this court said: "When the court found that the statement which had been prepared by defendant's counsel represented as correctly as possible the proceedings had on the trial of said cause, its proper course was to settle the same accordingly." It was held that the court had no right to vacate the judgment, unless in proper proceedings it should determine that the judgment had been rendered upon some error of law or fact, or by reason of some inadvertence, or excusable neglect; that it could not disturb or change the rights of the parties, as determined by the judgment, by reason of facts or transactions occurring subsequent to the rendition thereof. The opinion was filed February 12, 1897. The defendant has taken no further steps to have said statement settled or said motion brought to a hearing. On March 30, 1899, the plaintiff served notice of motion to dismiss defendant's motion for a new trial, on the grounds, among others, that defendant has received all the money awarded to her by the said judgment, and thus waived her right

to move for a new trial, and laches in prosecuting the same. The notice of motion was accompanied by affidavits setting forth the above facts, in substance. The defendant filed a counter affidavit, in which she set forth "that the only reason why the defendant has failed to prosecute her motion for a new trial is the fact that the said plaintiff has failed and refused to comply with the repeated orders of this court to pay to defendant alimony, and thereby enable her to present said motion." There is no attempt made in defendant's affidavit to show that there is any merit in her pending motion, or that she is prosecuting it in good faith. She asks for the sum of \$350 to pay for transcribing the evidence, and for the further sum of \$500 to pay counsel fees and expenses in prosecuting the motion. No pretense is made that she has ever tried to have the statement settled. The matter came on for hearing on the notice, affidavits, and the record on April 4, 1899, and the court made an order denying the motion.

We think the motion should have been granted upon both grounds herein stated. The court found by the judgment that defendant had been guilty of extreme cruelty, and that plaintiff was entitled to a divorce. The presumption is that the judgment is correct. It has become final, except as affected by the motion for a new trial. More than five years have elapsed since its entry. The court found that plaintiff was unable to pay the \$350. It was held here that the court could not enforce the payment of the \$350 by setting the judgment aside. Neither can it enforce it by keeping a motion designed to vacate it pending forever. This is not a remedy "applicable" to the enforcement of the order. The plaintiff might have been compelled by contempt proceedings, by execution, or other appropriate remedy to comply with the order for the payment of the \$350, if he had the ability to do so. But the court, on the motion to vacate the judgment, found that plaintiff did not have the ability to pay it. Because plaintiff is unable financially to furnish defendant means to attack the judgment, it is not to be kept open forever. It is not like a case where plaintiff is seeking a divorce upon grave charges against defendant, and the court makes an order for the payment of a sum to enable defendant to protect her rights and present her defense. In such case the presumption is in favor of defendant. Here the presumption is in favor of the correctness of the judgment.

The rule is well settled in this state that a motion for a new trial must be prosecuted with due diligence. In *Eckstein v. Calderwood*, 27 Cal. 414, the statement was settled by the court in May, 1863. The motion not having been prosecuted, the respondent made a motion in December, 1863, to dismiss it for want of diligence in prosecuting it. The court granted the motion, and the order was affirmed here. In *Boggs v. Clark*, 37 Cal.

239, the statement was settled and filed August 6, 1867. The moving party not having taken any steps to prosecute the motion, it was dismissed, for want of diligence, in October, 1867. The order dismissing was affirmed here on appeal. In this case there is no excuse for the delay, except that plaintiff cannot pay \$350 to defendant, against whom he has a judgment. Another reason exists why the motion for a new trial should be dismissed. Defendant accepted the part of the judgment that was beneficial to her. It was a final judgment, and by its terms gave her \$450. This sum was based upon the findings, and was the result of the litigation. Defendant took the \$450, and now seeks to attack the judgment through which she received it. This she cannot do. Having taken the benefit, she must bear the burden. The amount of this judgment was not large, but the principle is the same. It may have been as great a hardship to plaintiff to have paid the \$450 as it would be to a wealthy man to pay \$450,000. If the defendant should procure a new trial, she would still have the \$450, and plaintiff would not have his divorce. If she has used it, or is otherwise unable to pay it back, the plaintiff cannot be placed in the same condition in which he was before the trial.

The principle is well settled that a party accepting and receiving the portion of the judgment beneficial to him cannot appeal from it. *Bennett v. Van Syckel*, 18 N. Y. 481; *Clark v. Ostrander*, 13 Am. Dec. 548, note; 2 Freem. Judgm. § 480a; *People v. Burns*, 78 Cal. 646, 21 Pac. 540; *In re Baby's Estate*, 87 Cal. 202, 25 Pac. 402; *In re Shaver's Estate* (Cal.) 63 Pac. 340. The above principle was applied by the supreme court of Indiana in *Garner v. Garner*, 38 Ind. 139, where the party against whom a decree of divorce was granted married. After his marriage he appealed, and his appeal was dismissed. The court said in the opinion: "It seems to be the law that a party cannot be relieved from a judgment of divorce after he has used the privilege of the judgment. Having availed himself of the benefits of the decree or judgment, he must bear its burdens." In *Bourne v. Simpson*, 9 B. Mon. 454, the husband brought suit against the wife for divorce, which was granted. The decree gave her a negro man, woman, and child, two beds, a French bedstead, a horse, \$100, and a piano. She received and used all the property except the piano. She afterwards claimed the right to dower in certain lands of which the husband was seised during coverture. The court in the opinion said: "Having used all the privileges conferred on her by the decree, she is too late in complaining of its burdens, if any such exist." The rule is well stated in Baylies, *New Trials*, p. 18, § 7: "A party may also waive his right to appeal from a judgment or order by acts which are wholly inconsistent with the assertion of the right. Thus, if all the pro-

visions of a judgment are connected and dependent, so that a part cannot be reversed without a reversal of the whole, a party cannot proceed to enforce such portions of the judgment as are in his favor, and appeal from the part which is against him. In such case the right to proceed on the judgment and enjoy its fruits, and the right to appeal, are not concurrent, but wholly inconsistent, and an election to assert one right is a waiver and renunciation of the other." The order should be reversed, and the court below directed to dismiss the motion.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed, and the court below directed to dismiss the motion.

132 Cal. 354

RICE et al. v. NATIONAL CITY et al. (L. A. 737.)

(Supreme Court of California. March 29, 1901.)

MUNICIPAL CORPORATIONS—CITY MARSHAL—SALARY—INCREASE—TERM OF OFFICE.

The board of trustees, on March 16, 1898, fixed the salary of the city marshal at \$5 per month, and \$1 for each dog impounded. Defendant was elected city marshal on April 11, 1898, but refused to qualify and file a bond. On June 21, 1898, the board of trustees increased the salary of the city marshal to \$25 per month, and on July 13th appointed defendant marshal, and he qualified and entered on the duties of his office. Held, that the contention that defendant was not entitled to receive \$25 per month, because the increase in salary was made in violation of a statute forbidding an officer's salary to be raised during his term of office, cannot be sustained, since his term did not begin until he qualified and accepted the office.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by J. A. Rice and another against National City and Samuel W. Smith, to enjoin the payment of a certain sum to defendant Smith as city marshal. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

D. M. Hammack, for appellants. L. E. Dodmun, for respondents.

HAYNES, C. The plaintiffs, taxpayers of National City, brought this action against said city, and Samuel W. Smith, as city marshal, and also against the city clerk and treasurer, to enjoin them from paying said city marshal the sum of \$25 per month, that being the salary fixed by a certain ordinance, which plaintiffs contend increased the salary of the marshal after his term of office commenced. The defendants demurred to the complaint for want of facts, and, their demurrer having been overruled, declined to answer, and now appeal from the judgment thereupon entered.

Defendant Smith was elected to the office of city marshal at the April election, 1896, for the term of two years, and qualified and entered upon the duties of his office on the 20th of that month, the monthly salary of the city marshal being then fixed by ordinance at \$40 per month. On March 16, 1898, shortly before the expiration of his term of office, the board of trustees passed a new ordinance, in which it was provided that the city marshal should receive \$60 per year, payable in monthly installments of \$5 each, and also \$1 for each dog impounded under the authority of the ordinances of said city, and in case the dog was redeemed under the provisions of the ordinance, as well as under certain other circumstances mentioned in the ordinance, he should receive \$1.50 per dog. At the regular election held April 11, 1898, defendant Smith was again elected city marshal for the term of two years, commencing on April 20, 1898, and was duly declared elected, and notified by the city clerk of his election. It is further alleged that defendant Smith failed, refused, and neglected to file his bond and take the oath of office and to qualify under his said election, and "that a vacancy in said office was thereby created, and said office thereupon became vacant, but the said defendant held over until his successor was elected and qualified, and that said defendant did so voluntarily hold over and act as city marshal and to fill said vacancy created by his refusal to qualify." It is further alleged that on June 21, 1898, the board of trustees adopted a new ordinance (No. 140), "attempting to amend said ordinance No. 138, by which [new ordinance] the salary and compensation of the marshal of said city was raised and increased from the sum of five dollars per month to twenty-five dollars per month." It is further alleged that on July 13, 1898, "the board of trustees of said city filled the vacancy so created by electing and appointing said defendant to said office, and that afterwards, and in the manner and within the time required by law, said defendant qualified under said election and appointment of said board of trustees, and that said defendant is now filling said office according to law." It is also alleged that ever since said appointment the marshal has been paid said salary, and that the clerk will continue to draw warrants therefor, and the city treasurer to pay them, unless enjoined from so doing.

It is clear from the allegations of the complaint that defendant Smith did not take office under his election in April. He refused to qualify, and, as alleged, a vacancy resulted. The term of the office, as fixed by the municipal government act, is two years, dating from the 20th of April after the election. But that does not necessarily fix the term of the officer. The language of the statute is, "their several terms of office," not during the statutory term fixed for the

office. Incumbents frequently die. Sometimes they resign. In either case the term of the incumbent ends. If the people fail to elect an officer, or if the person elected fails or refuses to qualify, the incumbent holds over until his successor is appointed or elected and qualifies; but the period during which he holds over is not a new term, but is a continuance or prolongation of the term for which he was elected. It was so held in *People v. Edwards*, 93 Cal. 153, 157, 28 Pac. 831, where it was also said: "During the time he holds over his salary cannot be increased, and he and his sureties are liable on his official bond for all his acts until his successor is elected or appointed and qualified." Or, as said in *People v. Ward*, 107 Cal. 239, 40 Pac. 538: "He had a fixed tenure and a contingent term." See, also, *People v. Hammond*, 66 Cal. 654, 6 Pac. 741, and *Dillon v. Bicknell*, 116 Cal. 111, 47 Pac. 937. If Doe had been appointed instead of Smith, it would hardly be contended that the ordinance passed in June, prior to his appointment, increased or in any manner changed his compensation "during his term of office," which could not begin until he was appointed and qualified. If the statute had provided that the compensation attached to the office of city marshal should not be increased or diminished during the statutory term of two years for which the marshal shall be elected, respondent's contention would be sound. The difference, however, is apparent. The object of the statute is to protect the incumbent against a reduction of compensation during his occupancy of the office, and also to take away all inducement to use his official influence and efforts to procure an increase of it during his incumbency; and in accepting the appointment Smith had a right to rely upon the compensation as then fixed, but which could not take effect until he entered upon a new term under his appointment. Our conclusion upon the main question renders it unnecessary to consider the question whether the complaint is otherwise sufficient. The judgment should be reversed, with directions to dismiss the action.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to dismiss the action.

(6 Cal. Unrep. 668)

FOWLER et al. v. CARNE et al. (L. A. 913.)

(Supreme Court of California. March 29, 1901.)

VENDOR AND PURCHASER—RESCINDING CONTRACT—FINDINGS—EVIDENCE TO SUPPORT—ANSWER—AMENDMENT—VALUE—PROOF—HARMLESS ERROR—EXPERT TESTIMONY—QUESTION—FORM.

1. Where plaintiff in an action to rescind a contract for the purchase of land alleged that

it was not worth more than \$6,000, but introduced no evidence of its value, and defendant and several witnesses testified it was worth from \$14,000 to \$16,000, and that the shares of stock in a water company sold plaintiff was sufficient to water 20 acres in a year of ordinary rainfall, it cannot be contended that findings that it was worth \$15,000, and that the shares of water stock were sufficient to irrigate 20 acres, were not supported by the evidence.

2. Where defendant testified that he did not represent that all of the land purchased by plaintiff was suitable for fruit raising, except that part already planted to fruit trees, and that 10 acres in addition to that under cultivation might be rendered suitable for cultivation by a small expenditure, a finding that defendant did not make such representation was supported by the evidence.

3. Where defendant testified that there were 1,476 trees on the land purchased by plaintiff, and the written contract specified that there were from 1,400 to 1,500, a finding that defendant did not represent that there were 1,600 was supported by the evidence.

4. Plaintiff alleged that defendant fraudulently represented that the shares of water stock sold plaintiff were sufficient to irrigate the entire tract purchased by plaintiff, and defendant denied that he represented that plaintiff's shares of water stock would entitle her to a sufficient amount of water to irrigate said lands, or any portion thereof except that part planted to fruit trees. *Held*, that allowing defendant to amend his answer after the trial by striking out the words, "or any portion thereof except that part planted to fruit trees," was not prejudicial to plaintiff, where the findings of the court supported the answer as it stood prior to the amendment.

5. Where plaintiff in an action to rescind a contract for the purchase of land alleged that it was worth only \$6,000, but introduced no evidence of its value, error in the admission of evidence of value on the part of defendant was harmless, since the burden to show value was on plaintiff.

6. Where witnesses as to the value of land were qualified to give an opinion, the question what was the value of the land as "between a party who wished to buy and one who wished to sell" was not objectionable as to form.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; W. S. Day, Judge.

Action by Laura E. Fowler and husband against John Carne and others. From a judgment in favor of defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Barnes & Selby and H. L. Poplin, for appellants. Blackstock & Edwing, for respondents.

GRAY, C. This action was brought to rescind a contract of purchase and sale of a certain fruit ranch of about 53 acres, situated in Ventura county, together with 55 shares of water stock, and to compel defendant to give up for cancellation a note and mortgage for \$12,000, given to secure the balance due under said contract, and to recover \$3,000 and interest paid on said contract, and also the further sum of \$3,000 and interest for the value of a dwelling built on said ranch by plaintiffs. The complaint alleges that plaintiff was induced to enter into the contract by the fraudulent representations of

defendant. The defendant denied the fraud, set up the mortgage and note in a cross complaint, and on a trial before the court without a jury had judgment in his favor on the issue of fraud, and also foreclosing the mortgage. From this judgment, and from an order denying a new trial, the plaintiffs appeal.

Laura Fowler and her husband and co-plaintiff resided in Chicago, Ill., and in July, 1898, they met the defendant Carne, who resided in Ojai Valley, Ventura county, Cal. Neither of plaintiffs knew anything about fruit farms or fruit farming in Ventura county, but they desired to purchase a fruit farm and live in California principally for the health of themselves and their two boys, and incidentally to profit by fruit farming. Accordingly, on making the acquaintance of defendant, they opened negotiations with him for the fruit ranch in controversy, which resulted in the contract now sought to be rescinded. Plaintiffs did not see the ranch, but took the defendant's word for everything. The representations of defendant claimed in the complaint to have been false, and on which plaintiff was induced to make the purchase, are as follows: (1) He represented that said lands and 55 shares of water stock were of the value of \$15,000; (2) that said lands were in every way adapted, suited, and capable of and for profitable growing of citrus fruits, especially lemons and oranges; (3) that 20 acres of the tract contained 1,600 trees, that would yield a crop worth net profit of \$3,200 for the year 1899; (4) that the remainder of the tract, 33 acres, was in proper condition to put into orange and lemon culture, and just as good as the 20 acres already in trees and bearing; (5) that the 55 shares of stock of the San Antonio Water company, sold with the land, carried with it water ample and sufficient to irrigate the entire tract planted to fruit trees or any and all crops that would grow upon said lands; (6) that the lands were entirely free from freezing temperature in winter time each year. As to all these alleged false and fraudulent representations the findings are adverse to plaintiff. Appellant's principal attack is directed against these findings. She contends that they are not supported by the evidence.

As to representation 1 above referred to, the finding is "that said realty and water stock at the time of the sale thereof to plaintiff Laura E. Fowler were of the value of \$15,000." Plaintiff, in her complaint, alleged that this property "was not of a value to exceed six thousand dollars," but she introduced no evidence whatever as to its value. The witnesses for defendant gave their opinions as to its value, fixing it, most of them, from \$14,000 to \$15,000; one of them testifying that, in his opinion, it was at the time of the sale worth from \$15,000 to \$16,000. Certainly, this finding is supported by the evidence.

As to representations 2 and 4, the findings are "that it is not true that defendant Carne * * * stated or represented * * * that said lands, other than the twenty acres thereof planted to trees, and about ten acres in addition thereto, were in any way or at all adapted, suited, or capable of or for profitable growing of any citrus fruits." The court also finds that about 10 acres in addition to the 20 acres already planted to trees could, by a small expenditure, be rendered fit for cultivation, and as good as said 20 acres; and that defendant did not represent that any of the tract not already planted "was in proper or any condition to put into orange or lemon culture." These findings find support in the testimony of defendant, and, so far as it relates to the condition of the ranch, his testimony is corroborated by that of other witnesses called in his behalf.

The finding as to representation 3 is to the effect that defendant made no such representation, but did represent that the 20-acre tract contained about 1,476 trees. This finding is also supported by defendant's testimony, which is corroborated by the written contract between the parties, in which the number of trees is given as "between fourteen and fifteen hundred orange, lemon, and other fruit trees." The evidence shows without conflict that this representation as to the number of trees did not differ materially from the true number.

As to representations 5 and 6, the findings are that they were not made, but it is, in substance, found that the water from said 55 shares is sufficient in a year of ordinary rainfall to properly irrigate the 20 acres set to trees, and that defendant so represented to plaintiffs. This finding is supported by the testimony of defendant and of several witnesses who gave their opinion, derived from experience, as to the amount of continuous flow of water in inches required to irrigate a certain number of acres on the tract in question. There was some conflict in the evidence on the question of the sufficiency of the water derived from these 55 shares to irrigate the 20 acres already planted; but it was for the trial court to sift this evidence, and find where the preponderance lay, and we are not prepared to say that the finding on the question was without warrant in the evidence.

As to many of the alleged false representations the trial court seems to have relied on the testimony of the defendant alone whenever it came into conflict with that of the plaintiffs. This, perhaps, arose from the fact that in an important particular already referred to the testimony of defendant was corroborated by the written contract made in Chicago on or about the same day as the alleged false representations. We have reference here to the testimony as to the representation concerning the number of trees. We cannot uphold appellants' contention

that the findings on the subject of false representations are without support in the evidence; and, these findings being adverse to plaintiffs, it follows that the groundwork of their action is gone. It will, therefore, be unnecessary to inquire whether the other findings complained of are supported by the evidence.

Appellants, in their brief, complain of several errors of law, only two of which we will discuss. The first is that the court permitted the defendant to amend his answer by striking therefrom the words, "or any portion thereof other than said twenty acres planted to fruit trees," thereby changing an admission that defendant represented to plaintiffs that there was ample water to properly irrigate the 20 acres in orchard each and every year into a denial of that fact. We think appellants misapprehend the effect of the amendment. To set them right, we quote the entire allegations of the complaint and answer pertinent to the question. The complaint is as follows: "That he had, and would sell with the said tract, 55 shares of the stock of the San Antonio Water Company, which shares of stock he stated and represented to plaintiffs carried and entitled the owner to water ample and all sufficient to irrigate the said entire tract of land during the entire irrigating season of each year.

* * * That said tract was well and amply supplied with water for the proper and sufficient irrigation of the same planted to fruit trees, orange and lemon trees, and any and all crops that would grow upon said lands." The answer to the above allegations was as follows: Deny "that the defendant Carne stated or represented to plaintiffs, or either of them, that said shares of water stock carried or entitled the owner to water ample or sufficient to irrigate said tract of land, or any portion thereof other than said 20 acres planted to fruit trees, during the irrigating season of each year, or of any year other than one of ordinary rainfall; or that said lands, * * * or any portion thereof other than said twenty acres planted to fruit trees, was well or amply supplied with water for the proper or sufficient irrigation of the same planted to fruit, orange, or lemon trees, or any crops that would grow upon said lands, or at all." The part of the above quotation in italics was stricken from the answer on motion of defendant to amend some days after the trial, and immediately before the findings were filed. An examination of the findings discloses that on this issue they follow the exact language of the answer as it stood before this amendment. The testimony of the defendant also supports the answer exactly as it stood before the amendment. He says: "I told them it was very dry at that very time, and that I had a letter from my son saying that it was dry, and the fruit was dropping. * * * I explained to Mrs.

Fowler and Dr. Fowler that the supply from this water stock, according to my experience, would be sufficient to irrigate the twenty acres in citrus fruits in a season of ordinary rainfall. * * * I told them there was no water for citrus fruit on the ten acres; that all the water was used on this twenty acres, except for domestic use." There is no pretense that it was represented that water was to be had for this ranch, or had ever been obtained for it, from any other source than from these 55 shares of water stock. We are therefore at a loss to understand why the defendant desired to amend his answer as he did, or of what benefit it could be to him to so amend it. So long as the evidence of defendant and the findings followed and supported the denials and allegations of the answer as it was before amendment, the amendment was entirely immaterial, and accomplished nothing. Besides, the amendment did not materially change the issues, and appellants were not injured thereby.

The second alleged error of law that we will notice is claimed to have been made in overruling plaintiffs' objection to evidence offered by defendant as to the value of the property sold. Though the plaintiffs alleged that this property was worth no more than \$6,000,—and the burden was undoubtedly on them to show that it was worth less than they agreed to pay for it, in order to show that they were injured by the alleged false representations,—yet, as we have already seen, they offered no proper evidence as to the value of the property whatever. Therefore, if the defendant had presented no evidence on the question of the value of the property, the finding on that subject must have been adverse to the plaintiffs, or just as it now stands, to wit, that the property was worth \$15,000, the amount for which it sold. The evidence as to value in no way affected the findings. They are the same as they would have been in the absence of such evidence. Therefore the plaintiffs are in no way injured by the evidence complained of. Again, all the witnesses who testified on this question of value showed themselves, either in direct or cross examination, to be competent to give an opinion thereon. The form of the question—it being directed to the value of the property "between a party who wished to sell and one who wanted to buy it"—is not open to objection. *Lawrence v. City of Boston*, 119 Mass. 126.

The further contentions of appellants are not of sufficient importance to require special discussion. The judgment and order should be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(132 Cal. 456)

MORSE v. STEELE (S. F. 2,089.)¹

(Supreme Court of California. April 10, 1901.)
 EXECUTORS AND ADMINISTRATORS—CLAIMS—
 CONTINGENT—REJECTED—ACTIONS—TIME TO
 SUE—STATUTORY PROVISIONS—PLEADING—
 SUPPLEMENTAL COMPLAINT—PREMATURE
 ACTION.

1. Under Code Civ. Proc. § 1498, providing that where a claim is rejected by an executor the holder must sue the executor within three months, if it be then due, or within two months after it becomes due, an action against an executrix on a contract made between plaintiff and deceased two years before his death, as to certain live stock, which was to continue in force for four years, and which was presented to the executrix as a contingent claim and rejected, does not lie until such claim becomes due.

2. Where an action was prematurely brought, the original complaint falls, and it is not error to refuse to permit the filing of a supplemental complaint.

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by Henry M. Morse against Emma S. McPherson Steele, as executrix of the estate of E. L. G. Steele, deceased. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Noble Hamilton, R. M. F. Soto, and E. H. Stearns, for appellant. Bishop & Wheeler and Wm. Rix, for respondent.

GAROUTTE, J. This appeal is taken from a judgment rendered upon the pleadings. Plaintiff and E. L. G. Steele entered into a contract pertaining to the care and proceeds of certain live stock, which contract was to be continued in force for the period of four years. Two years thereafter Steele died, and the contract was presented to the executrix of his estate as a contingent claim. The claim was rejected, whereupon the present action was brought thereon. Of course, the judgment in such an action could go no further than simply to establish the status of the claim, even conceding that any judgment whatever could be rendered. Section 1498 of the Code of Civil Procedure declares: "When a claim is rejected either by the executor or administrator, or a judge of the superior court, the holder must bring suit in the proper court against the executor or administrator, within three months after the date of its rejection if it be then due, or within two months after it becomes due. otherwise the claim shall be forever barred." There is no authority in the law for bring-

¹ Rehearing denied May 10, 1901.

ing the present action unless it can be found in this section. And, in view of the fact that contingent claims are required to be presented to the representative of an estate for allowance, it would seem that in case of rejection there should be some legal procedure by which the claimant's rights may be preserved. For this reason, the court is strongly inclined towards holding the existence of such authority in the aforesaid section. The claim here involved certainly was not due when presented; hence no action could be brought upon it, as in the case of a rejected claim which is due. But the court is satisfied that, for the purpose of bringing an action upon the claim, it may be held, without doing any violence to rules of construction, that a claim similar to the one here presented, namely, a contingent claim, is a claim "not due," within the purview of the aforesaid section 1498. This claim is both contingent and not due. Indeed, no contingent claim is due. But, by the happening of the event upon which the contingency depends, the claim becomes due, and then may be enforced as any other claim which becomes due. If the event upon which the contingency depends never happens, the claim never becomes due, and necessarily no action can be or should be brought upon it. By this construction of the statute the rights of all parties are protected, and equal and exact justice done. It follows that an action upon a rejected contingent claim may be brought only within two months after such claim becomes due. The claim here sued upon shows upon its face that it was a contingent claim, and necessarily not due when the complaint was filed; hence the action was prematurely brought. While there may be some obiter in *Fratt v. Hunt*, 108 Cal. 292, 41 Pac. 12, intimating that section 1498 by its terms is not broad enough to include "contingent claims," we conclude that the rule here laid down is the better rule, and the court so declares. The trial court did not commit error in refusing plaintiff the privilege of filing a supplemental complaint. This action was prematurely brought. For that reason the original complaint must fall. In such a case a supplemental complaint has no place as a pleading. *Lewis v. Fox*, 122 Cal. 250, 54 Pac. 823. The judgment is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

132 Cal. 401

In re COAN'S ESTATE. (S. F. 2,153.)

(Supreme Court of California. April 5, 1901.)
ADMINISTRATORS—CHILDREN—APPOINTMENT OF SON AND DAUGHTER—MALES PREFERRED TO FEMALES—FOREIGN WILLS.

1. Under Code Civ. Proc. § 1365, providing that the administration of estates must be granted in the second place to children of deceased; and section 1366, declaring that, of

several persons claiming and equally entitled to administer, males must be preferred to females,—an order appointing both son and daughter of deceased to administer her estate was error, notwithstanding that section 1367 authorizes the court to grant letters to one or more of several persons equally entitled to the administration.

2. Code Civ. Proc. §§ 1322-1324, providing that, when a copy of a duly-probated foreign will is produced by "any person interested in the will," letters of administration shall issue thereon, must be construed with section 1350, declaring that, if the executors fail to apply for letters, etc., letters of administration with the will annexed must be issued as designated for the grant of letters in cases of intestacy, and section 1366, prescribing in cases of intestacy that, of several persons claiming and equally entitled to administer, males must be preferred to females, and cannot be construed by themselves to the support of an appointment of both son and daughter of deceased to administer.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Proceedings for the appointment of an administrator cum testamento annexo of the estate of Mary Elizabeth Coan. From an order appointing J. W. Coan and Catherine Eubank joint administrators, J. W. Coan appeals. Reversed.

W. M. Pierce and Fred A. Treat, for appellant. Dougherty & Lacey, for respondents.

GRAY, C. At her death deceased was a resident of Pennsylvania, and left a will in which she appointed "Adam Keller, of Carlisle, Pa.," as executor. This will was duly probated in said state. As shown by the findings in this matter, J. W. Coan was the son, and Mrs. Catherine Eubank was the daughter, of deceased. Both of them were residents of California, and both entitled to succeed to a portion of the personal estate of said deceased under the terms of her said will. Said J. W. Coan petitioned for letters of administration with the will annexed on the mother's estate. Mrs. Eubank also petitioned for letters to herself or the public administrator, and her three nonresident sisters, also interested in the estate, joined her in this petition. Coan filed an opposition to the appointment of either his sister or the public administrator, and, after hearing all these matters together, the court found that Coan and his sister were equally entitled to letters, ordered that the will be admitted to probate, and that letters of administration with the will annexed issue to both Coan and his sister, Mrs. Eubank. Coan appeals from that part of the order in favor of Mrs. Eubank.

Section 1365, Code Civ. Proc., places "the children" second in the list of those entitled to administer. If there were no other provisions concerning the matter, it would seem from the section cited that all the children, when entitled to succeed to the personal estate of the deceased parent, are equally entitled to letters; but this section is qualified

by the next section (section 1366, Code Civ. Proc.), which provides that, "of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to the half blood." The way to prefer one to the other is to appoint the one and exclude the other; the way not to prefer either is to appoint both, as was done in this case. The section quoted is mandatory by its terms, and it is plain that, if any effect is to be given to it, a brother and sister are not equally entitled to administer, and cannot in a contest be treated as "several persons equally entitled to administer," and be both appointed under the provisions of section 1367, Code Civ. Proc. The finding that the brother and sister were equally entitled was merely an erroneous conclusion of law. It being found that the one was a son, and the other a daughter, of the deceased, the order should have directed letters to issue to the son alone, as the court had no discretion to do otherwise under the terms of the statute. It will be presumed that the appellant is entitled to administer because it has been so adjudged by the trial court, and no appeal from that adjudication is before us. That question, then, must be treated as settled for all purposes of this case. If he is entitled to administer at all, he is entitled to be appointed sole administrator, and is therefore aggrieved by the appointment of the respondent, and may appeal from the order appointing her.

It is contended by respondent that the sections of the Code relating to the probate of foreign wills (sections 1322-1324, Code Civ. Proc.) should be construed independently of the other provisions of the Code, or, as she expresses it, those sections "are a law unto themselves, and are not affected by section 1365 et seq." This contention cannot be maintained. Section 1350, Code Civ. Proc., provides that, if the executor named in the will is incompetent or fails to apply, etc., "letters of administration with the will annexed, must be issued as designated and provided for the grant of letters in cases of intestacy." The section just quoted from is not restricted to any class of wills, and it certainly must include foreign wills in its provisions. The "cases of intestacy" referred to in said section 1350 are provided for in said section 1365 et seq. It seems, therefore, beyond question that these sections apply to the probate of a foreign will, where, as in this case, the controversy as to who shall administer is between parties interested in the will. In *Re Engle's Estate*, 124 Cal. 292, 56 Pac. 1022, and in *Re Bergin's Estate*, 100 Cal. 376, 34 Pac. 867, the contest for letters was in each case between one interested in the will and the public administrator, who had no interest in the will or in the estate; and in this respect, at least, these cases are to be distinguished from the case now before us. We advise that the order appealed from be reversed, and that the trial court be di-

rected to enter an order on the findings in accordance with the views herein expressed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the trial court directed to enter an order on the findings in accordance with the views herein expressed.

136 Cal. 432

WINCHESTER v. HOWARD et al.
(L. A. 768.)

(Supreme Court of California. April 6, 1901.)
CORPORATIONS—OFFICERS—CORPORATE FUNDS
—MISAPPROPRIATION—DIRECTORS—LIABILITY—PRESUMPTION—ELIMINATION—PETITION—SUFFICIENCY.

1. A petition, in an action to charge directors of a corporation with a misappropriation of the corporate funds by its officers, alleged that the purchase of a note was only a pretended purchase, and that the payment of the corporate fund therefor was unlawful, and that the corporation suffered by reason of the misappropriation and pretended purchase. *Held*, that the use of the words "pretended," "unlawful," and "misappropriation" did not dispense with the necessity of pleading the facts showing a misappropriation, and such words would be stricken.

2. Const. art. 12, § 3, provides that the directors of a corporation shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of the corporation during the term of such director. A petition to charge defendants, as directors of a bank, with the misappropriation of its funds, alleged that the treasurer of the defendant corporation paid the sum of \$20,000 for a note, and that the note was not secured in any way, but did not allege that the note was not paid, or that the makers were not solvent at the time it was purchased, or that the money was embezzled by any officer of the corporation, or was used for any unlawful purpose, or was converted by any officer to his own use. *Held*, that the facts alleged were not sufficient to make the defendants liable for a misappropriation, and hence a demurrer to the petition was properly sustained.

In banc. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Joseph Winchester against Bryant Howard and others. From a judgment in favor of defendants sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

C. H. Rippey and Withington & Carter, for appellant. S. F. Leib, for respondent.

PER CURIAM. This appeal is from the judgment for the purpose of reviewing the order sustaining the respondent's demurrer to the complaint. The action was brought by plaintiff, as assignee of certain depositors of the Savings Bank of San Diego County, to recover of respondent and others the sum of \$376,359.46, claimed to have been misappropriated by the officers of the bank. The proceeding is under the latter clause of section 3, art. 12, of the constitution, which reads as follows: "The directors or trustees

of corporations and joint stock associations shall be jointly and severally liable to the creditors and stockholders for all monies embezzled or misappropriated by the officers of such corporation, or joint stock association during the term of such director or trustee." The plaintiff in his brief concedes "that the allegations which connect Mr. Mabury are not claimed to hold him further than the same allegations would impose a liability upon other directors not implicated." As this appeal is for the purpose of reviewing the order sustaining Mabury's demurrer to the complaint, we need not discuss the allegations of the complaint as to any other defendant. It is stipulated that the plaintiff must recover, if at all, on the provision of the constitution quoted.

There has been no legislation for the purpose of aiding or assisting in carrying into effect the said provision. The character of action that may be brought, the proportion of recovery to be paid, respectively, to the creditors and to the stockholders, whether the creditors are to be paid first, and whether judgment creditors or contract creditors merely are meant, whether the creditors or stockholders must have been such at the time of the alleged embezzlement or misappropriation before they can complain, whether a creditor can complain if the bank is solvent, or whether a creditor in any case can recover more than the amount due him, or whether an action can be maintained by the creditors without the stockholders, or vice versa, and many other questions of similar import, are all matters of judicial construction, if the provision is self-executing. But, under the view we take of the complaint, it is not necessary here to decide as to whether or not the provision is self-executing. The remedy seems to be given to "creditors and stockholders," or, at least, the aim is to create a liability in their favor. Whether or not, in such case, the action to recover for such liability may be maintained by an assignee, being a person not named in the provision, need not be determined. If it be conceded that the provision is self-executing, —which we do not intimate to be the case,—and that an assignee of a contract creditor can maintain the action, yet the demurrer was properly sustained as to Mabury. The provision imposes a liability upon the honest, faithful director or trustee for all amounts embezzled by any officer of the corporation. The honest official is made to pay for the moneys stolen or embezzled by the dishonest one. The action is therefore in its nature a penal action. *Carr v. Rischer*, 119 N. Y. 117, 23 N. E. 296; *Globe Pub. Co. v. State Bank (Neb.)* 59 N. W. 683, 27 L. R. A. 854. Therefore the provision must be strictly construed, and the liability claimed must be shown, not by implication, but by unambiguous language. *Askew v. Ebberts*, 22 Cal. 264; *Association v. Sullivan*, 62 Cal. 395. The liability is for "moneys embez-

zled or misappropriated" by another. In this case there is no claim or allegation that the money was embezzled, but the attempt is to show that it was misappropriated. What, then, is the meaning of the word "misappropriated" as used in the constitution? It is used in connection with "embezzled," and does not mean merely applying money in a manner not authorized by law. It is used in a criminal sense in article 2, § 1, of the constitution, where it is provided: "And no person hereafter convicted of the embezzlement or misappropriation of public money shall ever exercise the privilege of an elector in this state." Pen. Code, § 504, makes the fraudulent appropriation to any use or purpose, not in the due and lawful execution of his trust, by any officer of a corporation of property which he has in his possession by virtue of his trust, embezzlement. In speaking of the word "misappropriation," as used in the provision, this court said in *Fox v. Mining Co.*, 108 Cal. 426, 41 Pac. 308: "But in my opinion the word 'misappropriation' is to be construed by the maxim, 'Noscitur a sociis.' It means something like embezzlement; or, in other words, it means the misapplication of funds intrusted to an officer for a particular purpose by devoting them to some unauthorized purpose, and does not apply to the payment of an extravagant price for services or materials properly appertaining to the business of the corporation." It is therefore evident that unless the complaint, in view of the above definitions, alleges fully a misappropriation of the funds of the corporation by some officer thereof, while Mabury was a director, it states no cause of action against him. The complaint contains 27 separate statements as to the alleged misappropriations. As they are all of the same general nature, it will not be necessary to examine each in detail. One or two will suffice for the purposes of this case.

The first is as follows: "(1) On the 29th day of November, 1887, said defendant Bryant Howard, who was then the attorney in fact of defendant Hiram Mabury, directed John Ginty, who was then the secretary and treasurer of said savings bank, to pay to said Consolidated National Bank of San Diego, out of the funds of said savings bank, for the benefit of said Hiram Mabury, the sum of \$20,000 upon the pretended purchase by said savings bank from said Hiram Mabury of a note of Guion, Hamilton & Hartley, payable to said Hiram Mabury, of that date, due February 29, 1888, with interest at 12 per cent., for \$20,000, which note was not then secured in any way, which sum of \$20,000 said John Ginty as such treasurer, on said November 29, 1887, did unlawfully pay out of the funds of said savings bank to said Consolidated National Bank, for the benefit of said Hiram Mabury, by reason of which misappropriation and pretended purchase the said savings bank and its depositors have

suffered a loss, including interest amounting to \$54,236.65." We may eliminate from the above specification the words "pretended," "unlawfully," and "misappropriation." While the words are unpleasant, they are not sufficient to dispense with the necessary statement of facts. *Spring Valley Water Works v. City of San Francisco*, 82 Cal. 321, 22 Pac. 910, 1046, 6 L. R. A. 756; *Ambler v. Choateau*, 107 U. S. 590, 1 Sup. Ct. 556, 27 L. Ed. 322; *Pehrson v. Hewitt*, 79 Cal. 598, 21 Pac. 950.

The character of the transaction must be determined by the facts alleged, and not by the epithets used by the pleader. We then have the allegation that Ginty, the treasurer of the savings bank, under the direction of Howard, the president, on November 29, 1887, paid to the Consolidated National Bank of San Diego the sum of \$20,000, upon the purchase of the note of Guion, Hamilton & Hartley payable to Mabury for the sum of \$20,000, with interest at 12 per cent., due February 29, 1888. That said note was not secured in any way, and the sum was paid for the benefit of Mabury. As the note was payable to Mabury in the first place, it would, of course, follow that the payment of the purchase price was for his benefit. It is not alleged that the makers of the note were not solvent at the time it was purchased. In fact, it is nowhere alleged that they were ever insolvent, nor that the note has not been paid. It is alleged as a conclusion that the depositors have suffered a loss in consequence of the purchase, including interest amounting to \$54,236.65. Whether this loss was caused by the fact that the money, if kept, could have been loaned at a higher rate or used in speculation, does not appear. It is not alleged that the money was embezzled by any officer of the corporation. It is not alleged that it was used for any unlawful purpose or converted by any officer to his own use. It may be, and probably is, true that the money of the savings bank should not have been loaned without security, but we cannot think that a loan made by an officer of a bank, in good faith, for the bank, and not for his own gain, would be a misappropriation, within the meaning of the constitutional provision.

The fifth specification of facts relied upon to constitute a misappropriation is as follows: "(5) That on the 22d day of October, 1889, the said Bryant Howard, as president of said savings bank, directed said John Ginty, as such secretary and treasurer, to pay said Consolidated National Bank the sum of \$88,210, upon the pretended purchase of certain notes held by said Consolidated National Bank of one R. W. Waterman, which notes were then long overdue, were not secured in any manner, and which had been in large part protested, and which notes were not transferred to said savings bank, in pursuance of which the said John Ginty did, on said 22d day of October, 1889, as such secre-

tary and treasurer, unlawfully pay out of the funds of said bank to said Consolidated National Bank the sum of \$88,210, by reason of which misappropriation said savings bank and its depositors have suffered a loss, including interest, of \$23,696.52." Here it appears that on the 22d day of October, 1889, the treasurer of the savings bank, under direction of the president, paid to the Consolidated National Bank, \$88,210, for the purchase of certain notes held by the national bank made by one Waterman which were overdue, and which had been in part protested. It is alleged that the notes were not secured, but there is no allegation that the maker was then or ever was insolvent. The amount of said notes is not shown, neither is it shown that they were not paid. It is alleged that by reason of the purchase the savings bank suffered a loss, including interest, of \$23,696.52. Whether this loss was from the amount due on the face of the notes, or by reason of the bank not having the money to loan or use for other purposes, does not appear. The savings bank may have received the entire amount back and thousands of dollars interest, and yet all the allegations concerning this transaction may be true. There is no allegation that any officer of the bank embezzled or appropriated to his own use a single dollar of the money. It is provided in section 5209 of the Revised Statutes of the United States: "Every president, director, cashier, teller, clerk or agent of any 'national banking association,' who embezzles, abstracts or willfully misapplies any of the money, funds or credits of the association, * * * shall be deemed guilty of a misdemeanor." This section came before the supreme court of the United States in *U. S. v. Britton*, 107 U. S. 666, 2 Sup. Ct. 512, 27 L. Ed. 520, and the court, in construing the section, said: "To constitute the offense of willful misapplication there must be a conversion to his own use, or use of some one else, of the moneys and funds of the association by the party charged. * * * There is no averment of a conversion by the defendant to his own use, or the use of any other person, of the funds in the purchase of the shares. The counts, therefore, charge maladministration of the affairs of the bank, rather than a misapplication of its funds." The central idea of the provision is "embezzlement or misappropriation" by the officers to their own use. It was not the intention to make every director of a bank responsible for the business mistakes of his associates. Neither is it the policy of the law to allow a stockholder to profit by an investment if it proves to have been a good one, and to hold the directors responsible if it proves to have been a bad one. Corporations are managed by their agents and directors. If, after using their best judgment, an investment should not prove profitable, it is no more than happens to individuals in the everyday transactions of life. Banks have their financial

crises, when assets that were at the time they were taken ample become valueless. In all cases the directors and officers should be honest, and held criminally for any embezzlement or misappropriation of funds to their own use. The individual directors should not be held for the acts of others with which they are in no way connected, unless under the plain mandates of the law. In this case the facts alleged do not make respondent liable for the acts of other officers. The judgment is affirmed.

BEATTY, C. J., did not participate in the foregoing.

132 Cal. 392

In re BLACK'S ESTATE. (Sac. 797.)

(Supreme Court of California. April 4, 1901.)
WILLS—PROBATE—VALIDITY—UNDUE INFLUENCE—UNREASONABLENESS—BURDEN OF PROOF—PROPONENT—MENTAL CONDITION—EVIDENCE—ATTENDING PHYSICIAN—ADMISSIBILITY.

1. Undue influence, to affect the validity of a will, must bear directly on the testamentary act.

2. Evidence of mere opportunity to unduly influence testatrix is not sufficient without a preponderance of evidence that such influence was exercised, and induced a disposition of property other than would have been made without it.

3. Where a will is unreasonable, the burden of explaining away the unreasonableness does not devolve on the proponent in a contest over its probate.

4. Where, in a will contest, the testimony of attending physicians of the testatrix as to her mental condition was not founded on information acquired in attending her which was necessary to enable them to prescribe or act for her, it was not barred by Code Civ. Proc. § 1881, which precludes a physician from being examined only as to such information, and was therefore properly admitted.

Department 2. Appeal from superior court, Yolo county; A. J. Buckles, Judge.

Application by W. F. Wall for the probate of the will of Mary A. Black, deceased. From a judgment probating the will, R. E. Moore and others appeal. Affirmed.

Chas. W. Thomas, for appellants. Arthur C. Huston, for respondent.

McFARLAND, J. This is an appeal by the contestants of the will of Mary A. Black, deceased, from a judgment probating said will, and from an order denying their motion for a new trial.

As to the contention that the evidence did not justify the verdict, waiving the technical point made by respondent, it is enough to say that the evidence largely preponderates in favor of the findings of the jury.

Appellants' main contentions relate to the instructions to the jury. The case ought to have been a reasonably simple one, but the parties managed to get it into a labyrinth of legal propositions. The attack on the will made in the pleading of appellants had very feeble support in the evidence, but apparent-

ly respondent feared to stand on the real merits of his case, and sought unnecessarily to fortify his position by numerous objections to evidence and a multitude of instructions, and thus enabled his opponents to make a more respectable showing on appeal than they made in the trial court. At the request of respondent the court gave the jury 36 mortal instructions, covering 16 pages of the printed transcript, while appellants asked for 27 more, 17 of which were given and 10 refused. It would be surprising if such a record did not show some errors. However, in the statement on the motion for a new trial, the assignments of error as to the rulings of the court in the matter of instructions go only to parts of such rulings. We will notice only such points made in their brief as are based on the record.

The giving of respondent's instruction No 4, which is so elaborately discussed by appellants, is not assigned as error. It is proper, however, to say that it has not the meaning ascribed to it by appellants. It does not mean that appellants must have proven conjunctively both mental unsoundness and undue influence in order to have succeeded in upsetting the will. It merely means that a preponderance of evidence was necessary to establish mental unsoundness, and that such preponderance was also necessary to establish undue influence, and could not have been otherwise understood by the jury. Each of the three issues of mental unsoundness, undue influence, and fraud was separately submitted to the jury at the request of appellants, and no other issue was requested to be or was so submitted; and a finding for appellants upon any one of these issues would have resulted in a judgment in their favor. There is no assignment of error as to instructions numbered 5, 6, or 7, which contain mere statutory definitions. The giving of subdivisions fifth and seventh of instruction 8 is assigned as error, but no argument is made as to these subdivisions. Appellants insist that instruction 9 is erroneous, and so prejudicial to appellants as to require a reversal. This instruction is on the subject of undue influence, and, like some others, is perhaps subject to the criticism that it has too many words in it; but when closely examined it will be found, we think, to be substantially in accord with the principles announced on that subject in *Re McDevitt*, 95 Cal. 17, 30 Pac. 101; *Re Carpenter's Estate*, 94 Cal. 406, 29 Pac. 1101; *Re Langford's Estate*, 108 Cal. 610, 41 Pac. 701; *Re Calkins' Estate*, 112 Cal. 301, 44 Pac. 577; *Re Kaufman's Estate*, 117 Cal. 295, 49 Pac. 192; and kindred cases. It substantially does nothing more than to state the rule that evidence of mere opportunity to exercise undue influence is not sufficient, but that there must be a preponderance of evidence to the point that said influence was actually exercised, and that it influenced the mind of the testatrix at the time of the making of the will, and induced

her to make a disposition of her property other than she would have made had it not been for such undue influence. The instruction should be considered in connection with certain other instructions given on the same subject at the request of appellants, of which the following are fair samples: "(23) If, from the testimony, you believe that William Wall and James Black, or either of them, made false and fraudulent representations to the testatrix concerning her children, R. E. Moore, Mrs. Washington, and Mrs. Wolfskill, or any of them, and that such representations were believed by the testatrix, and that she thereby became incensed against said children, or any of them, and under the influence and belief of such representations, and by reason thereof, executed a will, then you are instructed that you should find that the execution of said will was obtained by undue influence and fraud." And again: "(15) If you believe from the evidence that William Wall and James Black, or either of them, falsely and positively represented to the testatrix, in a manner not warranted by their information, they believing such representation to be true, that her children, Mrs. Washington, Mrs. Wolfskill, and R. E. Moore, or any of them, had made unkind and slighting remarks about her, and if you believe from the evidence that such false representations were made with the intent to induce said testatrix to become or remain hostile in feeling towards her said children, or any of them, and thereby induce the said testatrix to withhold from her said children, or any of them, her favor or property, and to gain an advantage for themselves, or either of them; and if you believe from the evidence that under the influence of said false representations, so made, the testatrix made and executed the will in question,—you will then find that such will was signed and executed under undue influence and fraud." All these instructions, taken together, correctly gave the law on the subject to the jury, and as favorably as appellants could have expected, and we do not think that they were at all prejudiced in the premises. Instruction 11 is correct. It is merely to the effect that undue influence must bear directly on the testamentary act. In instruction 14 it is merely said in the brief that it is "to my mind contradictory and contravenes the law"; but we do not see any grounds for this short criticism. Instructions 16, 18, 27, 29, and 30 are criticised as "argumentative," but there is no assignment of error in giving any of them.

We see no reason for a reversal on the ground of the refusal to give instructions asked by appellants. In appellants' brief the refusal to give, "or to give without modification," instructions 2, 7, 8, 17, 18, 19, 22, 23, and 24, is noticed, but such refusal is not assigned as error. The refusal to give No. 3 is submitted "without argument." Its refusal was not error. Instruction 19 was

properly refused. If given, it would have told the jury, in substance, that, if they thought the will "unreasonable," then it devolved on the proponent to explain away the unreasonableness, which is not the law. As to appellants' instruction No. 20, it is doubtful if the latter part of it is true as a proposition of law, or whether it is within the domain of law at all, and, moreover, it is not clear that there was any evidence to which it could be applied, even if true as an abstract legal proposition; but, at all events, the other instructions given were full enough on the subject alluded to in instruction 20, and appellants were not prejudiced by its refusal.

The record shows 36 exceptions to rulings on the admissibility of evidence, and we deem it necessary to notice only one of them. Appellants contend that the testimony of three physicians as to the mental condition of the testatrix was improperly admitted because they had attended her professionally, and should not have been allowed to testify on account of the confidential relation of physician and patient, as prescribed by section 1881 of the Code of Civil Procedure. This objection was made, however, only to the testimony of Dr. Prose; but it was properly overruled. Under section 1881 a physician is precluded from being examined as a witness only "as to the information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient" (In re Redfield's Estate, 116 Cal. 644, 48 Pac. 794; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845; People v. Koerner, 154 N. Y. 355, 48 N. E. 730; Rog. Exp. Test. [2d Ed.] p. 107); and it clearly appears that the testimony of the physicians in the case at bar was not founded upon any such information. As to the other numerous exceptions and rulings upon the admissibility of evidence, it is sufficient to say that such rulings do not present any ground for a reversal. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(132 Cal. 440)

CROWLEY v. FREUD et al. (S. F. 2,553.)¹
(Supreme Court of California. April 6, 1901.)
CONSOLIDATED CITY AND COUNTY GOVERNMENTS — COUNTY OFFICERS — DEPUTIES — QUALIFICATIONS — APPOINTMENT — CIVIL SERVICE COMMISSION.

1. Under Const. art. 11, § 8½, empowering consolidated city and county governments to provide for the number of deputies that each county officer shall have, and for the compensation payable to each of such deputies, the consolidated municipal government of the city and county of San Francisco, through its civil service commission, could not prescribe the qualifications of the deputies of the county sheriff, clerk, recorder, etc., and compel those officers to select deputies from persons named by such commission.

2. Under Const. art. 11, § 8½, empowering

¹ Rehearing denied May 6, 1901.

consolidated city and county governments to provide for the manner in which "county officers" should be elected, etc., the contention that there were no county officers in such consolidated governments, was idle.

Beatty, C. J., and Van Dyke and Temple, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Timothy O. Crowley against J. Richard Freud and others. From a judgment for plaintiff, defendants appeal. Affirmed.

F. K. Lane, City Atty., and G. W. McEnerney, for appellants. Garber, Creswell & Garber and Campbell, Metson & Campbell (Geo. D. Squires, of counsel), for respondents.

McFARLAND, J. The only question presented in this case is whether the consolidated municipal government called the "city and county of San Francisco" can, through its civil service commission, prescribe the qualifications of deputies of certain county officers, such as sheriff, county clerk, recorder, etc., and compel those officers to select their deputies from persons named by said commission. The court below held that there is no such power, and in accordance with such ruling made certain restraining and enjoining orders, from which defendants appeal. The power in question does not exist unless it is granted in that clause of section 8½ of article 11 of the state constitution, adopted in 1896, which is as follows: "Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent in any charter framed under said section eight of said article eleven, to provide for the manner in which, the times at which, and the terms for which the several county officers shall be elected or appointed, for their compensation, and for the number of deputies that each shall have, and for the compensation payable to each of such deputies." It is scarcely necessary to again consider at length the position of appellants—so elaborately discussed, and so clearly held to be untenable, in *Kahn v. Sutro*, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620—that there is no such thing as "county officers" in that part of the state which is included within the boundaries of the city and county of San Francisco; for the clause of section 8½ of the constitution above quoted directly recognizes such officers, and expressly calls them "county officers," and the whole clause deals with county officers and their deputies, and with no other subject whatever. In the opinion in *Kahn v. Sutro*, the citation of authorities is very full, and it would be a mere waste of labor to restate here the reasoning there employed, or again refer to the authorities there cited. That case establishes the law as to the matters therein determined. It is proper, however, to notice the contention of appellants that *Kahn v. Sutro* has

been overruled, or materially modified, by the subsequent case of *Martin v. Board*, 126 Cal. 404, 58 Pac. 932. There is no foundation for this contention. *Kahn v. Sutro* was decided before section 8½ had become a part of the constitution, and it was there held that under the constitution and the statutes as they then stood the terms of office and the times of election of county officers were fixed by the general state laws on the subject; but the *Martin* Case was decided after section 8½ had been adopted, and was based entirely on the amendment made by that section, which expressly makes the law as to the election, etc., of county officers different from the law as it stood on that subject when *Kahn v. Sutro* was decided. The *Martin* Case was brought by certain county officers in San Francisco, upon the theory that the adoption of section 8½ had not changed the law declared in *Kahn v. Sutro* as to the time of their election and their terms of office; and this court held in the *Martin* Case that those things had been changed by section 8½, because it declared that it was competent to provide in the charter of a consolidated city and county government "for the manner in which, the times at which, and the terms for which the several county officers shall be elected." This was the only question involved, and the only question decided; the only question to which the minds of the court were directly called, and upon which they directly acted. The contention of appellants is based mainly upon one or two expressions to be found in the opinion in the *Martin* Case. One of these,—and the main one,—is as follows: "But the act establishing a uniform system of county and township governments does not and never did apply to the county of San Francisco in the sense claimed by the appellant." This, however, is not saying that it does not apply in any sense. And what was the sense in which appellants in that case claimed such application? They "claimed," briefly stated, as follows: Section 6 of article 11 provides that all municipal charters shall be, except in municipal affairs, "subject to and controlled by general laws"; county officers not being within the exception of "municipal affairs," the county government act, which provides for their election, time of office, etc., "controls the provisions of the charter on that subject"; and section 8½ can be kept out of conflict with section 6 only by a construction which is stated in appellant's brief in the *Martin* Case in this language: "The only construction admissible, therefore, is that which renders section 8½ subject to section 6 by permitting a charter to provide for the appointment, election, tenure, and compensation of county officers and their deputies only where there is no general law on the subject; the charter to be superseded in that respect whenever a general law is adopted." They also contended that section 8½ could not be legally adopted as an "amendment,"

and that what was attempted thereby could only be done through a general revision by a constitutional convention; and they argued that for the foregoing reasons, and for many others which were urged, section 8½ is not an existing amendment, and therefore the county government act applies to San Francisco for all purposes. The above views of counsel show the application of the county government act to San Francisco "in the sense claimed by the appellants." But the court did not agree with these views, and held that section 8½ was a valid amendment, and that by its express terms it provides for the election and terms of office of the county officers of the city and county of San Francisco; and it is with respect to the contentions of appellants in the Martin Case that the expression above quoted must be taken. And a somewhat broader expression in the opinion, following closely after the one above noticed, must be taken as subject to the same qualification as the first. It is nowhere in the opinion stated that there are no county officers in the city and county of San Francisco; on the other hand, it recognizes the existence of such officers, as section 8½ itself does. For instance, in the constitutional convention Judge Hagar, in replying to the objection that consolidated governments multiplied offices and increased expenses, said that the opposite was the result, and referred to the consolidated government of San Francisco as sustaining his position; and in the opinion in the Martin Case the following from his remarks is quoted: "We have a sheriff who is sheriff of the county and of the city. * * * We have a tax collector and we have an auditor that acts for both. Formerly we had one for each." Whether there were county officers in San Francisco was not a question in the Martin Case, and there was no pretense of overruling *Kahn v. Sutro* on that subject. The only question involved was, when are county officers to be elected, and what are their terms of office? *Miller v. Curry*, 113 Cal. 644, 45 Pac. 877, is to the same effect as *Kahn v. Sutro*.

The fact that in a consolidated city and county there is neither a separate county governmental organization nor a separate city governmental organization, each distinct from and entirely independent of the other,—as there is in ordinary counties and cities,—was as fully recognized in *Kahn v. Sutro* as in *Martin v. Board*. There is no conclusiveness in the argument that there can be no county officers for a consolidated government, because to hold otherwise would be to violate the original section 4 of article 11 of the constitution, which contemplates a "uniform" system of county governments; for other provisions of the constitution,—mostly amendments,—and particularly section 8½, which are specific provisions on the subject, allow such want of uniformity in the case of a consolidated city and

county government, and expressly apply provisions to county officers in such consolidated government which do not apply to officers in other counties. Not only is the state itself interested in county officers as parts of its necessary governmental machinery, but the people of any particular county of the state are interested, and some of them are frequently deeply interested, in county officers, such as sheriffs, recorders, clerks, etc., in other counties. The functions of such officers are general, not municipal. And while, in the American system of state governments, the people of the whole state have generally kept in their own hands control over such important public governmental agencies as county officers, still if they choose to yield up part of that control by adopting a constitutional amendment such as section 8½, there is no apparent reason why they may not do so, unless the amendment should be so revolutionary as to be destructive of a republican form of government, as the same is understood in this country. Section 8½ cannot be said to be of that character. But when the whole people of the state have thus yielded up part of their sovereign power to a local municipality, the grant will certainly not be carried, by construction, to any greater extent than the words of the granting amendment clearly go. By section 8½ power over county officers is given to the municipality only to the extent of providing for the manner of their election and their terms of office and compensation. As to their deputies,—and they alone are involved in this action,—the only power granted is to provide "for the number of deputies that each shall have, and for the compensation payable to each of such deputies." By no reasonable stretch of construction can this be held to include the power to prescribe the qualifications of such deputies by any mode or process whatever. The foregoing views are conclusive of the case in favor of the respondent, and it is not necessary to pursue in detail the various points and arguments made by counsel for either side in support of their respective contentions. The orders appealed from are affirmed.

We concur: HARRISON, J.; HENSHAW, J.; GAROUTTE, J.

I dissent: BEATTY, C. J.

VAN DYKE, J. I dissent. *Martin v. Board* fully expresses my views concerning the nature of the consolidated government styled the "City and County of San Francisco." As was there pointed out, by the consolidation act passed in 1856 the act dividing the state into counties, so far as the same related to the formation of the county of San Francisco, was repealed, and the provisions of law defining the powers and duties of county officers, excepting those relating to

supervisors, were considered as applicable to the officers of said city and county of San Francisco, and all the property and property rights of the former city and the former county of San Francisco were transferred to and vested in the new corporate body designated the "City and County of San Francisco." All the officers who, prior to that time, had been simply county officers and those who had been purely city officers, were thenceforth alike officers of the new municipal corporation, and were thereafter neither officers of the city of San Francisco nor officers of the county of San Francisco. As remarked in the dissenting opinion in *Kahn v. Sutro*: "In no sense can it be said that some were county officers and some were city officers. The sheriff and county clerk are as much officers of the municipal corporation as the mayor or the police judge. Whatever may be said of their powers and duties, they are part and parcel of the corporate organization known as the 'City and County of San Francisco.'" At that time the legislature was not restricted by constitutional limitations, and could do just what it did do, to wit, merge and consolidate the former city of San Francisco and the former county of San Francisco into one body under the name and style of the "City and County of San Francisco," and thereupon wipe out of existence each of the former public corporations. The present constitution in many ways recognizes the existence of this consolidated local government. For instance, in the judiciary article it is provided that: "There shall be in each of the organized counties or cities and counties of the state, a superior court, for each of which at least one judge shall be elected by the qualified electors of the county, or city and county, at the general state election: provided, * * * that in the city and county of San Francisco there shall be elected twelve judges of the superior court;" and it is further provided for the classification of the 12 judges of the superior court of the city and county of San Francisco. But for the county of San Francisco, as distinguished from the subdivision of the state known as the "city and county," no court is provided by the constitution, either of record or inferior court; and no sheriff, clerk, or other officer incident to a court is therefore required. Judge Hagar, chairman of the article of the constitution in reference to counties, cities, and towns, speaking in defense of the consolidated government of the city and county of San Francisco, said: "The tendency is to reduce the number of officers. Instead of having a set of city officers and a set of county officers, they are consolidated. We have a sheriff who is the sheriff of the county and of the city. We have a tax collector and we have an auditor that acts for both. Formerly we had one for each. The tendency of consolidated government is to reduce the offices from two to

one in every case, and reduce the expenses in every particular." Since the consolidation act there has not been, nor is there now, any county of San Francisco. Necessarily there can be no officers of a county that does not exist. Besides, it was expressly provided that the officers formerly known and recognized as county officers were constituted officers of the new body politic, to wit, the city and county of San Francisco, and they have continued to be such up to and since the adoption of the present freeholders' charter. Being officers of the city and county of San Francisco, recognized as such under the freeholders' charter, they are subject to its provisions, the same as the officers who, before the consolidation, were known and recognized as officers of the city of San Francisco. Although *Kahn v. Sutro* was not overruled in terms in *Martin v. Board*, yet the effect is the same. The two cases are not in harmony, and cannot stand together. A question had arisen whether so-called "county officers" were subject to the county government act, or whether they were officers of the consolidated municipal government in like manner as though they belonged strictly to a city government; and one purpose, evidently, of the adoption of the new section 8½ of article 11 of the constitution was to set this controversy at rest, and the plain meaning of subdivision 4 of said new section is to put the so-called "county officers" in the same category as those formerly known as "city officers." Public policy favors local self-government, and the popular sentiment in this respect is constantly strengthening. This is manifest by the constitution of 1878-79, and by the repeated amendments thereto proposed by the legislature and adopted by the people. And it may also be said that the popular tendency is in favor of the merit system in the appointment and tenure of all subordinate officers in the civil service. Bearing these facts in mind, the court should adopt a liberal line of construction, and resolve all doubts in favor of such recognized public policy, and sustain the freeholders' charter in its integrity, instead of weakening it in a vital part.

I concur: TEMPLE, J.

(132 Cal. 447)

CAHEN v. WELLS, Auditor. (S. F. 2,439.)
(Supreme Court of California. April 6, 1901.)
MUNICIPAL CORPORATIONS—CIVIL SERVICE—
STATUTE PROVIDING SAME CON-
STITUTIONAL.

The San Francisco city and county charter (St. 1899, p. 350, art. 13) establishes a civil service commission, and requires that all places of employment in the different offices and departments shall be filled by appointments from the applicants receiving the highest rank in competitive examinations therefor conducted by the commissioners. Regulations as to the conduct of the examinations are prescribed,

and section 12 provides that no deputy, clerk, or employé who shall have been appointed under the rules shall be removed or discharged except for cause, on written charges, which shall be investigated by the commissioners. *Held*, in a proceeding to enjoin the payment of the salaries and expenses of the commissioners, that though section 12 might be unconstitutional, as violating Const. art. 20, § 16, prohibiting the holding of an office, the tenure of which was not fixed by law, for more than four years, inasmuch as the general provisions of the law were not inseparably dependent on section 12 the entire act was not void.

In bank. Appeal from superior court, city and county of San Francisco; Carroll Cook, Judge.

Proceeding by S. Cahen against Asa R. Wells, auditor of San Francisco city and county, to enjoin the payment of salaries and expenses of the civil service commissioners. From an order sustaining a demurrer to the complaint, the plaintiff appeals. Affirmed.

P. F. Dunne, for appellant. Lloyd & Wood, Franklin K. Lane, George W. Lane, and Garret W. McEnerney, for respondent.

McFARLAND, J. This case differs materially from the case of *Crowley v. Freud* (this day decided) 64 Pac. 696, although the two cases were argued and submitted at the same time, and both involve powers of the civil service commission created by the present charter of the city and county of San Francisco. This action was brought to enjoin the defendant, Wells, who is auditor of said city and county, from drawing any warrant in payment of salary of the civil service commissioners, or of any employé of said commissioners, or of any expenses of said commission, on the ground that all the provisions of said charter on the subject of civil service are unconstitutional and void. A general demurrer to the complaint was sustained in the court below, and judgment rendered for defendant, and from that judgment plaintiff appeals.

The provisions of the charter (St. 1899, p. 350) here brought in question are contained, under the caption of "Civil Service," in article 13 of that instrument. This article is quite lengthy, and contains 20 sections (St. 1899, p. 350). The main attack in this case is made on section 12. Leaving that section out of view for the present, it will be sufficient for the purpose of this decision to state very briefly some of the provisions of the other sections of the article. Those provisions are, in substance, as follows: Three persons, who shall constitute the "civil service commission," shall be appointed by the mayor, and shall "classify all the places of employment under the offices and departments of the city and county"; and it is provided in section 2 that "no appointment to any such place shall be made except according to the rules hereinafter mentioned." Id. p. 350. The commissioners are to make rules "for examinations, appointments, promotions, and removals"; and "all applicants

for places in the classified civil service shall be subject to examination, which shall be public, competitive and free." The examinations are to be held after notice, and are to be conducted either by the commissioners or by examiners appointed for that purpose. From the returns of the examiners a register is to be prepared of persons whose general average standing upon the examination is not less than the minimum fixed by the rules, and who are otherwise eligible; and such persons "shall take rank upon the register as candidates in the order of their relative excellences as determined by the examination." When a position is to be filled in any department or office, the head of the same shall notify the commissioners of that fact, and the commissioners shall thereupon certify to the appointing officer the name of one or more candidates, not exceeding three, standing highest on the register of the class to which the position belongs; and the appointing officer shall fill the place by the appointment of the person certified by the commissioners, if only one be certified, or, if two or three be certified, then by the appointment of one of those certified. The first appointment is declared to be on "probation" for a period "to be fixed by the rules of the commissioners," but not to exceed six months; and during this period of probation the head of the office may, "by and with the consent of the commissioners," discharge the person appointed "upon assigning in writing his reasons therefor to the commissioners." If he is not discharged within the probation period "his appointment is deemed complete." It is also provided that to meet "extraordinary exigencies" the head of an office may, "with the approval of the commissioners," make temporary appointments to remain in force until regular appointment under the provisions of the article may be made, but not exceeding 60 days. There are other details as to appointments under the said article 13, which need not be here mentioned.

Said section 12 is as follows: "Sec. 12. No deputy, clerk, or employee in the classified civil service of the city and county, who shall have been appointed under said rules, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before the civil service commission, or by or before some officer or board appointed by the commissioners to conduct such investigation. The finding and decision of the commissioners, or such investigating officer, or board, when approved by the commissioners, shall be certified to the appointing officer or board and shall be forthwith enforced by such officer. Nothing in this article shall limit the power of any officer or board to suspend a subordinate for a reasonable period not exceeding thirty days." Id. p. 352. Appellant contends that section 12 is unconstitutional and invalid, because it provides for a life

tenure of office, and is therefore in violation of section 16 of article 20 of the state constitution, which is as follows: "When the term of any officer or commissioner is not provided for in this constitution, the term of such officer or commissioner may be declared by law; and if not so declared such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years." Of course, a judgment in favor of appellant in this present action would obliterate all the provisions of the charter on the subject of civil service, and therefore plaintiff must maintain the unconstitutionality not only of the provisions of section 12, but also of all the other provisions of article 13. This he endeavors to do by showing that the life tenure which he claims to be created by section 12 is the main, controlling, final, and vital purpose of all the provisions of the charter about civil service, and that if section 12 be unconstitutional the other provision, being merely introductory, ancillary, and instrumental to the main purposes, must fall with it. His positions, therefore, are: First, that section 12 is unconstitutional; and, second, that its unconstitutionality carries with it the unconstitutionality of the whole scheme of civil service presented in the charter, all the provisions being so inseparably blended that no part can stand if other parts are invalid.

In our view of appellant's second position, it is not necessary for us to determine whether or not his first position is tenable. We have not before us the case of a person who, having been appointed under the civil service provisions of the charter, and having held his position for more than four years, claims to be entitled to hold it for life. Whether or not section 12 undertakes to provide for terms of office in excess of the limitation of section 16 of article 20 of the constitution; whether or not all persons dealt with by article 13 of the charter are within the description "officer," as used in said section 16; whether or not the head of an office might remove a subordinate without the consent of the commission,—these and other questions which would be involved in passing on the constitutionality of section 12 can be more properly determined as the facts of future cases may present them. In the present action they are remote, general, and speculative.

In the briefs of counsel on both sides there are a great many quotations from sayings of people who are designated as prominent "civil service reformers"; and it is insisted by respondent that, in the opinion of these reformers, the main principle of what is called "civil service reform" is that appointments to subordinate official positions shall be made only after competitive examinations, and upon the basis of merit, to be ascertained by such examinations, while it is

insisted by appellant that "according to those opinions" a permanent tenure for life, subject only to removal for cause after a trial, is the mainspring of such reform, without which all the other machinery would be useless. While the decision in this case as to the purposes of the framers of the charter must rest on the language to be found in the charter itself, yet it may be said that its language seems to be in accord generally with the views of said reformers quoted in the briefs. The purpose to be gathered from the language of the charter, as well as from said quotations in the brief, is clearly dual. One of the purposes is to secure a change in the method of appointment of subordinates, and most of the provisions of article 13 are especially directed to that end. It is clear that one of the supposed evils which civil service was expected to eradicate was the tendency to give places as rewards of political services, which left open the temptations to make improper promises and bargains about appointments prior to elections and party conventions. The intended remedy is what is called the "merit system," by which it is sought to give places to such persons best fitted to discharge the duties of such places, upon the theory that fitness can be best ascertained by a competitive examination. Under this system the head of an office has no opportunity to appoint a friend, and it is assumed that he would not be likely to select as competent a man as an examining board would select for him. It is apparent that this is one of the main purposes appearing on the face of article 13 of the charter. The great body of the article deals with the appointments of subordinates, and with the details of the examinations of candidates for such appointments. And this is an independent purpose not inseparably interwoven with section 12, and, not being itself unconstitutional, is not involved in the asserted unconstitutionality of section 12, and can stand as a valid enactment, even though section 12 be eliminated. Appellant contends—and quotes some of the "sayings" above noticed—that all the provisions about appointments under the so-called "merit system" would be worthless without the provision in section 12 against removals, and that therefore the two are inseparably connected. But since the head of an office could not, under the merit system, fill a vacancy with a person of his own choice, but must do so with the person, or one of the two or three persons, certified by the commission, the incentive to make removals, except for actual incompetency, would be very slight. One of the reformers quoted in the brief, after pointing out that removals are rarely asked for except to make a vacancy for a particular man, says, "Under the merit system of appointment, the question of removals would be solved without legislation."

Our conclusions are that those sections of article 13 of the charter which provide for

the method of appointment are not inseparably interwoven with section 12, which deals with removals; that those sections stand as valid enactments, even though section 12 be eliminated; and that there applies to the case at bar the well-established rule of construction which is stated in *Cooley*, Const. Lim. p. 211, as follows: "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. * * * If a statute attempts to accomplish two or more objects, and is void as to one, it will still be in every respect complete and valid as to the other." We must not be understood, however, as in any way expressing an opinion as to the constitutionality of said section 12. The judgment appealed from is affirmed.

We concur: BEATTY, C. J.; HENSHAW, J.; GAROUTTE, J.; VAN DYKE, J.; TEMPLE, J.; HARRISON, J.

135 Cal. 503

PEOPLE v. WELLS, FARGO & CO.
(S. F. 2,136.)

(Supreme Court of California. April 6, 1901.)
INTERNAL REVENUE—EXPRESS COMPANIES—
REGULAR RATES—PAYMENT OF WAR REVENUE TAX—REFUSAL OF PACKAGE.

Where a package was offered to an express company for transportation, accompanied by a tender of the full amount of the company's regular charges for the service, such company could not refuse to accept the package unless further payment of one cent or of a one-cent documentary internal revenue stamp was made, and mandamus would lie to compel its acceptance.

McFarland and Harrison, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Mandamus by the people of the state of California against Wells, Fargo & Co. From a judgment for relator, defendant appeals. Affirmed.

E. S. Pillsbury and Alfred Sutro, for appellant. Tirey L. Ford, Atty. Gen., Geo. A. Sturtevant, Dep. Atty. Gen., and Wm. M. Abbott, Dep. Atty. Gen., for the People.

HENSHAW, J. This action is mandate, brought by the state to compel the defendant corporation, an express company, to accept, carry, and deliver a certain package offered to it for transportation, the offer being accompanied by a tender of the full amount of defendant's regular charges for such services. Defendant refused to accept the package without further payment by plaintiff of one cent, or of a one-cent documentary internal revenue stamp, as provided by the United States statute of June 13, 1898, commonly designated the "War Revenue Act." These

facts were admitted by defendant's answer, and plaintiff moved and obtained judgment upon the pleadings. From that judgment defendant appeals.

At the time when the appeal came before this court for argument, many questions which had received learned and elaborate attention from counsel in their printed briefs had been disposed of by a decision of the supreme court of the United States in *American Exp. Co. v. Michigan*, 177 U. S. 404, 20 Sup. Ct. 695, 44 L. Ed. 823. So far as the law of that case is applicable to the one before us, it is of the highest authority, and absolutely determinative. It invites, therefore, careful consideration. The first distinction to be noted between this case and the one which came under decision before the supreme court of the United States is this: In the former the pleadings admit that the regular charge of the express company was tendered by the shipper, and refused by the company, which exacted one cent, or a one-cent internal revenue stamp, in addition to its regular charge. In the latter case the company increased its rates by adding to them the amount of the war revenue tax. In dealing with the question of the increased rate, the supreme court of the United States held that the state tribunal had not decided that the rate otherwise reasonable had become unreasonable solely because increased by the amount of the war tax, and its further discussion of the law is based upon this holding that, in effect, the state court had decided that the increased rate was not unreasonable per se. We cannot here do better than quote at length from the opinion of the supreme court after it had reached this conclusion:

"The controversy which is contained in the merits of the cause is resolvable into three questions: First. Does the act of congress impose upon the express company the duty of making a receipt for a package tendered to it, and does it also forbid the express company from requiring the shipper to furnish the stamp to be affixed to the receipt, or of supplying the means of paying the same? Second. If the act of congress does impose such duty on the express company, and does inhibit it from requiring that the shipper furnish the stamp or the means of paying it, does the act further forbid the express company from seeking to cast the burden on the shipper by an increase of rates? Third. And, as a corollary of the second proposition, does an increase of rate by an express company which is otherwise just and reasonable become unlawful, under the act of congress, because such increase is made with the purpose of shifting the burden of the one-cent tax from its own shoulders to that of the shipper? The first proposition is unnecessary to be considered, since, even although it be conceded that the act of congress imposes on the express company the duty of paying the one-cent stamp tax, this admission would not be at all decisive of the cause,

unless also it be ascertained under the second proposition that the act of congress also forbids the express company from shifting the burden of the tax by means of an increase of rates. And no necessity for passing on the first proposition arises from the mere fact that the decision of the second proposition requires a consideration of the provisions of the statute which it would be necessary to take into view if the first proposition was under consideration. It is also to be observed that the second and third propositions, which involve, the one the right to shift the burden of the tax by exacting that the one cent be provided, and the other the power to increase rates within the limits of the requirements that the charges as increased are reasonable, both depend upon the same considerations. Indeed, the question into which all the issues are ultimately resolvable is whether the right exists to shift the burden, of course ever circumscribed by the duty of not exceeding reasonable rates. If it does not,—that is, upon the hypothesis that it not only can be but is forbidden,—then it must result that all methods adopted to attain the prohibited result are void. On the contrary, if the right to seek to shift the burden obtains, then the substantial result of what is done becomes the criterion, and the mere fact that the motive announced for a reasonable increase of rates is declared to be a shifting of the burden cannot prevent the exercise of the lawful right. * * * Now, there is nothing in the provisions just quoted which, by the widest conjecture, can be construed as expressly forbidding the person upon whom the taxes are cast from shifting the same by contract or by any other lawful means.”

The court then decides that, conceding (not determining) that the primary duty to pay the tax is cast upon the transportation company, it is a burden which may be shifted, and that a rate charge, otherwise not unreasonable, will not, as matter of law, be held to be unreasonable when increased by the amount of the war revenue tax, for so to hold would be to declare, against the language of the law, that the burden may not be shifted, and, further, it would be, in effect, but to hold that the act of congress, by the mere fact of imposing a stamp tax, forbids all attempts to shift it, and, consequently, that the carrier is deprived by the law of the right to fix rates, even though the limit of reasonable rates be not transcended. With this exposition of the law there can be no cavil, but it is to be remembered that the state of facts to which it applies is one where the express company's regular and reasonable rate, exacted of each and every shipper, includes the amount of the war tax, while in the case at bar it is admitted that the regular rate and charge of the company was tendered and refused. The supreme court of the United States found it unnecessary to decide, and therefore did not decide, whether, primarily, the

duty to pay the tax is cast upon the carrier. Throughout its discussion it conceded that such was the law. If a decision upon this point had been necessary, we entertain no doubt but that one conclusion could have been reached,—that this duty is primarily upon the carrier. The language of the act seems to foreclose any controversy upon the matter: “There shall be levied, collected and paid, for and in respect of * * * documents, * * * by any person or persons or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, * * * the several taxes,” etc. Section 6, War Revenue Act. “It shall be the duty of every * * * express company * * * to issue to the shipper * * * a bill of lading, * * * and there shall be duly attached * * * to each bill a stamp of the value of one cent.” Section 25, Id. In the Michigan case the express company shifted the burden by a reasonable change in its rate. In the present case the question before the court may thus be put: May an express company, to which has admittedly been tendered its regular charge for the transportation of a package, refuse to accept and transport that package upon its arbitrary demand that something more than the regular charge shall be paid? Here it is true that the exaction is small, amounting to only one cent; but, if the principle is good, it would apply equally well if the amount were large. Being an arbitrary demand of the company,—that is to say, a demand which it could waive at pleasure,—it would mean, if the principle contended for by appellant be upheld, that one shipper might receive the services of the express company upon payment of the regular charge, while others for the same service would be compelled to pay varying sums, arbitrarily exacted, in addition to the regular charge. So stated,—and we think the statement a fair one,—it will not need discussion to show that the principle is erroneous, and that this may not be done. Each and every shipper is entitled to the services of the company upon the payment of the regular charge for the same service. The judgment appealed from is therefore affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; TEMPLE, J.; VAN DYKE, J.

McFARLAND, J. I dissent. I can see no difference whatever between the case at bar and the case of American Exp. Co. v. Michigan, decided by the supreme court of the United States, and reported in 177 U. S. 404, 20 Sup. Ct. 695, 44 L. Ed. 823. The facts in the two cases are exactly the same. In the Michigan case the express company refused to accept any goods for transportation “unless the shipper attaches the stamp to the said bill of lading, * * * or furnishes the money or means for that purpose

to said company." That was exactly what was done in the case at bar. In the Michigan case there was no pretense that the express company had rearranged its schedules of charges. When a package was presented, it merely demanded that the shipper put the stamp on the receipt, or furnish the money for that purpose; and the United States supreme court held that it had the right so to do. The same demand was made in the case at bar. There was no question of the reasonableness of the rate in either case. The question decided in the Michigan case is precisely the same question upon which the case at bar depends, and I can see no distinction between the two cases in either the facts or the law. I think that the judgment should be reversed upon the authority of the said case of *American Exp. Co. v. Michigan*.

I concur: HARRISON, J.

132 Cal. 397

WOLFSKILL v. DOUGLAS. (Sac. 702.)
(Supreme Court of California. April 5, 1901.)
NEW TRIAL—FINDINGS—SUFFICIENCY OF EVIDENCE—ALLEGATIONS OF COMPLAINT
—VARIANCE—TRIAL.

1. Three devisees of a ditch agreed to advance a certain amount each, to pay certain expenses, to be charged in the account of the manager of the ditch, and if, in the settlement of his account, such expenses should be allowed as proper charges against the revenue of the ditch, in which the testator's widow had a life interest, the advances should be refunded. The expenses were allowed as a proper charge, and one of the devisees sued the agent of the manager of the ditch for the return of his advance, from the revenues. The manager testified that he knew from his accounts that such an amount was received from the ditch revenues. *Held*, that the evidence was sufficient to sustain a finding that defendant collected from the ditch revenues the funds with which to repay plaintiff.

2. A contention that, because the complaint alleged that the testator's widow refunded the amount of plaintiff's advance to defendant, the finding that it was collected from the revenues of the ditch did not correspond with the allegations of the complaint, was unfounded, since the widow was entitled to the revenues of the ditch, and, if they were paid to her and then refunded, the sum was substantially a repayment on her part.

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by John Wolfskill against James A. Douglas. From an order denying his motion for a new trial, defendant appeals. Affirmed.

Bush & Ish and Byron Ball, for appellant. R. Clark, for respondent.

VAN DYKE, J. This is an appeal from an order denying defendant's motion for a new trial. A separate appeal from the judgment was considered by this court and the judgment affirmed February 7, 1900. 59 Pac. 987.

The first point made by the appellant is that the complaint states no cause of action, but in the opinion on affirmance of the judgment it is held that the complaint does state a cause of action sufficient to support the judgment.

James Moore in his lifetime was the owner of the Moore Ditch, in Yolo county, and in his will devised the same in equal shares to his three children, R. E. Moore and the wife of the plaintiff and the wife of the defendant herein, with a life interest in the revenues of said ditch to Mrs. Moore, later Mrs. Black. At the time of Moore's death the ditch water rights were being litigated, and certain expenses had accrued, which the court ordered paid. Thereupon the plaintiff, the defendant, and said R. E. Moore entered into an agreement by which they mutually agreed to advance the sum of \$400 each to pay these expenses, and that the same should be charged in the account of said Moore as manager of said ditch, and, if in the settlement of said account the expenses so advanced by plaintiff, defendant, and Moore should be allowed as proper charges against the revenue of said ditch, the same should be refunded. In pursuance of this agreement each advanced \$400, which was used in the payment of said court expenses; and in January, 1894, the said account was settled and allowed by the superior court of Yolo county, and the charges so paid by plaintiff, defendant, and Moore were allowed as proper charges against the revenues of said ditch, and the funds theretofore collected by defendant from said ditch revenues then became available for the payment of the debt herein sued on. The appellant contends that the evidence does not sustain the finding of the court that the defendant collected from the revenues of said ditch the funds with which to repay the plaintiff for the advances made, or that such funds ever came into the defendant's hands for such purpose. Moore testifies: "I know, according to my accounts, it was paid. I say he received it from the ditch revenues." And the defendant, Douglas, was Moore's agent. We think the evidence sufficient to support the finding. But the appellant says that it is alleged in the complaint that said Mary A. Black refunded and paid said \$400 to the defendant, whereas the finding is that it was collected from the revenues of the ditch, and that the finding, therefore, does not correspond with the allegations of the complaint. This, however, is a mere play upon words. Mrs. Black was entitled to the revenues from the ditch, and, if the money was collected from the revenues of the ditch, it was substantially a repayment on the part of Mrs. Black. The action was not barred by the statute of limitation. The order appealed from is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

132 Cal. 399

MOORE v. DOUGLAS. (Sac. 727.)

(Supreme Court of California. April 5, 1901.)

APPEAL—CONFLICTING EVIDENCE—JUDGMENT—REVIEW—DELAY IN APPEAL—NEW TRIAL—DEMURRER TO COMPLAINT—PLEADINGS—PROOF—VARIANCE.

1. Where an appeal from a judgment is not taken in time, neither it, nor whether the complaint stated a cause of action, or the judgment was supported by the findings, or the findings were contradictory with the pleadings, can be considered.

2. The action of the court in overruling an objection to testimony on the ground that the complaint did not state a cause of action cannot be reviewed on appeal from an order denying a new trial.

3. Where it did not appear that defendant was in any respect misled to his prejudice by the admission of evidence which he claimed varied from the pleadings, it was not error to refuse to strike it out, under Code Civ. Proc. § 469, providing that no variance between the pleadings and proof shall be deemed material unless it actually misled the adverse party to his prejudice.

4. There being a substantial conflict in the evidence, the findings will not be disturbed on appeal.

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by Robert E. Moore against James A. Douglas. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Bush & Ish and Byron Ball, for appellant. N. A. Hawkins, for respondent.

VAN DYKE, J. This action is, in a measure, a companion of *Wolfskill v. Douglas* (Sac. 702) 64 Pac. 704, and much of the testimony taken was used in both actions. The appeal is from the judgment in favor of the plaintiff, and also from an order denying defendant's motion for a new trial. The judgment was rendered July 19, 1895, and the order denying a new trial, July 6, 1899. The notice of appeal was filed July 17, 1899. The appeal from the judgment, not having been taken in time, cannot be considered; and the appellant's contention that the complaint fails to state a cause of action, and that the demurrer to the same should have been sustained, also that the judgment is not supported by the findings, and that the findings are contradictory and inconsistent with the pleadings, cannot, therefore, be considered; there being no appeal from the judgment. *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Insurance Co. v. Fisher*, 109 Cal. 566, 42 Pac. 154; *Hall v. Susskind*, 120 Cal. 559, 53 Pac. 46; *Jenkins v. Frink*, 30 Cal. 586; *Roberts v. Eldred*, 73 Cal. 394, 15 Pac. 16.

On the appeal from the order denying a new trial it is contended by the appellant that the court erred in overruling his objection to certain testimony, and denying his motion to strike out the same after being admitted. The objection to the testimony was placed upon the ground that the complaint states no cause of action, and that there is a variance between the proof offered and the plead-

ing; and the motion to strike out the testimony was based upon similar grounds. The objection to the evidence upon the ground that the complaint states no cause of action was only, in effect, a demurrer to the complaint upon that ground, and, as we have seen, cannot be reviewed upon an appeal from an order denying a new trial. Whether there was a variance between the allegations of the complaint and the evidence offered could not be determined until after the evidence had been received, and, as the defendant does not make it appear that he was in any respect misled to his prejudice thereby, no material error was committed in refusing to strike it out. Code Civ. Proc. § 469. In reference to appellant's contention that the evidence does not support the findings, the most that can be said in his favor is that there is a substantial conflict in the evidence; and hence, under the general rule, the findings must be allowed to stand. The order denying a new trial is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

132 Cal. 421

FROST v. WITTER. (L. A. 781.)¹

(Supreme Court of California. April 6, 1901.)

NOTES—MORTGAGES—FORECLOSURE—PLEADING—COMPLAINT—AMENDMENT—NEW CAUSE OF ACTION—LIMITATIONS—EXTINGUISHMENT OF COLLATERAL OBLIGATION—CONTINUANCE—APPEAL—EVIDENCE—ASSIGNMENT OF NOTE BEFORE SUIT.

1. An amendment to a complaint on a note alleging a mortgage to secure the note was not erroneous as stating an entirely different cause of action, but merely set up an additional remedy, and was properly allowed.

2. Where complaint on a note was filed two days before the expiration of limitations of four years, and an amended complaint setting up a mortgage to secure such note was filed four days thereafter, the action was not barred by limitations, which ran only to the filing of the original complaint.

3. Civ. Code, § 2911, providing that a lien is extinguished by the lapse of the time within which an action can be brought on the principal obligation, had no effect on an action on a note commenced two days before the expiration of limitations, the complaint of which was amended four days thereafter by alleging a mortgage to secure such note, since extinguishment of a collateral could not affect the principal obligation.

4. Where a complaint on a note was filed two days before limitations expired, and was amended four days later to allege a mortgage to secure the note, and the mortgagor had sold the premises subject to the mortgage, the latter's personal liability was not extinguished by the mortgagee's allowing limitations to run against the mortgage.

5. Where, on the facts shown by the bill of exceptions, there was no error in refusing to grant defendant a continuance, resort could not be had to defendant's affidavit for continuance to show the contrary.

6. Where a note made to S., "cashier of Paso Robles Bank," was assigned to the bank, but the assignment was not dated, and S. severed his connection with the bank long before suit on the note, the evidence, in absence of evidence to the contrary, was sufficient to sustain a finding that the note was assigned before suit.

¹ Rehearing denied May 6, 1901.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

Action by F. D. Frost against G. F. Witter, Jr. From a judgment for plaintiff, defendant appeals. Affirmed.

E. Graves and G. F. Witter, Jr., for appellant. W. H. Spencer, for respondent.

SMITH, C. Appeal from a judgment for foreclosure of mortgaged premises and from an order denying defendant's motion for new trial. The original complaint counted on a promissory note made by the defendant to one Speyer March 14, 1894, payable six months after date, and assigned to plaintiff. It was filed September 12, 1898, two days before the lapse of four years from the maturity of the note. An amended complaint was filed September 16, 1898, which, in addition to the matter alleged in the original complaint, counted also on a mortgage of even date, executed by the defendant to secure the note, and also made one W. G. Witter a party as claiming some interest in the mortgaged premises, etc. The defendants each moved to strike the amended complaint from the files on "the ground that [it] wholly changes the cause of action," and the motions were denied. The amended complaint was then demurred to on general grounds, and on the ground that the action was barred by the provisions of section 337, Code Civ. Proc., and section 2911, Civ. Code. The demurrer of the new defendant, W. G. Witter, was sustained on the latter ground; that of the original defendant overruled. The answer of the remaining defendant, besides a general denial and the plea of the statute, pleads affirmatively that by deed of date June 20, 1898, he had conveyed the mortgaged property to W. G. Witter subject to the mortgage, and "that the plaintiff negligently and without the consent of [the] defendant * * * permitted the statute of limitations to run on said mortgage," etc. On this plea it is found that defendant deeded the land to W. G. Witter as alleged, and it appears from the ruling on demurrer that as to him the action was barred. On the issues raised by the general denial and the plea of the statute, the findings are for the plaintiff. Judgment in the usual form was accordingly rendered for the foreclosure of the mortgage and for the docketing of a deficiency judgment. The principal questions involved relate (1) to the refusal of the court to strike out the amended complaint; (2) to the overruling of the defendant's demurrer and plea of the statute of limitations; and (3) to the sufficiency of defendant's affirmative plea.

1. In considering the limit to the right of amendment, cases of amendment at the trial for variance under sections 470 and 471 of the Code of Civil Procedure are to be distinguished from amendments under sections 472

and 473. With reference to the former, an express limit is established by the statute. With reference to the latter, this is not the case. It is with the latter class of amendments only that we are concerned here. Again, some distinction is perhaps to be made between amendments as of course, under section 472, and amendments allowed by the court, under section 473. But in the absence of any restriction or qualification to the right of amendment under the former section, it may be assumed that it is at least as extensive as under the latter. Whether or not it is more extensive it will be unnecessary in this case to inquire. The question will be regarded, therefore, as relating generally to the limit or extent to which the complaint may be amended under sections 472, 473, Code Civ. Proc. On this point I find no general rule laid down by the decisions in this state. All that is said is that great liberality should be used by the courts in allowing amendments (*Burns v. Scooffy*, 98 Cal. 276, 33 Pac. 86, and cases cited); and that the allowance of amendments is a matter within the discretion of the courts (*Coubrough v. Adams*, 70 Cal. 378, 11 Pac. 634; *Lestrade v. Barth*, 17 Cal. 288). And in practice the courts have been extremely liberal,—as, e. g., in *Heilbron v. Heilen*, 72 Cal. 376, 14 Pac. 24, where the complaint was amended so as to describe a different tract of land from that described in the original complaint; or in *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673, where the case was changed from an action at law to a case in equity; or in *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, where the change allowed was from an action on a special contract to an action on a quantum meruit; or as in *Castagnino v. Balletta*, 82 Cal. 256, 23 Pac. 127, where the change was from an action on a mechanic's lien to an action on the special contract, or in *assumpsit*; or in *Bogart v. Crosby*, 80 Cal. 195, 22 Pac. 84, where the principal debtors, who had been omitted from the original complaint, were brought in by amendment. In other states the decisions are conflicting. *Pom. Rem. & Rem. Rights*, § 566. In one, and perhaps the most numerous, class of cases, the rule is established, says the author cited, that a party "cannot, under the form of an amendment, change the nature and scope of his action"; or, rather, as he adds in the same breath, "he cannot substitute a wholly different cause of action." The latter, however, is an essentially different proposition, and is the form in which the rule is commonly asserted,—as, e. g., in *Shields v. Barrow*, 17 How. 144, 15 L. Ed. 158, and the Alabama cases cited in note to 1 Enc. PL & Prac. p. 463. And it is obvious that the unqualified way in which the rule is sometimes stated—i. e. that a new or different cause of action cannot be introduced by amendment—cannot be accepted; for the most common kinds of amendments are

those in which complaints are amended that do not state facts sufficient to constitute a cause of action, and in these, and often in the case of new parties, a new cause of action is in fact for the first time introduced. All that can be required, therefore (to use the language of Mr. Pomeroy), is that "a wholly different cause of action" shall not be introduced; or, as said by the court in *Shields v. Barrow*, *supra*, that "a complainant [is not] at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment," or "to strike out the entire substance and prayer of his bill, and insert a new case by way of amendment"; or, as expressed by this court in an early case, the matter of the amendment must not be "entirely foreign to the original complaint." *Canal Co. v. Kidd*, 28 Cal. 681. On the other hand, under statutory provisions similar to ours, the rule has been entirely repudiated by the court of appeals of New York, and it is there held to be immaterial whether the cause of action set out in the amended complaint is new or otherwise. *Brown v. Leigh*, 12 Abb. Prac. (N. S.) 193, and other cases cited; *Pom. Rem. & Rem. Rights*, § 566, p. 649, note 1. The rule has not been expressly adopted in any of the decisions in this state, though the point that it had been violated has often been made and overruled on special grounds,—as, e. g., that the amendment did not "materially" change the cause of action (*Louvall v. Gridley*, 70 Cal. 510, 11 Pac. 777); or that the amendment did not state an "essentially" different cause of action (*Bogart v. Crosby*, 91 Cal. 281, 27 Pac. 603); or that the new matter was not "entirely foreign to the original complaint," as in *Canal Co. v. Kidd*, *supra*. But the rule has not been affirmatively asserted in any of the decisions; and in the case last cited the court declined to consider the question whether a cause of action could be introduced by amendment different from the one originally alleged, "or, more properly speaking, attempted to be alleged." And this is in accordance with the cases cited *supra*, in each of which the cause of action set up in the amended complaint was more or less widely different from the original. For the purposes of this case, however, it may be assumed that the rule in its more liberal form—as stated in the cases cited—has been tacitly recognized, and the question to be considered will be regarded as relating simply to its application.

In applying the rule, some confusion has resulted from the neglect to define the terms "cause of action" and "action," to which, therefore, our attention must be first directed. The latter term is very commonly confounded with the suit (*litis*) in which the action is enforced. But this is not the technical meaning of the term, according to which an action is simply the right or power to enforce an obligation. "An action is nothing else than the right or power of pros-

ecuting in a judicial proceeding what is owed to one,"—which is but to say, an obligation. "*Actio nihil aliud est quam jus persequendi in iudicio quod sibi debetur.*" The action therefore springs from the obligation, and hence the "cause of action" is simply the obligation. This is in accordance with the view of Mr. Pomeroy, though expressed by him in new and somewhat awkward terms. *Pom. Pl. & Prac.* § 453. The obligation thus constituting the cause of action may be either *ex contractu* or *ex delicto*; and, again, the latter may be either for compensation or damages, or for restitution,—as, e. g., the obligation of a wrongdoer to restore the property of another; for, though there is a distinction between actions brought for the recovery of damages or compensation and those brought for restitution, the former constituting actions in *rem* and the latter actions in *personam*, yet in either case the action is to enforce an obligation; nor can there be an action for any other purpose. 1 Aust. Jur. § 527. The "cause of action" is therefore to be distinguished also from the "remedy," which is simply the means by which the obligation or the corresponding action is effectuated; and also from the "relief" sought. *Pom. Pl. & Prac.* § 453. Applying these definitions to the case at bar, it is clear that the cause of action set up in the original, and that set up in the amended, complaint, was simply the obligation sought to be enforced,—that is to say, the obligation to pay the money agreed to be paid,—and that the only change that took place was in the remedy by which it was sought to enforce the obligation. This was the view taken in *Lackner v. Turnbull*, 7 Wis. 105, affirmed in *Ball v. McGeoch*, 78 Wis. 359, 47 N. W. 610, where the original complaint was in *assumpsit* for work and labor, and the plaintiff was permitted to set up in an amended complaint a mechanic's lien; the court saying: "We do not think that in strictness the amendment which was made in this case did change the cause of action. It only changed the remedy, * * * but the cause of action, or, in other words, 'the labor performed and materials furnished' [and, it should be added, the corresponding obligation], were the same, whether the plaintiff proceeded under the original or amended complaint. By amending his complaint he was enabled to obtain relief which he would not have been entitled to under the original complaint, but the 'cause of action' was not changed by the amendment." In the present case the cause of action was the obligation to pay the note, to which the mortgage was merely an incident. *Storch v. McCain*, 85 Cal. 307, 24 Pac. 639. The original complaint was defective only by reason of failure to set up the mortgage, which by a technical statutory rule was necessary. The amendment simply cured this defect; and the effect of the judgment was simply to give to the plain-

tiff what he originally demanded, and some additional relief, which, though necessary under the statute, was of no value. The case therefore comes within the rule. Nor is this decision in conflict with *Ramirez v. Murray*, 5 Cal. 222, and *Hackett v. Bank*, 57 Cal. 335, cited by appellant's counsel. These cases did not refer to amendments under section 472 or section 473, Code Civ. Proc., but to amendments at the trial for variance, which are governed by a different rule. Code Civ. Proc. §§ 470, 471; Prac. Act 1851, §§ 71, 579. Nor is the cause of action here changed from tort to contract, or vice versa, as in those cases.

2. It follows that there was no error in overruling the defendant's demurrer or his plea of the statute. Where the cause of action is not changed, the time to which the statute of limitations runs is the filing of the original complaint. *Lorenzana v. Camarillo*, 45 Cal. 125; *Easton v. O'Reilly*, 63 Cal. 308; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100; *Vanderslice v. Matthews*, 79 Cal. 273, 21 Pac. 748; *Smith v. Bellows*, 77 Pa. 441; 1 Am. & Eng. Enc. Law, 551, and notes. The cases cited by appellant's counsel are not in conflict with this view. In each of them the causes of action in the original and in the amended complaint were different, or assumed to be different. *Anderson v. Mayers*, 50 Cal. 525; *Atkinson v. Canal Co.*, 53 Cal. 105; *Meeks v. Railroad Co.*, 61 Cal. 149. The decision in *Bank v. Parrish*, 116 Cal. 259, 48 Pac. 73, refers to the filing of a cross complaint by the defendant. Nor is the case affected by the provisions of section 2911, Civ. Code. A lien may be extinguished by the extinction of the principal debt, but the contrary does not follow. Nor, even were it extinguished, would that prevent a judgment on the principal obligation. The contrary has been expressly held. *Association v. King*, 83 Cal. 440, 442, 444, 23 Pac. 376; *Beatty, O. J.*, in *Hearn v. Kennedy*, 85 Cal. 57, 24 Pac. 606. The plaintiff was compelled by express statutory provisions to set up the mortgage, but it was for the defendant to waive the privilege if he desired; and the maxim would apply, "*Volenti non fit injuria.*" But here, if there were error in foreclosing the mortgage,—and I hold the contrary,—no harm was done, for the defendant had parted with his interest.

3. In the affirmative defense set up by the defendant it is claimed that, by the negligence of the plaintiff in suffering the mortgage to be barred as to the defendant's grantee, the obligation of the defendant was extinguished; but I know of no principle of equity on which this claim can be maintained. A surety may sometimes be released by failure to pursue the principal with due diligence, but the converse is not true. The

case of *Society v. Thornton*, 109 Cal. 427, 42 Pac. 447, cited by appellant, has no application. In that case the action was brought on the note alone, and the decision was simply an application of the rule established by other decisions in this state,—that the mortgagee "is not authorized to waive the security and to bring an action on the indebtedness." Had the mortgage been set up, whether it had become valueless by neglect or otherwise, the result would have been different. *Association v. King*, 83 Cal. 440, 442, 444, 23 Pac. 376. It will be observed also that the principal case, and the cases therein cited, involve simply the construction of section 1475 and cognate sections of the Code of Civil Procedure, and hence have no application to the case here, where the same questions are not involved.

Other points made by appellant's counsel are: (1) The refusal of the court to grant a continuance; (2) the denial of the defendant's motion for a reporter; (3) the admission of the note in evidence, and the alleged insufficiency of the evidence to show that the assignment was made to the plaintiff before the beginning of the suit. With regard to the first point, it will be sufficient to say that on the facts shown by the bill of exceptions there was no error, and that resort cannot be had to the affidavit of the defendant to show the contrary. With regard to the second, as the reporter could not be found, the motion could not be granted. Whether it was error in the court to proceed without the reporter need not be determined. The case was one in which the reporter's service could very well be dispensed with without inconvenience, and it is at least clear that no harm could have resulted. As to the admission of the note, the objection, I think, was not sufficiently definite. The note was not barred by the statute, and it was immaterial whether or not the assignment was dated. It was not objected that it did not appear that the assignment was not made before the beginning of the suit, nor was the witness asked that question. As to the evidence, in the absence of any evidence to the contrary, it was sufficient to justify the finding. The note was to Speyer, "cashier of Paso Robles Bank," and presumably for its use, and on his ceasing to be connected with the bank, in the year 1895, there was at least an equitable assignment to the equitable owner. Inferentially, the formal assignment was made about that date, and at all events would relate to it. I advise that the judgment and order appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(132 Cal. 468)

COHN v. KELLY. (L. A. 785.)

(Supreme Court of California. April 15, 1901.)

QUIETING TITLE—SEPARATE DEFENSE—CROSS COMPLAINT—ANSWER—NECESSITY—FINDINGS—MATERIAL ISSUES.

1. A separate defense, in an action to quiet title, in which it was alleged that plaintiff's deed was acquired by fraud, did not constitute a cross complaint, and hence plaintiff's failure to answer it was not an admission of its truthfulness.

2. Where, in action to quiet title, there was a general finding that the allegations of the complaint were true and that the averments of defendant's answer were false, and that plaintiff did not procure his deed by fraud, as alleged as a separate defense, it cannot be contended that the findings did not cover all the material issues of the case.

Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by L. B. Cohn against William J. Kelly. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Dunnigan & Dunnigan, for appellant. D. P. Hatch, for respondent.

HENSHAW, J. This was an action to quiet title. Defendant answered, denying the title of plaintiff to the property in controversy. Defendant then, "for a further and separate answer and defense to said cause of action set out in plaintiff's complaint," alleged fraud in the procurement of plaintiff's deed. At the conclusion of the evidence offered by plaintiff upon the trial, defendant moved for a nonsuit, urging, as he here urges, that his separate defense was in reality a cross complaint; that plaintiff's failure to answer it as a cross complaint was equivalent to his admission that the matters set up were true, and consequently he was entitled to a judgment against plaintiff upon the pleadings. This proposition, however, has been repeatedly advanced, and as repeatedly answered against the contention of defendant. *Brannan v. Paty*, 58 Cal. 330; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Goldman v. Bashore*, 80 Cal. 146, 22 Pac. 82; *Carpenter v. Hewel*, 67 Cal. 589, 8 Pac. 314; *Doyle v. Franklin*, 40 Cal. 106.

Complaint is further made that the findings do not cover all the material issues, but this complaint is also unfounded. In the first place, there is an omnibus finding that all and singular the allegations of plaintiff's complaint are true, and the allegations of defendant's answer are false; but, in addition to this, the findings specifically negative the charge of fraud and conspiracy, which was the basis of the separate defense, and this finding is supported by the evidence. In view of this fact, the absence of other findings becomes immaterial, since, if defendant was not defrauded as he alleges, he had no right to claim a rescission. The judgment appealed from is therefore affirmed.

We concur: **McFARLAND, J.; TEMPLE, J.**

(132 Cal. 459)

CHALMERS et al. v. SHEEHY et al.(S. F. 2,186.)¹

(Supreme Court of California. April 13, 1901.)

QUIETING TITLE—ANSWER—VERIFICATION—WAIVER—STATUTE OF LIMITATIONS—NEWLY-DISCOVERED EVIDENCE—SURPRISE—FRAUDULENT CONVEYANCES—ACTION FOR TORT—CREDITOR—EVIDENCE.

1. Where the transcript did not show that defendant's answer was verified, but there was no motion to strike it out, and the parties went to trial on the pleadings without objection, the objection that it was not verified cannot be raised for the first time on appeal.

2. Where land was conveyed to plaintiff by her husband pending an action by defendant against the husband, but before judgment was rendered, and the property was subsequently sold to defendant under execution on the judgment, the statute of limitations did not begin to run against defendant's right to set aside the deed to plaintiff until the execution of the sheriff's deed to defendant, since defendant's right did not accrue until he had caused the property to be sold under execution on his judgment.

3. Newly-discovered evidence which consisted of statements made by defendant on a former trial contradicting his present testimony, and merely designed for impeachment, is not sufficient to warrant a new trial.

4. The first counsel employed by plaintiff refused to continue prosecuting the case because plaintiff claimed that the fee received in a former suit was sufficient to pay for his present services, but the attorney confided to S., his successor, all the facts of the case. S. took charge of the controversy July 17th, and the trial was continued to September 8th, and at the close of the evidence was ordered submitted on briefs. S. received a copy of the testimony on September 23d, but, owing to his appointment as colonel of a volunteer regiment, the brief was prepared by his partner, and filed in July, 1898. *Held*, that the refusal to grant a new trial because of accident and surprise was not an abuse of discretion.

5. Where land was conveyed to plaintiff by her husband pending an action by defendant against the husband for slander, the contention that defendant could not attack the transfer as fraudulent, because he was not a creditor of the husband, cannot be sustained, since one having a claim for a tort is a creditor, even before an action is instituted therefor.

6. Where land was conveyed to plaintiff by her husband pending an action by defendant against him for slander, it was not necessary for defendant to show that plaintiff participated in the husband's fraud, in order to avoid the conveyance.

7. A physician transferred his property to plaintiff, his wife, pending an action against him for slander for circulating a defamatory report concerning defendant. The physician testified that the transfer was made on the advice of another physician, to avoid the unforeseen consequences likely to arise in any physician's surgical practice, but was unable to state any threatened suits of that nature. The physician was angry because defendant had attached his property in a former suit, and threatened to ruin defendant's reputation, and told a witness that he had fixed his property so that defendant could not get a cent of it. *Held*, that the evidence justified a finding that the transfer was made with the intention of placing the property beyond defendant's reach.

Commissioners' decision. Department 1. Appeal from superior court, Santa Cruz county; Lucas F. Smith, Judge.

Action by Ella T. Chalmers and another against James Sheehy and others. From the

¹ Rehearing denied May 13, 1901.

judgment, and from an order denying a new trial, plaintiffs appeal. Affirmed.

J. J. Dunne, for appellants. **Sullivan & Sullivan**, for respondents.

CHIPMAN, C. Action to quiet title. Sheehy alone answered, and is the sole defendant. The court adjudged that plaintiff Mary D. Chalmers and defendant James Sheehy were owners, as tenants in common, of an equal undivided one-half interest in and to the premises in controversy, and that plaintiff Ella T. Chalmers had no interest therein. Plaintiffs appeal from the order denying their motion for a new trial on a statement of the case. It was admitted at the trial, and the court found, that plaintiff Mary Chalmers was the owner of all the interest claimed by her. We do not see, therefore, that the appeal concerns her. The real issue is as to the ownership of the remaining undivided one-half interest in the property. Sheehy commenced an action against Chalmers on March 1, 1892, in the superior court of the city and county of San Francisco, for an alleged slander, laying his damage at \$50,000. The cause was tried in May, 1894, by a jury and Sheehy had a verdict against Chalmers for \$2,000, and judgment was accordingly entered on May 18, 1894. A transcript of the judgment docket was filed for record May 21, 1894, in the office of the county recorder of Santa Cruz county, where the land in question is situated. Execution duly issued on said judgment, and was received by the sheriff of Santa Cruz county, who duly levied upon Chalmers' interest in the land on June 4, 1896, resulting in the sale by the sheriff to Sheehy on October 19, 1896, of all the title and interest of Chalmers in and to the said premises for the amount of the judgment, costs, and accrued interest. There being no redemption, the sheriff duly executed his deed of the premises to Sheehy on April 21, 1897. Sheehy claims title under this deed. Plaintiff, Ella, claims title under deed of gift from her husband dated October 3, 1893, after Sheehy had commenced his slander suit against Chalmers, but before judgment in that action. The motion for a new trial was made on the grounds: (1) Irregularity in the proceedings; (2) accident and surprise; (3) newly-discovered evidence; (4) insufficiency of the evidence; (5) errors in law occurring at the trial.

1. Appellants make the point that the transcript does not show that the answer was verified. No verification appears in the printed copy of the answer. In the clerk's certificate, however, it is stated that the transcript was correct, "with the exception of the following, to wit: * * * The affidavit of James Sheehy, verifying the answer in said action." There was no motion to strike out the answer, and the parties went to trial on the pleadings without objection.

Conceding the clerk's certificate to be insufficient to show that the answer was in fact verified, it is too late to urge the objection here for the first time. It is also objected that the allegations of fraud in the answer impeaching the deed from Chalmers to his wife are not sufficiently specific. There was no demurrer to the answer, in the absence of which the allegations were sufficient. The case was tried on the assumption that the issue of fraud was properly pleaded.

2. Appellants also make the point that Sheehy's right to have the transfer to Mrs. Chalmers set aside is barred by the three-years statute of limitations (section 338, Code Civ. Proc., subd. 4). This contention rests upon the claim that the statute began to run from the date of Chalmers' deed to his wife, October 3, 1893. The present cause of action did not accrue to Sheehy until he had obtained the judgment in the slander suit, and had caused the premises to be sold in execution thereof; and hence the statute, as to him, did not begin to run at the date of Mrs. Chalmers' deed, but at the date of the sheriff's deed to Sheehy. *Hager v. Shindler*, 29 Cal. 47; *Stewart v. Thompson*, 32 Cal. 260; *Goodnow v. Parker*, 112 Cal. 437, 44 Pac. 738. The point was directly decided in *Stewart v. Thompson*. The cases are reviewed in *Goodnow v. Parker*, and *Stewart v. Thompson* cited approvingly.

3. The grounds much relied on for reversal are newly-discovered evidence and accident and surprise. The alleged newly-discovered evidence referred to in the affidavits is not set out. It is alleged to consist of statements previously made by Sheehy and one Horgan in another action, pending between Sheehy and Chalmers, contradictory of their testimony in this action, but of which affiants had no knowledge at the latter trial. Judging from what is stated in the affidavits, it is impeaching evidence, for it is stated to be intended to contradict testimony given by Horgan and Sheehy in the present action. The rule is that newly-discovered evidence which is merely cumulative or designed to contradict a witness is not of a character to warrant a new trial. *People v. Anthony*, 56 Cal. 397. Upon the question of accident and surprise the affidavits and counter affidavits are very lengthy, and embrace the history not only of the trial of the present case, but much of that relating to the action for defamation of character, out of which the defense in this action arose. An examination of the numerous affidavits shows that appellants relied on the alleged fact that the cause was not fairly or fully or properly presented to the court, on account of the abandonment of the case at a critical moment by plaintiffs' attorney, Mr. Eugene Deuprey, who had defended Chalmers in the slander suit and had prepared the present cause for trial. It is set forth in plaintiffs' affidavit that Mr. Deuprey was fully paid for his services, but, because of oth-

er important engagements, refused to attend to this present case, and that plaintiffs were compelled to employ counsel unfamiliar with the law and the facts, in consequence of which the cause was not tried as it should have been on plaintiffs' behalf; that the firm of Smith & Murasky were retained as substitute attorneys, and that Mr. Smith, of that firm, attended at the trial, but that about that time he was appointed colonel of the 1st California infantry volunteers, which made it necessary for Mr. Murasky, his partner, to take up the case without any previous knowledge of it, and prepare the brief for plaintiffs after the cause was submitted to the court; that Mr. Murasky was a candidate for an office about that time, and was elected, and he, too, gave up the case after he had prepared and submitted his brief, and the statement and motion had to be prepared by his successor, the present counsel. It is, no doubt, true that enforced changes in counsel during the progress of a case sometimes is most unfortunate, although not always necessarily so. We think, however, that the facts as shown to the court warranted its conclusion that no injury resulted to plaintiffs' cause by a change of counsel, and that plaintiffs were not wholly blameless for Mr. Deuprey's withdrawal from the case. Mr. Deuprey made affidavit that the trial was continued once at his request, and that before the day of trial arrived he demanded a fee for his services, which was refused on the ground that he had been amply paid in the slander suit, and ought not to expect pay in this action. He refused to take plaintiffs' view of the matter, but nevertheless accompanied Mr. Smith to Santa Cruz, and took part in the trial at the day fixed. He deposed that he imparted to Mr. Smith fully all the facts relating to the litigation and the law involved, as he understood it, and that Mr. Smith was fully equipped to conduct the case. A further continuance became necessary, and, because his clients refused him any compensation in this action, Mr. Deuprey drew out of the case, and Mr. Smith conducted it to the close of the evidence, when it was submitted upon briefs to be thereafter prepared. It was at this point he became colonel of the 1st California, although his regiment was not mustered in for several months thereafter, during which time it is shown that he continued in active practice. The first day of the trial was July 17, 1897, and the cause was then continued to September 8, 1897, giving Mr. Smith ample time for preparation. The testimony was written out and placed in his hands September 23, 1897, and his regiment was not mustered in until the following April. In an affidavit by Matt I. Sullivan, Esq., one of the attorneys for defendant, it is stated that the cause was continued the second time, by agreement, to July 31st, and from time to time for the mutual accommodation of counsel until Sep-

tember 8, 1897, when "Colonel Smith appeared alone as counsel for plaintiffs, announced himself as ready to proceed with the trial, made no suggestion whatever indicating surprise or accident, made no motion for a continuance, but proceeded with the case in a manner indicating that he was fully prepared to represent his clients"; that the cause was submitted to the court upon the evidence, upon briefs to be prepared and sent to the court. Affiant further stated that Col. Smith was actively engaged in the practice of law in San Francisco for several months after the submission of the case, to affiant's personal knowledge. The briefs found their way to the court in July, 1898, and the findings were filed and the judgment entered on August 19, 1898. There is no satisfactory explanation of Col. Smith's failure to brief the case. With the transcript before him, and an opportunity to consult with Col. Smith about the case after the trial, if not before, it is not likely that plaintiffs' case failed to be well and fully presented by Mr. Murasky. All the matters, of which the foregoing is a brief summary, were submitted on the motion to the trial judge, who was in a position to determine whether there had been any miscarriage of justice. A careful examination of all the facts, the salient features of which have been given, fails to convince us that there was any abuse of discretion in denying the motion.

4. The court found that the deed of Chalmers to his wife "was without consideration whatever, and was made with intent to hinder, delay, and to defraud said defendant Sheehy of his demand against said Wm. P. Chalmers, and was made in anticipation of judgment that might be rendered against said Wm. P. Chalmers in said action of Sheehy v. Chalmers" (the slander suit). It was further found that, at the time the transfer was made, Chalmers owned no property, except his interest in the land in dispute, out of which execution could be satisfied in whole or in part, and that Chalmers "is now, and at the time the transfer was made, and until said sheriff's sale was, without any property whatever, other than said" interest, and that the deed to plaintiff Mrs. Chalmers "is void as against said defendant James Sheehy." Appellants insist that the evidence does not support these findings. Appellants claim the law to be "that no third party can question the validity of a conveyance from the husband to the wife unless he was a creditor of the husband before the conveyance was made, or was a subsequent purchaser without notice"; that the slander suit had not been tried when Chalmers executed the deed, and Sheehy, therefore, was not a creditor, within the statute of frauds. It is also contended that there was no evidence of Mrs. Chalmers' participation in or knowledge of the fraud of her husband, if it be conceded that he acted fraudulently, and therefore the decision was erroneous. Mr. Freeman says

"that one having a claim for a tort is a creditor before the commencement of an action thereon as well as after, and as such creditor is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencement of his action." *Freem. Ex'ns* (4th Ed.) § 137a. See *Bump, Fraud. Conv.* §§ 502, 503; *Waite, Fraud. Conv.* (3d Ed.) § 90; 8 *Am. & Eng. Enc. Law*, p. 750. See, also, sections 3429, 3430, *Civ. Code*, as to who are creditors and debtors, and *Melvin v. State*, 121 Cal. 16, 53 Pac. 416, where it is said that the term "debt," used in our statutes, "should be given its modern legal significance, as including any sort of obligation to pay money." The cases are very numerous where it is held that a cause of action based upon a tort is within the statute against fraudulent conveyances, and that a person having such a cause of action is a creditor of the wrongdoer, before judgment is obtained. The following are cases where it was so held, and where the liability was for slanderous words: *Walradt v. Brown*, 1 *Gilm.* 397; *Lillard v. McGee*, 4 *Bibb*, 165; *Langford v. Fly*, 7 *Humph.* 585; *Shean v. Shay*, 42 *Ind.* 375; *Jackson v. Myers*, 18 *Johns.* 425; *Boid v. Dean*, 48 *N. J. Eq.* 193, 21 *Atl.* 618; *Cooke v. Cooke*, 43 *Md.* 522; *Miller v. Dayton*, 47 *Iowa*, 312. The principle has been applied to other forms of torts or causes of action arising ex delicto, and it is held that the injured party becomes a creditor when the cause of action accrues. *Bongard v. Block*, 81 *Ill.* 186; *Petree v. Brotherton*, 133 *Ind.* 692, 32 *N. E.* 300; *Weir v. Day*, 57 *Iowa*, 84, 10 *N. W.* 304; *Schaible v. Ardner*, 98 *Mich.* 70, 56 *N. W.* 1105.

Appellants' contention that participation in the fraud on the part of the grantee, Mrs. Chalmers, must be shown, is equally untenable; for it is not pretended that the deed to her was other than a gift, pure and simple, and there is evidence to sustain the finding that Chalmers was then and has been since unable to meet his liabilities, and owned no property at the time of or since the execution, levy, and sale to Sheehy, other than the land in dispute. The facts are unlike those in *Cook v. Cockins*, 117 Cal. 140, 48 Pac. 1025, and other cases cited by appellants. It is immaterial that Mrs. Chalmers was innocent (*Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286), or that she did not know the condition of her husband's affairs (*Threlkel v. Scott* [Cal.] 34 Pac. 851). When on the witness stand, Chalmers was unable to state when he first informed his wife that he had made the deed to her, and was unable to say that he at any time made a manual delivery of it to her; and he stated that he did not know who deposited the deed for record, and he testified that he thought it was prepared in the office of Mr. Deuprey, who was his attorney in the slander suit. As a reason for making the conveyance, he testified that he was advised by another physician to do so, "to avoid the unforeseen consequences of a suit for

damages," which it was explained was likely to arise in any physician's surgical practice; but when on cross-examination he was asked if he had been personally threatened with any suit prior to October 3, 1893, on account of any operation performed by him, or on account of any medical treatment of any patient, he could give but one instance, which was the threat of Sheehy to sue him, and that was not for alleged malpractice, but for falsely circulating a defamatory report concerning Sheehy. It appeared that Sheehy had loaned Chalmers money, and held his note for \$1,050; that, being called on for payment, Chalmers informed Sheehy that he was unable to pay it without mortgaging his interest in the land in dispute, and that he did not want to do that. Sheehy, however, brought suit and attached this land, and the debt was afterwards paid. It is in evidence that immediately following this suit, which was brought December 1, 1891, Dr. Chalmers made threats that he would blast the reputation of Sheehy. He circulated the story that he had treated Sheehy for a loathsome disease, and on December 3d brought suit against Sheehy for \$2,000 for medical services alleged to have been rendered in treating him for a constitutional disease; and there is evidence tending to show that this was by way of reprisal, and was without merit, for a jury gave Sheehy the verdict, and he recovered judgment for costs. Sheehy promptly brought his action for defamation of character upon learning of the reported slanderous statements by Chalmers. A witness, who had known Chalmers many years, and had been his friend up to the commencement of the slander suit, testified: "I had a conversation with Dr. Chalmers after the commencement of the slander suit, and before October 3, 1893, in relation to the slander suit. * * * He came to my office one night at eight o'clock, and stayed there until twelve o'clock, and we talked over different matters, and, among other things, talked over this slander suit. * * * I told him he was very foolish, and would have to pay for it in the end,—that he had property,—and then he remarked: 'He will never get a damned cent of my property. I will fix it so that he will never get a dollar out of it.'" Other facts appeared showing that the court was justified in believing that Chalmers' intention was to put the property where Sheehy could not reach it, should he recover; and, as it was all the property he had, he would thus prevent Sheehy from collecting anything if he succeeded in obtaining judgment. If we could assume the law to be as claimed by appellants, Chalmers' deed to his wife might have accomplished its evidently fraudulent purpose; but, as the law is otherwise, we must hold the effort to have been abortive. The deed was void, and the court did not err in so finding.

There are no errors of law alleged to have occurred at the trial which seem to call for special notice. The order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(132 Cal. 453)

UNION SAV. BANK v. BARRETT.
(S. F. 2,580.)¹

(Supreme Court of California. April 10, 1901.)
MORTGAGE FORECLOSURE—ACTIONS—ABATEMENT—SERVICE—APPEARANCE—WAIVER.

Code Civ. Proc. § 385, provides that an action does not abate by the death of a party if the cause of action survive. Section 581 gives a plaintiff three years after the commencement of an action to make service and return of summons, but declares that, if appearance is made, the action may be prosecuted as if summons had been served. *Held* that, where proceedings were instituted to foreclose a mortgage, and the mortgagor died before service of summons, on the appointment of an executrix and filing of an amended complaint an appearance by the executrix within the three years obviated the necessity of service of summons, and the executrix could not subsequently plead limitations.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Proceedings by the Union Savings Bank against Katie Barrett, executrix, to foreclose a mortgage. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

B. McFadden and A. Boyer, for appellant. Reed & Nusbaumer, for respondent.

PER CURIAM. Appeal from a judgment foreclosing the mortgage of the defendant's testatrix. The action was commenced August 13, 1896, and summons was issued therein June 25, 1897. The mortgagor died September 27, 1897, before any service of the summons was made. The defendant herein was appointed executrix of the last will and testament of said mortgagor, and on December 1, 1897, letters testamentary thereon were issued to her. Thereafter the plaintiff filed an amended complaint setting up these facts, and the defendant filed a demurrer thereto March 3, 1899. Her demurrer was overruled, and she subsequently filed an answer upon which the action was tried, and judgment rendered in favor of the plaintiff. The defense relied upon in her answer was the statute of limitations (sections 337, 343, Code Civ. Proc.), and in support thereof it is contended that the action was already barred at the time that she filed her demurrer, and that, under the provisions of section 1490, Code Civ. Proc., she had no authority to appear, or bind the estate by her appearance. The action did not abate by the death of the original defendant (Code Civ. Proc. § 385), but survived against her estate (Loan Society v. Wackenreuder, 99 Cal. 503, 34 Pac. 219), and could be prosecuted against the person who should thereafter be appointed her personal representative. Upon the appointment of such personal

representative the plaintiff had the same right to proceed against him as it would have had to proceed against the original defendant had she not died. Section 581, Code Civ. Proc., gives to the plaintiff three years after the commencement of an action within which to make service and return of the summons, and declares: "But all such actions may be prosecuted if appearance has been made by the defendant or defendants within said three years, in the same manner as if summons had been issued and served." In the present case the personal representative appeared in the action within three years, and thus obviated the necessity of any service of the summons. By this voluntary appearance the court acquired jurisdiction over her with the same effect as if she had been brought in by the service of summons upon her at that time, and, as this jurisdiction was acquired within three years after the commencement of the action, no rights of the estate, or of the persons interested therein, were waived by her appearance. In *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 Pac. 470, more than three years had expired after the amendment to section 581, without any service of the summons, during all of which time the mortgagor was living. It was held that, as the three years had expired in the lifetime of the mortgagor, the action was, in effect, at an end, and that it was not in the power of the administrator to revive it by an appearance. In *Davis v. Hart*, 123 Cal. 384, 55 Pac. 1060, the plaintiff allowed nearly nine years to elapse before making any attempt to serve the summons, and it was held that, although the defendant had died before the expiration of the three years, the running of the statute was not stopped thereby. The judgment is affirmed.

(132 Cal. 432)

ISLAIS & SALINAS WATER CO. v. ALLEN
et al. (S. F. 2,216.)

(Supreme Court of California. April 6, 1901.)
ACTION TO QUIET TITLE—RIGHT TO DISMISS—ANSWER DEMANDING AFFIRMATIVE RELIEF.

Under Code Civ. Proc. § 581, authorizing a dismissal of a suit by the plaintiff before trial on the payment of costs unless a counterclaim has been made, or affirmative relief sought by cross complaint or answer, it is not error to refuse to allow plaintiff in a suit to quiet title to dismiss his suit after the filing of an answer denying the material allegations in the complaint, and alleging facts entitling defendant to a decree to quiet title against plaintiff, and asking such relief.

Temple, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action to quiet title by the Islais & Salinas Water Company against Charles R. Allen and others. From an order refusing to allow plaintiff to dismiss, it appeals. Affirmed.

¹ For opinion on rehearing, see 64 Pac. 1074.

F. D. Brandon (J. H. Henderson, of counsel), for appellant. Leon Samuels, for respondents.

HAYNES, C. This action is prosecuted by the plaintiff against a large number of defendants, including one R. C. De Boom, to quiet its title to a large tract of land, being part of the Rincon de las Salinas or Bernal Rancho, situated in the city and county of San Francisco. De Boom alone answered, and, after denying the material allegations of the complaint, alleged that he is the owner in fee and in the possession and entitled to the possession of a large number of lots and blocks, being a portion of the land described in the complaint, and, after describing the portion so owned and possessed by him, alleged: "That said plaintiff, as defendant is informed and believes, and accordingly alleges, claims an estate or interest in the lands described adverse to said defendant; and this defendant alleges that the claim of said plaintiff is without any right whatever, and that said plaintiff has no estate, right, title or interest in or to said lands, or any part thereof;" and, after praying that plaintiff take nothing by its complaint, prayed "that it be ordered, adjudged, and decreed that this defendant is the owner in fee and entitled to the possession of the land hereinbefore described, and that plaintiff be forever enjoined from asserting any claim or title to any part thereof." Plaintiff served notice that it would move the court to strike out that portion of said answer and of defendants' prayer above quoted upon the ground that it was irrelevant and redundant, and also gave notice that, upon said motion being granted, plaintiff would immediately move the court to dismiss the action. Upon the hearing, which was had upon the complaint and answer, the court denied both parts of said motion, and plaintiff excepted. The plaintiff then moved the court to dismiss the said action as against defendant De Boom upon the ground that plaintiff did not desire to further prosecute the said action as against said defendant, and deposited with the clerk the costs to which the said defendant would be entitled. This motion was also denied, and plaintiff excepted, and a bill of said exceptions was settled. The action then came on for trial, and plaintiff offered no evidence, but moved, first, that a judgment of nonsuit be entered, and, this being denied, moved for a judgment of dismissal, which was also denied, and exceptions were taken, and a bill thereof settled. The defendant then introduced evidence in support of his allegations, and, findings being waived, judgment was entered for defendant De Boom as prayed for, and plaintiff appeals from the judgment upon the judgment roll which contains said bills of exception.

The only question here presented for decision is whether a plaintiff in an action to

quiet title to real estate is entitled to dismiss his action as against a defendant who has answered and put in issue all the plaintiff's material allegations, and also alleged the material facts entitling him to a decree quieting his title as against the plaintiff, and added a prayer therefor. The plaintiff (appellant here) insists that his motion should have been granted. Section 581, Code Civ. Proc., provides: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: (1) By the plaintiff himself, by written request to the clerk, filed among the papers in the case, at any time before trial, upon payment of costs, provided, a counter-claim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant. * * *" Appellant's contention is that affirmative relief is not sought by the answer, and that, therefore, he had a right to dismiss the action. If that were true, the plaintiff had a right to dismiss the action without applying to the court, and without moving to strike out any of the allegations of the answer, or any part of the prayer. It has been held in several cases that a cross complaint alleging title in the defendant, and praying that his title be quieted as against the plaintiff, is not necessary, inasmuch as the issues raised by the answer to plaintiff's complaint, if found for the defendant, and judgment entered thereon, would operate as an estoppel, and protect the defendant as well as a decree in his favor upon a cross complaint. *Wilson v. Madison*, 55 Cal. 5, 8; *Miller v. Lucio*, 80 Cal. 257, 22 Pac. 195. There are cases, however, where a cross complaint in actions to quiet title is necessary to the defendant's protection. See *Winter v. McMillan*, 87 Cal. 256, 264, 25 Pac. 407. Appellant relies principally upon *Wilson v. Madison*, and *Miller v. Lucio*, supra. In the last-named case all that was said upon this question was the following: "There was no error in striking out the defendant's cross complaint. In an action to quiet title, where defendant relies upon title in himself, a cross complaint is unnecessary. *Wilson v. Madison*, 55 Cal. 5; *Loan Association v. Wagner*, 61 Cal. 349. Besides, as judgment was given for plaintiff, the error, if any, was harmless." In that case the plaintiff did not move to dismiss his action. In the other case (*Wilson v. Madison*, supra) there was no dismissal of the case by the plaintiff, nor any motion to strike out the defendant's cross complaint to quiet his title against the plaintiff, to which the plaintiff had filed an answer. Upon that state of the pleadings the defendant moved that the issues raised by the cross complaint and the answer thereto be first tried. This motion was denied. This court held that under the circumstances the ruling was not erroneous, and said: "In fact, we can see no necessity for a cross complaint. Issue was joined on title by the complaint of plaintiff and defendant's answer thereto, and, if judgment

passed for the defendant, it would be an estoppel as to the title, which, under the rulings of the supreme court of California, would protect the defendant as well as a decree in his favor." Appellant also cites *Wood v. Jordan*, 125 Cal. 263, 57 Pac. 998, which appears to directly sustain its contention. That was an action to quiet title, and the defendant answered, setting up his title, and prayed for a decree establishing it, and enjoining the plaintiff from asserting any interest in the land. Thereafter the plaintiff procured a dismissal of the action, and a judgment of dismissal was entered. Defendant moved to vacate said judgment. The motion was denied, and he appealed. The court said: "He insists that by his answer he seeks affirmative relief, and that under section, 581, subd. 1, of the Code of Civil Procedure, it was erroneous for the court, under these circumstances, to dismiss the action. But this contention has been definitely settled against him in *Moyle v. Porter*, 51 Cal. 639." *Moyle v. Porter* was correctly decided under section 581, Code Civ. Proc., as it then stood. The first subdivision, as it then existed, provided: "(1) By the plaintiff himself, at any time before trial, upon the payment of costs, if a counterclaim has not been made;" and in that case the court said that "the answer of the defendant did not amount to a counterclaim." But now there is added to the foregoing subdivision the following: "Or affirmative relief sought by the cross complaint or answer of the defendant." It would seem that *Wood v. Jordan* was decided upon the authority of *Moyle v. Porter*, without the attention of the court having been called to the material change in the statute above specified, and should, therefore, not be regarded as authority in the present case.

The Code plainly provides that the plaintiff cannot dismiss his action if the defendant, by his answer, has sought affirmative relief. Whether he did so is therefore the question to be decided. Conceding that upon the denials in defendant's answer his title would have been quieted by a judgment in his favor, if the plaintiff had prosecuted its action, it does not follow that he may not seek and be entitled to affirmative relief. The commencement of the action and the allegations of plaintiff's complaint were an attack upon defendant's title to his property, which, however unfounded, impaired the market value thereof, and obstructed its alienation; and, if the plaintiff should be permitted to dismiss the action, the defendant, in most cases, would feel compelled to bring an action to remove the stain upon his title. It is therefore important to him to prevent a dismissal, and compel a trial of the action; and this he may do by setting up his own title and right of possession, and praying that it be quieted as against the plaintiff who has asserted an adverse right. It thus appears that the action to quiet title, in

some of its features, is peculiar. The defendant's title may never have been questioned, and therefore no cause of action existed in his favor against any one; but the plaintiff, by bringing the action, created a cause of action in the defendant against the plaintiff, for it was the assertion of an adverse claim or interest in the same property. In *Robinson v. Railroad Co.*, 65 Cal. 263, 3 Pac. 878, the plaintiff alleged that he was the owner of certain bonds of the defendant, secured by mortgage to trustees, and sought to remove the trustees upon the ground that they had failed to discharge the duties of the trust. The answer alleged that the bonds held by the plaintiff "were paid, satisfied, and discharged," and prayed that the bonds be delivered up and canceled, or in default of such delivery be declared void. The court said: "The answer claimed affirmative relief, and the plaintiff was not authorized to dismiss his action." In *Kitts v. Austin*, 83 Cal. 167, 172, 23 Pac. 290, the plaintiff in an action to quiet title was in possession of a portion of the land. The court said: "The defendant here in her answer set up her adverse claim of title to the property. She thereby became an actor, with the burden of proof upon her to establish her claim. And the court, having found that her adverse claim was superior to that of the plaintiff's from which the right of possession flowed, properly included in its decree an award of the possession." In *Mining Co. v. Moses*, 58 Cal. 168, 176, the trial court, after judgment that plaintiff was not the owner of the property, and defendants were the owners, decreed that the plaintiff's claims to the property were groundless, and that defendants were the true and lawful owners, "and that said defendants' title thereto is adjudged to be quieted against all claims, demands, and pretensions of the plaintiff, which said corporation (plaintiff) is hereby estopped perpetually from setting up any claim thereto, or any part thereof." This court said: "The answer of the defendants contained none of the elements of a cross complaint, as distinguished from a defense to plaintiff's action, and contained no prayer for affirmative relief. The part of the decree awarding affirmative relief should be stricken out." In the case before us, however, there were affirmative allegations, which, if sustained by the evidence, entitled the defendant to affirmative relief, and such relief was demanded. *Pomeroy*, in his work on *Code Remedies* (3d Ed. p. 120), says: "Affirmative relief may certainly be given to the defendant upon his answer in all cases where, from the nature of the subject-matter and from the relations of the parties, a specific remedy in his favor is possible according to the doctrines of equity jurisprudence; certainly in all cases where the answer can be considered as setting up a counterclaim. There are undoubtedly instances in which no such relief is

possible. Where, however, the nature of the subject-matter and of the relations between himself and the plaintiff are such that he could have maintained an independent suit in equity against the plaintiff, and procured specific relief thereby, or could have filed a cross bill under the old practice, he may now obtain the same remedy upon his answer, at all events, as was before remarked, if the demand alleged in the answer constitutes a valid counterclaim." Appellant also cites *Thompson v. Spraug*, 66 Cal. 350, 5 Pac. 506, where it was held that, "when a cross complaint has been stricken from an answer, leaving therein matters of defense only, the plaintiff may dismiss the case at any time before the trial, on payment of costs." It is conceded that in several cases of actions to quiet title where the defendant is the owner and in possession it has been held that a cross complaint is "unnecessary," and may be stricken out. But no case goes beyond holding that in such a case the cross complaint is unnecessary. Here, however, the notice of motion to strike out the affirmative allegations of the answer and the prayer for affirmative relief gave notice that, upon said motion being granted, the plaintiff would move immediately that the action be dismissed as to the defendant *De Boom*. In *Thompson v. Spraug*, supra, "the cross complaint was stricken out on motion. Subsequently the plaintiff dismissed the action." We think if the court in that case had been informed that the purpose for which the plaintiff desired to have the cross complaint stricken out was, as here, that he might dismiss the action, his motion would not and should not have been granted. We think the court did not err in denying appellant's several motions, and that the judgment should be affirmed.

We concur: **CHIPMAN, C.; GRAY, C.**

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

TEMPLE, J. (dissenting). I am unable to concur with my associates in the conclusion they have reached. If the issues tendered by the plaintiff had been tried, and found in favor of the defendant, and judgment entered accordingly, defendant would have had all the relief which he could get under the allegations of his answer. The judgment in either case would have been only an estoppel, and would, as a matter of fact, have amounted to nothing more, even though in terms it had declared the defendant to be the owner. In either view it would have settled the question of title as between the parties, and could have had no further effect. Affirmative relief means relief which the defendant would not get by a judgment that plaintiff's allegations are all untrue. The answer shows that defend-

ant is in possession of the demanded premises. In other words, the action, under our decisions, is really ejectment. A judgment for defendant would constitute a perpetual bar, and the so-called affirmative relief would be nothing more or other. I am utterly at a loss to comprehend how the fact that the plaintiff might desire to dismiss the action, and, if he does, the cloud would remain on defendant's title, can have any bearing on this question. To prevent the plaintiff from dismissing his action is not affirmative relief. That would be simply and only to compel the plaintiff to try his case, rather than to dismiss. This is not relief in an action, as the phrase is used, affirmative or otherwise. To say that this is the purpose of the claim to the supposed affirmative relief is to admit that the purpose is not to get affirmative relief. The same dilemma might arise in a suit upon a disputed money demand. The defendant might be very desirous of having the claim determined, but he claims no affirmative relief when, after denying the allegations of the complaint, he demands the judgment of the court that he owes plaintiff nothing. The supposed case is not analogous to the one in hand, simply because it is this case, and not another. These are matters of procedure, and the Code has provided that in such cases a plaintiff may dismiss his action, after answer without prejudice to his right to again sue. Whether this ought to be so is a matter of policy, which it is not the province of the courts to determine.

(132 Cal. 173)

SMITH et al. v. STEARNS RANCHOS CO.
(L. A. 771.)

(Supreme Court of California. April 11, 1901.)

In bank.

On application for rehearing. Denied.

For opinion in department, see 64 Pac. 261.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. The opinion of the court is based upon the ground that the canal company cannot arbitrarily make assessments for the cost of maintaining and operating the works, and enforce payment by shutting off the supply of delinquents. Concede this proposition, and it does not follow that this judgment should be reversed or modified. The judgment of the superior court is not inconsistent with this view. The defendant threatened to shut off the water from plaintiffs if they failed to pay certain assessments. He was temporarily restrained from carrying out this threat, and the question was litigated as to the real amount due from the plaintiffs as their share of the expenses incurred in maintaining and operating the canal. It was found that \$135 less was due in the aggregate than had been charged. Upon this fact

being found, the superior court enjoined the defendant from shutting off the water for failure to pay the assessment bills as presented, but provided that the defendant might present corrected bills for the sums actually due, and, if such bills were not paid, he could move to modify the judgment. In other words, the court merely reserved the right to relieve the defendant from the injunction, if it should be made to appear that the plaintiffs, or any of them, refused to pay assessments not arbitrarily made by the canal owner, but judicially ascertained by the court itself. It decided that it would not by injunction compel the canal owner to go on performing its contract, when the water takers were refusing to perform on their part,—that it would not afford equitable relief to parties who deliberately refused to do equity. The propriety of this decision appears to me to be unquestionable; but it is this part of the judgment which is reversed, and the result is that the defendant must go on furnishing zanjeros, meters, gates, etc., for measuring out the water, and keeping up the canal, at large expense, with no means of enforcing payment from water takers of their share of the expense except separate actions in the courts against the respective delinquents. In effect, a specific performance is decreed in favor of parties who refuse to perform, and the party enjoined is remitted to another action, or series of actions, to enforce his right under the contract. This is not equity. The judgment of the superior court was equity.

or that the inmates working with plaintiff were dangerous and unskillful, or that the accident happened through any incompetency of the officers or inmates. *Held*, that the superintendent was not liable for the injury, since it cannot be presumed that the inmates were unskillful from the fact that they were insane.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by J. E. Atkinson against Asa Clark. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. H. Carpenter, for appellant. Dudley & Buck and George F. Buck, for respondent.

CHIPMAN, C. Plaintiff sues to recover damages for personal injuries received through the alleged negligence of defendant in employing an unfit fellow servant. The cause was tried by a jury, and, at the close of plaintiff's evidence upon the issue of defendant's liability, the court granted defendant's motion for a nonsuit, and entered judgment accordingly, from which plaintiff appeals.

The complaint alleges that about September 18, 1895, defendant employed plaintiff as a servant, in the capacity of a carpenter, for a certain compensation; that plaintiff entered into the service of defendant on that day, and worked as a day laborer until October 2, 1895; that, while so engaged and working for defendant, he (defendant) negligently and wrongfully employed one Baptista Cavaleries and others, whose names are unknown to plaintiff, to work for defendant "as servants for hire, in * * * the same line of work as the plaintiff was then engaged to perform, and that in the choice of the aforesaid servants the defendant wrongfully neglected to use ordinary or any prudence or care in their selection, but willfully, and with full knowledge of their unskillfulness, carelessness, and mental and physical unfitness for the work for which they were employed, engaged and hired, without plaintiff's knowledge of the fact, or of their employment in his line of work, the above-named servants," etc. It is alleged that on October 2, 1895, while in defendant's said service, plaintiff was injured through the negligence of the said servants, in the following manner: Plaintiff was engaged to tear down a building, and, while he was at work removing the lath and plaster from the partition walls within the outer brick walls of the building, the said Cavaleries and said other servants, "while under defendant's control and direction, and within the scope of their employment and without the knowledge of plaintiff, negligently * * * precipitated said walls upon the person of plaintiff," thus injuring him. The testimony of defendant, who was called as a witness by plaintiff, was that he was the medical superintendent of the state asylum for the insane at Stockton; that one James Halliday was an outside attendant at the

(132 Cal. 476)

ATKINSON v. CLARK. (Sac. 710.)

(Supreme Court of California. April 24, 1901.)
INJURY TO SERVANT — NEGLIGENCE — PRESUMPTIONS—SELECTION OF INCOMPETENT WORKMEN.

Plaintiff was injured while tearing down some brick walls at the state insane asylum, on which some of the inmates were working. The patients allowed to work around the asylum were selected by subordinate officers appointed by the superintendent of the institution. There was no evidence that the superintendent was negligent in selecting the subordinate officers,

asylum, and had charge of the insane patients. Defendant testified: "The patients were put to work at various kinds of employment in and about the asylum, but I did not designate or select them myself. Whatever is to be done in a laboring way, the patients generally take a hand in. Q. They were under your authority, I suppose. A. Well, of course, yes; under my authority in a measure. I did not select them myself." Referring to the work of tearing down the building, he testified: That the patients were taken out by those who knew them and handled them. That he did not designate the patients himself. That Cavaleries was one of the patients. "I was not present when the wall fell down upon Mr. Atkinson, and knew nothing about it until I was called to see him immediately afterwards. James Halliday had charge of the patients who were working upon the building at the time. * * * The employés use their own discretion in taking out to work the patients that have been there a long time and are well known. Mr. Peterson, the foreman, has charge of the selection of the patients that are distributed about under the different attendants to go to work, and he receives them from the inside attendants. Peterson is one of the officers at the asylum." It appeared that there were three parallel partition walls, about 8 feet apart and 12 feet high, fastened at the ends to the outside brick wall and an inside corridor parallel brick wall. These partitions had been detached from the brick walls preparatory to being torn down. Plaintiff was working on the south side of the south partition wall, and could not see what was being done on the north side of the north partition wall. Something caused the north wall to fall over on the middle wall, which latter was thrown over on the south wall, causing it to fall on plaintiff. Plaintiff testified that after he was taken out from under the débris he saw Cavaleries at the north wall, "with a crowbar in his hand, digging at the partition which had first fallen"; that "Cavaleries caused the wall to fall." The reason for so testifying, as he stated, was that Cavaleries was the first one he saw when he was released from under the wall, and Cavaleries was then standing, with the bar in his hand, digging under the wall, and that there was no other person near at the time; the other patients were on the west side of the building. He testified that he did not know where Cavaleries was at the time the walls fell. From anything that appears, Cavaleries may have gone to the north wall after it had fallen. Plaintiff testified that he was hired by defendant, but that he (plaintiff) was working for the state and was paid by the state; that he knew he was working in a state insane asylum, and knew that the fellow workmen were insane inmates. It appeared that plaintiff had been working for two or three weeks alongside of these insane patients on the same kind of work. There is no evidence

that the inmates were known by the defendant to be, or in fact were, in any sense dangerous or unskillful. There is no evidence that they were unskillfully handled, nor, indeed, was it alleged as the fact, the allegation being that they were unskillfully selected; and there is no evidence of unskillful or imprudent selection of these inmates, and there is no evidence that there were not enough attendants to see to the proper management of the inmates as fellow laborers. Without entering upon the discussion of the questions raised by appellant, it is sufficient to say that before the superintendent could be held liable, if at all, there should have been evidence tending in some degree to establish the truth of the allegations in the complaint. Defendant did not select the inmates for the work, nor did he have immediate control or direction of them. His control was general, and the immediate duty of selecting inmates suitable for the work, and the management of them when at work, devolved upon other officers of the asylum. Liability for their negligence cannot fall upon the superintendent simply by reason of his general supervision of the asylum and its subordinate officers. Conceding liability at all, it could only arise in such a case as this where there is evidence of his negligence in selecting unskillful and incompetent subordinates, and that he was in some way culpable in allowing them to select the inmates for the work. But there is no evidence of incapacity of the subordinates, or that they were careless or unskillful in the selection of the inmates; nor is there any evidence that the inmates selected were dangerous or unskillful, or that the accident happened through any unskillfulness of officers or inmates. There can be no presumption that the inmates were dangerous or unskillful from the fact alone that they were insane. The judgment should be affirmed.

We concur: SMITH, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(132 Cal. 469)

PEOPLE v. OWENS. (Cr. 696.)¹

(Supreme Court of California. April 16, 1901.)

HOMICIDE—MOTIVE—NECESSITY—TRIAL—CASE—REASSIGNMENT—ORDER OF DEFENSE—PREPARATION—TIME—INDICTMENT—DEMURRER—WITNESSES—CROSS-EXAMINATION—IMMATERIAL MATTER.

1. The establishment of a motive is not an essential element in a conviction for murder.

2. The fact that defendant's case was transferred to another division of the superior court a short time before trial did not constitute an abuse of discretion, in the absence of a showing that defendant suffered any injury.

3. The allowance of time for defendant to prepare the order of his defense at the close of the state's evidence being a matter in the discretion of the trial court, the allowance of

¹ Rehearing denied May 16, 1901.

13 minutes for that purpose will not be reviewed, where no abuse of discretion was shown.

4. Where the information on which defendant was tried was in due form, a demurrer to it, on the ground that defendant's name was omitted from the copy furnished him, was properly overruled, since it raised only the question of defects in the information, and not those in the copy.

5. Where defendant sought to excuse shooting deceased on the ground of insanity, the question whether the witness and deceased were not living together as husband and wife, though unmarried, was not proper cross-examination, since it related to a matter wholly foreign to the issue.

In bank. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Thomas P. Owens was convicted of murder, and he appeals. Affirmed.

R. W. Miller, for appellant. Tirey L. Ford, Atty. Gen., and A. A. Moore, Jr., Dep. Atty. Gen., for the People.

GAROUTTE, J. Defendant has been convicted of the crime of murder in the first degree, with the death penalty affixed. He now appeals from the judgment and order denying his motion for a new trial. The evidence showing that defendant fired the fatal shot is uncontradicted, and insanity is relied upon as a defense.

Some claim is made by counsel that the evidence on the subject of defendant's insanity is such as to justify this court in setting aside the verdict as matter of law. But this claim cannot be maintained for a moment, and it may be said that even the preponderance of evidence points to defendant's mental responsibility. While the motive for the commission of the homicide is not plainly manifest from the evidence, yet the establishment of a motive is not at all essential as an element necessary to justify a conviction. The presence or absence of motive is simply a circumstance, sometimes weak and sometimes strong, in each particular case, going to the question of guilt or innocence. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

Defendant complains that his case was transferred from one department of the superior court to the other a very short time before the hour set for trial. We know of no law violated by such an order of transfer. And, if the transfer was made under an exercise of discretion upon the part of the judge or the court, we see no abuse of that discretion. Indeed, it is not established by the record that defendant suffered any injury by the reassignment of his case. He also complains that he was only allowed 13 minutes to prepare the order of his defense after the prosecution had rested its case. An allowance of any period of time is entirely a matter of discretion upon the part of the trial court, and, in the absence of a showing of an abuse of that discretion, this court will not interfere. Here there is no showing whatever.

The name of the defendant was omitted

from the charging part of the certified copy of the information at the time of his arraignment. He now complains because his demurrer to the information was overruled. The information upon which defendant was arraigned was in due form, and the demurrer was properly overruled. If the copy given to defendant was defective, his remedy for the defect was not by demurrer; for a demurrer must be directed to defects in the information, and not to defects in the copy. For the same reason, the motion in arrest of judgment was properly denied.

Misconduct by the district attorney in his argument to the jury is relied upon as ground of reversal. We find in the record various abstracts taken from his argument which appear to be of a rather fervid character, but beyond this they do not go. Courts are not favorably disposed towards granting new trials upon this ground, and in regulating the arguments of counsel much is left to the discretion of the trial court. There is no substantial error disclosed by the record upon this branch of the case.

A great many technical objections are made to the rulings of the court in limiting the cross-examination of the witnesses Mrs. Denison and her daughter. A great part of this proposed cross-examination was directed to the purpose of showing that the deceased and this daughter of Mrs. Denison, though unmarried, were living together as husband and wife. Such evidence was not proper cross-examination. Indeed, it was not proper evidence from any standpoint of the case. The relations between the deceased and the woman were a matter wholly foreign to the issue on trial. An attorney should not be allowed to place that kind of evidence before the jury upon the pretext that the examination is for the purpose of refreshing the recollection of the witness. If such were the rules of law, then all kinds of matter tending to degrade a witness could be inquired into upon cross-examination,—matters wholly foreign to the issue upon trial, and only serving the single purpose of prejudicing the witness in the eyes of the jurors. Witnesses cannot be impeached in this way.

No error was committed by the court in its ruling upon the evidence of the witness Leard, and the same may be said of the witness Dr. Swisher. We find many other exceptions in the record taken to the action of the trial court in the admission and rejection of evidence. We have examined them all with care, and there is no substantial merit in them. Defendant has had a fair trial, and the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

BEATTY, C. J. I concur in the judgment, but I do not concur in what is said as to

the preponderance of the evidence on the question of defendant's insanity. For the purpose of disposing of this appeal, it is enough to say that there is evidence to support the verdict upon that issue.

132 Cal. 473

HUNTER v. HUNTER. (S. F. 1953.)

(Supreme Court of California. April 24, 1901.)

DIVORCE—CRUELTY—CONDONATION—PLEADING—FINDINGS.

1. Civ. Code, § 118, provides that in actions for divorce conjugal kindness shall not be evidence of condonation of any of the acts authorizing divorce, unless accompanied by an express agreement to condone. *Held*, that where defendant had been guilty of inhuman and cruel treatment towards plaintiff, affectionate letters written to him thereafter by plaintiff were not sufficient to condone the offense.

2. Where the evidence shows condonation of the acts for which a divorce is sought, it is the duty of the court to find to that effect, though condonation was not pleaded.

Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Action by Lillian A. Hunter against Charles H. Hunter for divorce. From a decree denying a divorce, and from an order denying a new trial, plaintiff appeals. Reversed.

Will M. Beggs, for appellant. N. T. Biddle and Julian H. Biddle, for respondent.

PER CURIAM. Action for divorce on the ground of extreme cruelty. The court found that defendant "treated the plaintiff in a cruel and inhuman manner, inflicting on her great bodily injury and mental suffering, striking her, and otherwise physically abusing her." The fourth finding is "that, after the commission of the said acts of cruelty, the plaintiff forgave the said defendant, and condoned the said matrimonial offenses." As conclusion of law the court found that by reason of such condonation plaintiff is not entitled to a decree of divorce. Appellant claims that the evidence does not sustain the finding of condonation, and she appeals from the judgment and from the order denying motion for new trial.

The evidence showed that the parties were married in Nebraska in 1878, and had lived in Santa Clara county six years previous to the commencement of the action, and that six children were born to the marriage; the youngest now 5, and the oldest 19, years. The cruel treatment complained of consisted of successive acts of ill treatment, of which there was abundant evidence, and began about three years before the commencement of the action. It was of such character as not only to impair the health of plaintiff, but, as she testified, to endanger her life. In August, 1897, defendant left his home, and went to Nebraska. The complaint was filed March 17, 1898, and defendant returned to California the following month. Plaintiff testified on cross-examination: "He came to the house. We did not receive him very

kindly. We did not drive him away. He came in the house, and went around to each of the children, and wanted to know if I had a kiss for him. I told him 'No.' That was in April, 1898. He stayed all night, and left the next morning. He has been working on various ranches near my home ever since." Defendant introduced no evidence except to recall plaintiff as his witness, who was shown three letters written by her to defendant after he left his home August 2, 1897. She admitted that she wrote the letters. She testified: "After my husband went away, I had peace with my children. I had peace on the place. It seems as if I could not bear to have him come back again. If he had not written me as he did, I would not have commenced this suit. He said he intended to come back. My husband drove the boys from the ranch, and wanted to keep a hired man." In the first letter, dated August 4, 1897, she addresses her husband as "Dear Charlie," and begins by saying: "I wonder where you are to-night, and how you are feeling. We are all well." The letter is devoted to matters relating to the business of the farm; acknowledges the receipt of a letter from defendant, and expresses the "hope to hear again soon," and closes, "Love to all, and write soon to your Lillie." The second letter is dated August 10, 1897, and is addressed to "Dear Charlie," and states: "Received your letter to-day written Thursday, the day after you got there. Glad you stood the trip so well as you did." The letter then relates to doings on the farm, and what the children had been about, and closes: "Love to all, and hope to hear good news from you soon. * * * Children all send love. * * * A good-night kiss from your Lillie." The third and last letter is dated August 26th, and is much the same as the other two, minus the proffered kiss. The letters were admitted over plaintiff's objection that they were irrelevant, immaterial, and incompetent. Defendant's counsel stated that he offered them "for the purpose of showing that the witness knew that he (Hunter) was sick, and kept him informed of what she was doing. They are offered in evidence for that purpose." The court interrogated the witness after the letters were read: "Q. The Court: Don't you think it is possible for you and your husband to live together? A. No, sir. If he had been home six months longer, I should have been in my grave. I never expected him to come back and live with me. Q. At that time you did not intend to sue for a divorce? You really had forgiven him, Mrs. Hunter? A. No, sir; I did not forgive him. The debts mentioned in the letters were not all paid that year. I have paid a good many of the debts from money taken from the ranch. I borrowed \$127 from Nebraska, and that has not yet been paid. In one of the letters my husband wrote me that he had joined the Christian Science Church, and expected to live as long as the longest, he

said. This was just before he came back." Defendant here rested. The answer of defendant did not plead condonation in defense. Appellant claims that it was error to admit the evidence, because it was offered for a limited purpose, and not to prove condonation, and that, there being no issue of condonation presented by the answer, it was error to receive this evidence to prove such issue. It is not necessary to pass upon the admissibility, materiality, or relevancy of this evidence. If the letters be given all the weight which the most liberal interpretation of their meaning would warrant, they do not show condonation, for the Code says neither cohabitation, passive endurance, nor conjugal kindness shall be evidence of condonation of "any of the acts constituting such cause (i. e. the cruelty mentioned in the statute), unless accompanied by an express agreement to condone." Civ. Code, § 118; *Morton v. Morton*, 117 Cal. 443, 49 Pac. 557; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183. These letters, being the only evidence from which any agreement can be inferred, fall far short of being "an express agreement to condone." As condonation is a specific defense to an action for divorce, it should be pleaded like any other defense. It is true that an action for divorce differs from an ordinary proceeding in that a decree may not be rendered upon the admission of a party, or upon the uncorroborated evidence of either of the spouses. If, therefore, the evidence had shown condonation, it would have been the duty of the court, even without a pleading, to have found to that effect. But, as the evidence upon which the court bases its finding of condonation is wholly inadequate, as the letters were not even offered for the purpose of showing condonation, as the case was contested, and presumably the defendant urged all matters of defense available to him, we think this finding may and should be disregarded as wholly unsustained, when clearly the plaintiff becomes entitled to judgment. The judgment is therefore reversed, with directions to the trial court to enter judgment for divorce for plaintiff as prayed for, and to award her such other and further relief as, under the pleadings and proofs, may be equitable.

First. It is charged in the complaint that the decree of confirmation was obtained by fraud. The facts constituting the alleged fraud are perhaps insufficient, as pleaded, to sustain the charge, but, if it is permissible in a proceeding of this kind to attack the decree of confirmation for fraud, the plaintiff should have leave to amend. The opinion assumes, however, that the attack is collateral, and not permissible in this proceeding, however conclusively the fraud in obtaining the decree might be alleged and found. In other words, it seems to be considered either that a decree affirming the regularity of the organization of an irrigation district is beyond the reach of attack for fraud in its procurement, or that the state or other aggrieved party must first commence and prosecute to a successful conclusion a separate action to invalidate the decree of confirmation before attempting to call in question the proceedings in the board of supervisors. I do not assent to either proposition. I know of no reason why a decree of confirmation obtained by fraud may not be set aside in a proper proceeding, and, if it may be set aside upon that ground, I know of no reason why the state—as a party bound by the decree—may not in one action attack the decree and the proceedings of the board of supervisors which it was designed to confirm.

Second. The decree of confirmation was objected to upon the ground that the court never acquired any jurisdiction of the res. The petition for confirmation is a proceeding in rem, and the res is the irrigation district. The petition in this case contained no description of the alleged district more definite than this: that it was situated partly in San Bernardino and partly in San Diego counties. This being the case, the point is made in the briefs, and strenuously argued, that the court never acquired any jurisdiction to affirm the existence of the district. No notice of this point is taken in the opinion, and I agree with the petitioners that it called for a decision. There being no sufficient description of the district in the petition, it is certainly not unreasonable to contend that no one was called upon to answer or resist the petition to have it decreed a valid organization.

132 Cal. 289

PEOPLE ex rel. FOGG v. PERRIS IRR.
DIST. (L. A. 743.)

(Supreme Court of California. April 24, 1901.)

In bank. On rehearing. Denied.

For former opinion, see 64 Pac. 399.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing for the follow reasons: This case differs from the *Linda Vista* (*People v. Linda Vista Irr. Dist.* [Cal.] 61 Pac. 86) and other like cases in two important particulars:

132 Cal. 487

MEUX v. TREZEVANT et. al. (S. F. 1,812.)
 (Supreme Court of California. April 26, 1901.)
 MORTGAGES—FORECLOSURE—SALE IN SEPA-
 RATE PARCELS—CONFIRMATION—RE-
 VIEW—OPPOSITION—AFFIDAVITS.

1. Where property was described in a mortgage as a quarter section of land, but in fact consisted of a grape farm and four city lots, commissioners appointed to sell the property under foreclosure decree and order of sale, following the description in the mortgage, were not required to sell the vineyard property in two separate parcels, it being divided only by an imaginary line, but properly sold such property and each of the city lots as separate parcels.

2. Where, on a motion to confirm a mortgage foreclosure sale, there is a conflict as to whether the land constituted one known parcel or two separate known parcels, the finding of the trial court on such question will not be disturbed on appeal.

3. A sale of land under mortgage foreclosure will not be set aside because the same was not sold in separate parcels, as required by the mortgagor, unless it is made to appear that a larger sum would have been realized from the sale if the property had been offered in separate parcels, or that the sale of less than the whole tract would have been sufficient to satisfy the debt.

4. Where a mortgagor opposed confirmation of sale on the ground that the property was not sold in separate parcels, but it was shown that the property sold for its full cash value, and the only injury set forth in the mortgagor's affidavit was that the sale in one lot tended to reduce the number of bidders, and deprived affiant of the right to redeem either parcel separately, but failed to allege that he could redeem or desired to do so, the affidavit was insufficient to prevent confirmation.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Suit by T. R. Meux against N. M. Trezevant and another to foreclose a mortgage. From an order denying a motion to set aside the sale under a decree of foreclosure, defendants appeal. Affirmed.

C. C. Merriam (L. D. McKisick, of counsel), for appellants. Meux & Johnston (H. M. Johnston and E. D. Edwards, of counsel), for respondent.

COOPER, C. Appeal from order denying motion to set aside sale under a decree of foreclosure. The mortgage to plaintiff described as part of the premises mortgaged the following: "The northeast quarter of the southwest quarter of section 33, in township 13 south, of range 21 east, Mount Diablo base and meridian, together with one-fourth of one cubic foot of water from the Fresno Canal and Irrigation Company's canal, appurtenant to said land." The decree contained the description precisely as in the mortgage, and, after it was prepared and before it was signed, at the request of the judge it was presented to defendant's attorney, who indorsed thereon, "O. K. M. K. Harris," whereupon it was signed and filed. The order of sale followed the description in the decree. The commissioner duly adver-

tised the property, describing it as described in the decree and order of sale. On the day of the sale, and at the time and place named in the notice, and before the sale, the defendants served a written demand upon the commissioner that the real estate be sold in separate parcels, to wit: "The county or vineyard property separately as lot one and lot two, block three, Nevada Colony, Fresno county, California, together with one-eighth of one cubic foot of water from the Fresno Canal and Irrigation Company's canal, appurtenant to said lots of land, a plat of which colony, showing this division of land of said colony, with lots so numbered and divided, is recorded in the office of the recorder of said Fresno county, and said property is generally known, by its description as aforesaid, as colony lots; and also the Fresno city lots also separately as lot 21, block 204; lot 22, block 204; lot 25, block 337; and lot 26, block 337,—all in said city of Fresno." The property referred to in said demand as the county or vineyard property as lot 1 and lot 2 is the said northeast quarter of southeast quarter of section 33, described in the decree and order of sale. The commissioners sold the property in five separate lots, selling the lots in the city of Fresno separately, but sold the vineyard property in one parcel, as described in the decree and order of sale. The court properly refused to set aside the sale.

The commissioner in selling the vineyard property followed the decree and order of sale. It was his duty to do so. *Hopkins v. Wiard*, 72 Cal. 262, 13 Pac. 687; *Heyman v. Babcock*, 30 Cal. 367.

There was a conflict as to whether the land constituted one known parcel or two separate known parcels. In such case the finding of the court below as to such question of fact will not be disturbed here. *Gleason v. Hill*, 65 Cal. 18, 2 Pac. 413. In a motion of this kind, it must be made clearly to appear that the land consisted of separate "known lots or parcels." *Connick v. Hill*, 127 Cal. 165, 59 Pac. 832.

In opposition to the unsupported affidavit of defendant N. M. Trezevant, the plaintiff filed many affidavits, in which it was stated that the premises consisted of one vineyard, known as the "Trezevant Vineyard," upon which there is a dwelling house, two wells, a barn, a raisin house, outbuildings, a small orchard, and the balance in vineyard; that there are no visible monuments or landmarks upon the said land showing any division thereof, but, on the contrary, the imaginary line that would have divided the land in the manner claimed by appellant had been plowed across and planted in vines running across its entire length and cultivated regardless of any subdivisions; that the land or vineyard is almost entirely surrounded by levees, fences, and irrigating ditches, and, in order to irrigate the western portion of the vineyard, the water must be taken across the

eastern portion; that the water right constitutes a lien upon the whole land, and is not capable of segregation and apportionment. In view of the order of the lower court, we must consider the statements in these affidavits as true. Unless it is made to appear that a larger sum would have been realized from the sale of the property if it had been sold in separate lots or parcels, or that the sale of less than the whole tract would have brought sufficient to satisfy the writ, the sale will not be set aside. *Hudepohl v. Mining Co.*, 94 Cal. 591, 29 Pac. 1025. In this case there is no statement in defendant's affidavits tending to show that the property would have brought more if sold separately, or that the sale of less than the whole would have satisfied the writ. On the contrary, the affidavits on the part of defendant show, without contradiction, that the property sold for its full cash value, and that it would not have brought as much as it sold for if it had been sold in separate lots. The only pretense of injury set forth in defendant's affidavit is that he was injured by said sale in one lot, because it "tended to reduce the number of bidders," and because "it deprived affiant of the right to redeem either of said colony lots separately." This is clearly insufficient. Defendant does not show that he could redeem, or that he ever desired to or now desires to redeem, any part of said property. Courts will not set aside a sale under foreclosure for light or trivial reasons. It must appear that there has been a material departure from the mandates of the decree, or the law governing such sales, to the injury of the party applying to have the same set aside. Nor can injury be presumed from mere irregularities. The order should be affirmed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

132 Cal. 484

PEOPLE v. COMPTON. (Cr. 721.)

(Supreme Court of California. April 26, 1901.)
CRIMINAL LAW—IMPANELING JURY—WITNESS—IMPEACHMENT.

1. Where in a criminal case in one of the departments the court ordered that certain other jurors, attending other departments of the court at that time, should appear to act in case the jury was not selected from the regular panel then present, and on the exhaustion of such panel the names of those jurors appearing from other departments were placed in the box, and the jury completed therefrom, such jury was improperly selected, since, on the exhaustion of the regular panel, the jury must be completed by drawing other names from the trial jury box, and then those persons summoned to appear, or by the court ordering a special venire, not taking bystanders.

2. Where, in a criminal case, the testimony of an absent witness given at the preliminary examination was read to the jury, such testimony could not be impeached by showing that

subsequent to the preliminary examination the witness had made statements to third parties in contradiction of his testimony.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Charles Compton was convicted of crime, and appeals. Reversed.

W. H. Shinn and Davis & Rush, for appellant. Tirey L. Ford, Atty. Gen., and A. A. Moore, Jr., Dep. Atty. Gen., for the People.

GAROUTTE, J. Defendant appeals from a judgment and order denying his motion for a new trial. His principal contention is that the jury which convicted him was improperly selected, and with this contention the court agrees. For present purposes it will be assumed that there was a regular panel of jurors present in department 2 of the court for the purpose of trying the defendant. When the impanelment of the jury began, the court made an order that certain other jurors, attending other departments of the court at that time, appear in department 2 to act in the cause, provided the jury was not selected from the regular panel then present. In the selection of the jury the jurors regularly in attendance upon department 2 were exhausted, and no jury obtained, whereupon the court ordered the names of those jurors who had appeared from other departments in pursuance of its aforesaid order to be placed in the box, and it was from these jurors that the jury was finally completed. The course here pursued we deem a radical departure from the procedure laid down in the statute for the selection of a jury in a criminal case. The jurors brought from other departments of the court were either a part of the regular panel, or they were not. Again, when the selection of the jury began, those jurors were present in department 2 for the purpose of trying this cause, or they were not present for that purpose. If they formed a part of the regular panel, their names should have been placed in the box with the other part of the panel. There is no principle of law by which, in a criminal case, the court may place the names of part of a panel in the box, and draw the jury therefrom. Neither is there any principle of law by which the court may place the names of a portion of the panel in the box, and exhaust it, and thereafter place the remaining portion thereof in the box. The defendant is entitled to select the jury from the entire panel present and competent to act. If these jurors from other departments were present in court, properly assembled there, for the purpose of trying this cause, their names should have gone into the box before any names whatever were drawn therefrom. Defendant had a legal right to so demand. Taking the other view of this matter, if the jurors brought from other departments of the court were not properly a part of the regular panel, then the court had no authority to place their names in the

box at all, for jurors not on the panel cannot be brought into court to try a cause by the mere order of the court. The statute does not authorize it. When the panel summoned before the court from which the jury is to be selected is exhausted, and a jury is not completed, the law says the jury may be completed by drawing other names from the "trial jury box," and then those persons be summoned by the sheriff to appear in court. This is, in effect, a second regular panel. The only other course open to the court is to order a special venire, not taking bystanders. The attorney general says: "The effect of the order relative to the second jury in the case at bar was the same as if the court, before the expiration of the drawing of all names in the regular jury box, had directed that a special venire issue." This position cannot be successfully maintained. The jurors taken from the other departments of the court, if a part of the regular panel, should have had their names placed in the box when the impanelment of the jury began. This was not done. If those jurors did not form a part of the regular panel, then, to be qualified jurors to act in the case, they must have constituted a special venire; yet the law does not allow a special venire to be selected and brought into court in the way here adopted. If authority were needed upon this proposition, it may be found in *People v. Edwards*, 101 Cal. 543, 36 Pac. 7, where the impanelment of a jury in a criminal case was held irregular, notwithstanding the departure from the statute was not nearly so substantial as in the case at bar.

The witness Ware being absent from the state, his testimony given at the preliminary examination was read to the jury. Defendant thereafter proposed to impeach the testimony of the witness by showing that, since the preliminary examination, Ware had made statements to third parties in contradiction of his testimony. We know of no rule of law justifying the impeachment of the witness under these circumstances. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN DYKE, J.; HARRISON, J.

132 Cal. 490

MacDONALD et al. v. HAYES et al.
(S. F. 1,822.)

(Supreme Court of California. April 27, 1901.)

MECHANICS' LIENS—MATERIAL MEN—ABANDONMENT OF CONTRACT—EXTENT OF LIEN—COMPLETION BY OWNER—COST—EVIDENCE—ADMISSIBILITY.

1. Code Civ. Proc. § 1187, provides that cessation from labor for 30 days on any contract or building shall be deemed equivalent to a completion thereof, for all the purposes of a mechanic's lien. Section 1200 provides that if the contractor fails to perform his contract in full, or abandons the same, the portion of the con-

tract price applicable to the liens of other persons than the contractor shall be fixed by deducting the payments then due and actually paid from the value of the work and materials already done and furnished, estimated by the standard of the whole contract price. Held that, where a contractor had abandoned a house before completion, material men were not entitled to a lien to the full amount due them, limited only by the contract price, less the payments made thereunder to the contractor, though the owner did not proceed with the completion of the building within 30 days after the abandonment by the contractor.

2. It was error to reject evidence offered by defendant as to the value of work and materials furnished by the contractor, estimated by the standard of the whole contract price, and what would be the reasonable cost of completing the building according to the plans and specifications of the original contract, on the ground that such evidence was immaterial and irrelevant, because the work on the building was not resumed within 30 days after such abandonment, since such evidence was necessary to determine the extent of the owner's liability.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by D. B. MacDonald and others against John Hayes and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Leon Samuels, for appellants. William H. Jordan, for respondents.

HAYNES, C. Action to foreclose mechanics' liens in favor of the several plaintiffs, who had judgment foreclosing each of their several liens; and defendants Esther Attell and Seymour Attell appeal from the judgment and from an order denying a new trial. Hayes did not answer.

Esther Attell is and was the owner of a house and lot in the city of San Francisco, and on November 21, 1896, entered into a written contract with defendant Hayes to make certain alterations and repairs upon the building upon said lot. This contract was duly recorded before the work was commenced, and no question is made as to its validity. Hayes was to receive for the work and materials \$2,200, to be paid in installments; the first two of \$415 each; the third of \$400, the fourth, \$420; and the last, \$550, to be paid 30 days after completion; the time for the payment of the first four installments being fixed by specified conditions of the work. Hayes entered upon and pursued the work in accordance with the contract until he had earned and received the first and second installments, amounting to \$830; and on January 27, 1897, in the language of the finding, "he entirely ceased labor thereon, without completing said building." And the court further found that from and after that date no work of any kind was done thereon until March 27, 1897. Plaintiffs regarded the cessation of work for 30 days "as a completion of the building," and thereupon filed their several claims of liens for the foreclosure of which this action

is prosecuted. The answer of Mr. and Mrs. Attell affirmatively alleged the contract with Hayes; the work done under it; the payments made; that he failed and neglected to proceed further with the work; that on January 18th he was notified in writing to supply material and workmen sufficient to complete the contract within the time limited therefor, or the owner would furnish them and proceed to finish the work, and deduct the reasonable cost thereof from the contract price; that he failed and refused to proceed further with the performance of his said contract, and that all labor ceased on said building and under said contract until the 27th of March, 1897, when a contract was made with D. R. Perry to furnish the necessary material and labor to complete the building according to the plans, specifications, and drawings set forth in the contract made with Hayes; that Mrs. Attell paid Perry for such completion of the building \$1,500, which was the reasonable value thereof; that she had paid Hayes the first and second installments under his contract, amounting to \$830; that the value of the labor and materials done and furnished by Hayes, including materials then actually delivered, estimated by the standard of the whole contract price, was the sum of \$1,150; and that no more than \$120, if any sum at all, is applicable to the payment of the lien claimants,—and offered to deposit said sum in court for distribution by the court to them.

Upon the trial defendants called as a witness Thomas A. Peters, who testified that he was a contractor and builder; that he knew the building in question, and examined it after Hayes ceased work; that he also examined the contract, and was familiar with its terms and conditions, and the plans and specifications. No question was made as to his competency. He was then asked the following question: "Taking the building in the condition it was left by Hayes when all work thereon by or under him ceased, and including all materials then delivered or on the ground, at what figure did you estimate the cost of completing said building according to the plans and specifications set forth in said contract with Hayes? Mr. Jordan: I object to the question that it is immaterial and irrelevant, unless it appears that there was no cessation of work on said building for a period of thirty days after Hayes had ceased work thereon." The objection was overruled provisionally, and the witness answered: "\$1,500. Hayes had not completed half of the building when he ceased work." And in reply to another question, to which the same objection and same ruling were made, he answered that \$1,500 was the reasonable cost. Mr. Jordan then moved to strike out both answers "on the ground that it did not appear that there was not a cessation of work on said building for a period of thirty days after January 27, 1897." This

motion was granted, and defendants excepted. Other witnesses were called by defendants, and apt questions put to ascertain the value of the work and materials done and furnished by Hayes, including material upon the ground not used, estimated by the standard of the whole contract price of \$2,200, and what would be the reasonable cost of completing the building according to the plans and specifications of the Hayes contract, to all of which the objection was made "that it is immaterial and irrelevant what the value of such work and materials is, unless work on said building did not cease for a period of thirty days after January 27, 1897"; and these objections were all sustained by the court, and defendants excepted to each ruling. The same question is also made and clearly presented by an amendment made to the complaint by striking out the allegation that the contractor "abandoned" the work on January 27, 1897; that the value of all the work done and materials furnished and used or on hand at the time of the abandonment was about \$1,800; that the first and second payments, amounting to \$830, had been paid, leaving due and unpaid from defendants to Hayes at the date of abandonment \$970,—and inserting in lieu thereof the following: "That all work ceased upon said building, as plaintiffs are informed and believe, upon the 27th day of January, 1897, and that no labor was done upon said building, whatsoever, subsequent to said 27th day of January, 1897, for a period of more than thirty days, and until after the 26th day of February, 1897."

The objections to the testimony offered by defendants and the above amendment to the plaintiffs' complaint are based upon the last clause of section 1187 of the Code of Civil Procedure, which is as follows: "Cessation from labor for thirty days upon any contract or upon any building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter." It is not alleged, nor in any manner contended, that the contractor ceased work or abandoned the contract because of any fault of appellants, or of any violation of the contract by them, and therefore there was not, at the date of his cessation from the work, or at any time afterwards, any indebtedness or liability on the part of appellants to the contractor; but it is contended that, because appellants did not resume work within 30 days after the contractor ceased, they are liable to respondents, who furnished materials to the contractor, to the full amount of the contract price remaining unpaid, notwithstanding appellants were compelled to finish the work at an expense which, added to the payments made to the original contractor in accordance with the contract, exceeded the contract price. This contention cannot be sustained. If that were the law it would work a monstrous injustice to

the owner who had in all respects complied with the requirements of the law and of his contract, and who, notwithstanding such compliance, would be at the mercy of a defaulting contractor, who could thus pocket the partial payments specified in the contract, and, without paying for the material purchased and used in earning the installments paid, enable the material man, who had contracted with him to be paid out of the installments, to enforce payment from the owner, with whom he had no contract relation. To justify the finding and enforcement of such a liability, the statute must be absolutely incapable of any other construction. Respondents' argument is "that there had been no abandonment, under the law, but that there had been a statutory completion both of the contract and of the building." There is no allegation in the complaint that the contractor ever resumed work on the building. It was alleged in the answer that he did not, and that a contract for its completion was let to another, and the court found that Hayes "entirely ceased labor thereon without completing said building." This is a fair definition of "abandonment." I do not see why the word itself was not used. There are several cases in our reports where cessation of the work for 30 days is spoken of as a "completion." But this language is generally used in reference to the time within which notices or claims of lien shall be filed. It is quite true that, where the notice of lien is filed because of a cessation of labor for 30 days, a suit may be maintained to foreclose the lien. But the statute plainly distinguishes between actual completion and those cases where the contractor fails to perform his contract fully, or abandons the contract after part performance or before completion, so far as the rights of the subcontractor and the owner are concerned. Where there is a valid contract between the owner and contractor, it is the measure of the owner's liability. *Greig v. Riordan*, 99 Cal. 319, 33 Pac. 913; *Kellogg v. Howes*, 81 Cal. 175, 177, 22 Pac. 509, 6 L. R. A. 588; *Walsh v. McMenomy*, 74 Cal. 359, 16 Pac. 17, and cases there cited. But in cases where, as here, the contractor fails to perform his contract, section 1200, Code Civ. Proc., provides the mode of determining the owner's liability as follows: "In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the contract and the provisions of sections 1183

and 1184, and the remainder shall be deemed the portion of the contract price applicable to such liens." Defendants Attell, in their answer, alleged that, under the provisions of the above-quoted section, there was a balance in their hands of \$120, which they offered to pay into court for distribution by it among those entitled thereto. As there was no evidence received by the court tending to show the extent of their liability, measured by the rule stated in said section, we can only say that it furnished the true rule by which the rights of the parties are to be determined, and that the court erred in not receiving the offered evidence, and in holding that plaintiffs were severally entitled to liens upon Mrs. Attell's house and lot for the full amount due them from defendant Hayes, limited only by the full contract price, less the payments made thereunder to Contractor Hayes.

Respondents contend that, as the appeal from the judgment was not taken within 60 days, the evidence cannot be reviewed. There is no controversy as to the facts. The rulings of the court upon the exclusion of defendants' evidence present only questions of law, and were saved and presented by a bill of exceptions. The same questions were also made upon the defendants' motion for a new trial.

In view of the conclusion reached, it is not necessary to consider whether the motion for nonsuit should have been granted. Nor is it necessary to consider whether the claim of plaintiff Leahy should have been rejected; the notice of lien having alleged an indebtedness of \$195 from Hayes for materials, while the true amount is said to be \$135. As the defendant Mrs. Attell concedes that there is a small amount in her hands applicable to the claims of the plaintiffs, and which is obviously insufficient to satisfy all of them in full, the validity of said claim is a question for the consideration of his co-plaintiffs. I advise that the judgment and order be reversed, and the cause remanded.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded.

132 Cal. 480

BUNKER v. OSBORN. (S. F. 1,807.)

(Supreme Court of California. April 26, 1901.)

BILLS AND NOTES—INDORSERS—CONTRIBUTION—PLEADING—LIMITATION OF ACTIONS.

1. Under Civ. Code, § 3116, providing that an indorser of a negotiable note warrants that it is in all respects what it purports to be, and that the signatures of all prior parties are binding on them, in an action by an indorser who has taken up a note, against his co-indorser, for contribution, it is immaterial whether the note was or was not legally executed by the maker.

2. Under Civ. Code, § 1432, providing that a party to a joint obligation, who satisfies more than his share of the claim, may require a proportionate contribution from all the parties joined with him, an indorser who has paid the note may require contribution from his co-indorser, whether the indorsements were for the accommodation of the maker or not.

3. Where one of two joint indorsers has paid the note, and sues his co-indorser for contribution, it will be presumed that they were equally liable, and defendant should be required to pay one-half.

4. Where the complaint, which is otherwise good, contains allegations which are not essential, such allegations, and the findings based thereon, may be treated as surplusage.

5. Where one joint indorser paid the whole note, and within two years after such payment, but more than two years after the note was due, sued his co-indorser for contribution, the action was not barred by Code Civ. Proc. § 339, subd. 1, providing that an action on a liability not founded on an instrument in writing must be brought within two years, since the statute did not begin to run until the note was paid.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. M. Troutt, Judge.

Action by C. F. Bunker against G. W. Osborn. From a judgment for plaintiff, defendant appeals. Affirmed.

Naphtaly, Freidenrich & Ackerman, for appellant. T. M. Osmont and E. J. French, for respondent.

GRAY, C. An instrument dated February 16, 1894, purporting to be the promissory note of the Boyle Mining Company (a corporation) for \$3,000, besides interest, payable 90 days after date, to the order of G. W. Osborn and Alfred Gonzalez, was by the said payees, on the date of said note, duly indorsed to Wells, Fargo & Co.'s Bank (a corporation). After the said note was due by its terms, Gonzalez paid the amount thereof to said last-named corporation. This suit was brought by the assignee of Gonzalez to enforce contribution from Osborn of one-half of the amount so paid by Gonzalez. Plaintiff had judgment as demanded in his complaint, and the defendant appeals from said judgment, and from an order denying him a new trial.

The note of February 16, 1894, was executed and delivered for the purpose of paying and discharging a previous note of date November 21, 1889, which the Wells, Fargo & Co.'s Bank held against Gonzalez and Osborn. Osborn was president and Gonzalez was secretary of the said Boyle Mining Company, and it appears that on their said personal note of November 21, 1889, they had borrowed \$3,000 from the said bank, all of which had been paid out to the use and for the benefit of the said Boyle Mining Company. On the receipt of the note of the Boyle Mining Company the bank surrendered the earlier note of Gonzalez and Osborn. Attached to the note of 1894 was a copy of the resolution of the mining company authorizing its execution. This resolution was

certified by Osborn as president, and Gonzalez as secretary, to have been duly passed at a regular meeting of the board of directors of said corporation, and that "said meeting of the board of directors was duly and regularly called and held." The name of the mining company was signed to the note by Osborn as president and Gonzalez as secretary. A waiver of demand, protest, and notice was indorsed upon the note, and signed by Gonzalez and Osborn.

1. On the foregoing state of facts, it is immaterial whether the note of 1894 was legally executed by the said mining company. Gonzalez and Osborn, as indorsers, were liable to the payee, whether it was so executed or not. Indorsers impliedly warrant that the note "is in all respects what it purports to be," and "that the signatures of all prior parties are binding upon them." Sections 3116, 3117, Civ. Code.

2. It is likewise immaterial whether the indorsement was for the accommodation of the Boyle Mining Company or not. The parties had jointly indorsed the note, and the presumption arising from that fact is that they were equally liable, and there is nothing in the record to rebut that presumption. One of them having paid the entire amount due on the note, he was entitled to contribution of one-half that amount from his co-indorser. Civ. Code, § 1432. The allegation in the complaint as to the accommodation character of the indorsements was not essential, and, the complaint being good without it, it may be disregarded as surplusage, and the finding on the same subject may be treated the same way.

3. Appellant contends that the account introduced in evidence on the cross-examination of Gonzalez shows that, at the time the 1889 note was given to Wells, Fargo & Co.'s Bank, the mining company was not in need of funds, but had a surplus of about \$3,000 in its treasury, and from this it is argued that the \$3,000 received on the said note was not obtained for its benefit. The evidence, however, is not only to the effect that the \$3,000 was in the first instance obtained for the use of the mining company, but that it was actually checked out in execution of that purpose. The fact, if it be a fact, that the company had \$3,000 in its treasury on November 21st, would not prevent its treasurer from obtaining \$3,000 more. All this surplus might be necessary to meet demands expected to accrue in the near future. The evidence shows without conflict that the money obtained on the first note to the bank went to the mining company. There is nothing in the case to show that Gonzalez derived any benefit personally from the giving of either of the two notes to the bank. It is true that by the giving of the second note he was released from liability on the first, but it seems that in this he had not bettered his position, as his liability on the second note was as great as on the first. It is also urged

by appellant that every claim which Gonzalez had against the mining company was settled, included in, and paid off by said company by its note for \$14,066.91, given to Gonzalez on February 16, 1891. It is sufficient to say, as to this, that the testimony of Gonzalez is to the effect that the \$3,000 note involved in this case was not included in the said note of February 16, 1891, and the court found, in accordance with this testimony, that "neither is it true that plaintiff's claim sought to be recovered herein was included in any settlement ever had or made between him and said company."

4. The cause of action is not barred by subdivision 1, § 339, Code Civ. Proc., because the statute did not begin to run until the note of 1894 was paid by Gonzalez. The note was so paid, as shown by the testimony of Stein, on June 19, 1896, and this suit was commenced August 28, 1897. *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077. Other points urged by appellant are not of sufficient importance to demand special notice. The judgment and order appealed from should be affirmed.

We concur: SMITH, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(132 Cal. 502)

ROGERS et al. v. DE CAMBRA et al.
(S. F. 1,271.)

(Supreme Court of California. April 30, 1901.)

In bank. Ejectment by Hanna Rogers and others against Manuel S. De Cambra and another. Judgment affirmed.

For opinion in department, see 60 Pac. 863.

VAN DYKE, J. Upon further consideration of the matter, we are satisfied with the opinion rendered in department, and adopt the same, and the order therein made, as the opinion and order of the court in bank. Judgment and order appealed from affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.; HARRISON, J.

I dissent: BEATTY, C. J.

(132 Cal. 497)

PEOPLE v. TERRILL. (Cr. 711.)¹

(Supreme Court of California. April 29, 1901.)
FORGERY—INDICTMENT—EVIDENCE—VARIANCE—ACQUITTAL—FORMER JEOPARDY.

1. The indictment charged forgery in uttering a false and fictitious note, dated April 28, 1897, purporting to have been made by R. J. McIntyre to Eddie Bunney for \$260, gold coin, payable one year after date. The note offered in evidence corresponded with such description, except that it contained a provision for interest, and for payment of attorney's fees if collected by suit. *Held*, that there was no material variance, since the description in the indictment was correct, as far as it went, and sufficient to identify the instrument, and the fact that there were conditions in the instrument not inconsistent with, but in addition to, those mentioned in the description, was immaterial, since an indictment is sufficient, without containing a copy of the instrument alleged to be forged.

2. On a trial for forgery, the court excluded the instrument claimed to be forged, on the ground of variance with the indictment, and directed a verdict for defendant; and a verdict was returned of "not guilty, on the ground of a material variance between the note set forth in the indictment and the note offered." *Held*, that defendant could not be again tried for the offense, since by the verdict he was acquitted, and it was immaterial what reason the jury gave for the acquittal, or that there was in fact no material variance.

3. On a trial for forgery, the court excluded the instrument claimed to be forged, on the ground of variance with the indictment, and directed a verdict for defendant. In fact, there was no material variance. *Held*, that Pen. Code, § 1021, providing that if the defendant was formerly acquitted on the ground of variance between the indictment and the proof, without a judgment of acquittal, it was not an acquittal of the same offense, had no application except when there was in fact a material variance; that the variance here, being immaterial, should have been disregarded, and the case is governed by section 1023, providing that, when defendant has been once placed in jeopardy on an indictment, the jeopardy is a bar to another indictment for the same offense, or for any offense necessarily included therein of which he might have been convicted under that indictment.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Samuel B. Terrill was indicted for forgery. From an order directing a verdict for defendant on the ground of variance between the writing offered in evidence and the indictment, the people appeal. Affirmed.

Tirey L. Ford, Atty. Gen., H. A. Melvin, and James H. Campbell, Dist. Atty., for the People. Jackson Hatch, for respondent.

COOPER, C. This is an appeal by the people from an order of the court directing the jury to find a verdict for defendant. The indictment charged the defendant with the crime of forgery in uttering and passing a certain false and fictitious note, dated April 28, 1897, purporting to have been made by one R. J. McIntyre to one Eddie Bunney for \$260, gold coin, payable one year after date. In proof the prosecution offered in evidence a certain promissory note, of which the following is a copy, to wit: "\$260.00. San Jose, April 28th, 1897. One year after date, without grace, I promise to pay to the order of Eddie Bunney, at San Jose, Cal., two hundred and sixty dollars, in gold coin of the United States of America, with interest thereon in like gold coin at the rate of 9 per cent. per annum from date until paid, for value received; and in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as this court may adjudge reasonable as attorney's fees in said suit or action. R. J. McIntyre." The defendant objected upon the ground of variance, and that the note offered in evidence was not the one described in the indictment. The objection was sustained, and the judge said: "The defendant's objection of a variance between the

¹ Rehearing denied May 31, 1901.

note set forth in the indictment and the note offered, the court sustains, and refuses to allow it in evidence. Now, gentlemen, you will return a verdict as I have prepared it here, finding the defendant not guilty, upon the ground of a material variance between the note alleged in the indictment and the note offered in evidence." The jury retired, and, after returning into court, found the following verdict: "We, the jury, find the defendant not guilty, upon the ground of a material variance between the note set forth in the indictment and the note offered and read in the case, and the introduction of which in evidence was, under defendant's objection, refused. Geo. W. Hanson, Foreman. Dated, Aug. 16, 1900."

The court erred in directing the jury to bring in a verdict on the ground of variance between the note offered in evidence and the indictment. The indictment was sufficient, without containing a copy of the note alleged to have been the subject of the forgery. *People v. O'Brien*, 96 Cal. 174, 31 Pac. 45. There was no material variance here between the promissory note offered in evidence and the note described in the indictment. The indictment correctly described the note, as to its date, amount, time of maturity, maker, payee, and the kind of money in which it was payable. It did not contain any statement as to the interest agreed to be paid, nor as to the clause concerning attorney's fees; but we are not prepared to say this was necessary, unless we should hold that a literal copy of the note should have been set forth in the information. It is said by Underh. Cr. Ev. § 31, in speaking of a variance: "In determining whether a variance is material, the question to be decided is, does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense?" It was said in *People v. Arras*, 89 Cal. 226, 26 Pac. 766: "A material variance between the proof and the information arises when an acquittal of the defendant under the information would be no bar to a further prosecution for the same offense. In this case the check described in the information and the check introduced in evidence have so many earmarks in common as to establish the identity of the two instruments as being one and the same, beyond all doubt, and to indicate conclusively that the misdescription could not have misled the defendant to his prejudice, and that a conviction or acquittal of the offense charged in this information would forever bar any further prosecution for the larceny of the check." The language of that case may well be applied to the promissory note described in this. No one could doubt the identity of the note as being the one described in the indictment. The defendant

could not have been misled by the description.

But the error of the court in regarding as material a variance which was not so in fact will not render the acquittal less available and conclusive as a bar to a subsequent prosecution. It is provided in Pen. Code, § 1021: "If the defendant was formerly acquitted on the ground of variance between the indictment or information and the proof, or the indictment or information was dismissed upon an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense." In *People v. Hughes*, 41 Cal. 236, this court, in speaking of a similar provision of the criminal practice act, said: "If the variance be immaterial, it should be disregarded; and, if the defendant be in fact acquitted on the ground of an immaterial variance, he cannot be again prosecuted for the same offense. * * * The error of the court or jury in regarding as material a variance between the allegations and proof will not render the acquittal less available as a bar to a subsequent prosecution." In this case there was no material variance, and section 1021 of the Penal Code does not apply. It is provided in section 1023, Pen. Code: "When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information." In this case the defendant has been placed upon trial upon a valid indictment. A jury was duly impaneled, and have found him not guilty. Our constitution provides "that no person shall be twice put in jeopardy for the same offense." Article 1, § 13. Jeopardy attaches when a defendant is placed upon his trial before a competent court and jury upon a valid indictment, unless the jury be discharged from rendering a verdict by legal necessity or by his consent, or, in case a verdict is rendered, it be set aside at his instance. It is provided in Pen. Code, § 687: "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." The maxim of the common law, "That no man is to be brought into jeopardy of his life more than once for the same offense," is embraced in article 5, of the amendments to the constitution of the United States, and in the constitutions of the several states, in the following language: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." It is therefore evident that the defendant has been "once in jeopardy." In such case the court has no authority to order a new trial, at the in-

stance of the prosecution, for errors in the rulings of the court or in its instructions during the progress of the trial; and such new trial, if granted, would be vain and useless. Conceding that the court improperly directed the jury, the principle is the same. The court had no power to command the jury to bring in a verdict, and the jury were not bound by the instruction. Pen. Code, § 1118. The rule is that if, through misdirection of the judge in matter of law, a verdict is improperly rendered, it can never afterwards, on application of the prosecution in any form of proceeding, be set aside. 1 Bish. Cr. Law, § 665; *People v. Webb*, 38 Cal. 467; *People v. Horn*, 70 Cal. 17, 11 Pac. 470; *People v. Roberts*, 114 Cal. 68, 45 Pac. 1016. It results from what has been said that the order must be affirmed.

We concur: SMITH, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(132 Cal. 516)

WILLS et al. v. PORTER et al. (L. A. 697.)

(Supreme Court of California. April 30, 1901.)

CONTRACTS—RESCISSION—DILIGENCE—EQUITY.

1. Plaintiff and interveners alleged that they were stockholders in defendant corporation; that defendant P. owned a majority of the stock; that the majority of the directors were persons whom he had supplied with one share of stock each, and elected to act in his interest; that, the corporation being indebted to P. for land purchased of him, which, by agreement, was to be paid only out of the proceeds of sales of such land, and owing other debts, the directors had adopted a resolution authorizing a loan and mortgage of all its property, and, in consideration of P.'s guarantying the payment of the loan, that he should be paid at once; that the loan was made, and P. was paid his claim out of the proceeds; that the land had decreased in value, and prayed that the resolution be annulled, and P. be required to return the money so paid him. *Held*, under Civ. Code, § 1691, providing that rescission, when not effected by consent, can be accomplished only by the complainant rescinding promptly on discovering the facts which entitle him to rescind, that rescission should be denied, the action not having been commenced until two years after the acts complained of, and no excuse being offered for the delay.

2. Where a corporation negotiated a loan, and, in consideration of the principal shareholder guarantying the payment, paid him out of the proceeds a debt which was not then due, he should not be required to refund the amount so paid him, until he is released from his liability on the contract of guaranty.

Temple, J., dissenting.

In bank. Reversed.

For opinion in department, see 61 Pac. 1109.

PER CURIAM. This action was brought by plaintiff as a stockholder of the Porter Land & Water Company, a corporation, for the purpose of annulling a certain resolution

passed by the board of directors of said corporation, and of recovering of defendant Porter \$46,650, and interest thereon, the said sum having been paid to Porter under the authority of the board of directors, and by virtue of said resolution. A complaint in intervention was filed by certain other stockholders. A demurrer was interposed to the complaint and to the complaint in intervention, and overruled, and answers filed. After trial, findings were filed, and judgment entered thereon in favor of plaintiff and the interveners. A motion for a new trial was made and denied, and this appeal is from the judgment and order denying the motion.

The complaints, as amended, allege, in substance: That on the 23d day of April, 1887, the defendant Porter entered into a written contract with one McFarland, by the terms of which the corporation defendant was to be formed, and Porter was to convey to it, for the considerations therein named, 16,000 acres of land of the Ranch Ex-Mission San Fernando. Porter then supposed the ranch contained 18,000 acres, and under the contract he was to retain 2,000 acres for his own use, and to convey just 16,000 acres to the corporation; and if, upon a survey being made of the ranch, there proved to be less than 18,000 acres, the amount reserved by Porter should be diminished, and the full 16,000 acres conveyed to the corporation. The corporation was formed as provided for in said contract, and a survey made of the ranch, by which it was found that the ranch contained 18,734 acres, or 734 acres more than the number of acres to be conveyed to the corporation after reserving 2,000 acres for Porter. The corporation, after its formation, duly adopted the contract so made by Porter with McFarland, and after the survey of the said ranch it entered into a supplemental contract with Porter in regard to the 734 acres. This supplemental contract recited that the original contract was for the conveyance of 16,000 acres, and that there was 16,734 acres, and that it was impracticable to segregate the 734 acres from the 16,000 acres. It then provided that Porter should convey the 734 acres to the corporation by the same conveyance, and with the 16,000 acres. It was further provided, as the consideration for the 734 acres that the corporation should improve, subdivide, and sell it with the 16,000 acres, and out of the proceeds, after paying expenses and commissions pro rata, to account for and pay to Porter the sum of \$40 per acre for each and every acre of the said surplus, and all sums above \$40 per acre to be retained by the corporation as compensation for improving and selling it. It was further provided that the payment to Porter for the 734 acres should be made whenever dividends on the capital stock should be declared, and should in all cases be in the proportion of money on hand, when the dividends are declared that 734 bears to 16,734, less the proper proportion of

costs, expenses, and commissions. These payments to Porter were to bear interest from the 16th of August, 1887, at the rate of 6 per cent. per annum, but Porter was to have no interest, except as a stockholder, in whatever interest might be realized upon the profits of the sales of the 734 acres. The said Porter, in pursuance of the contracts, duly executed a deed to the corporation of the 16,734 acres and certain personal property, also included in the agreement. The capital stock of the corporation consisted of 524 shares of which defendant Porter owns 336, plaintiff 5, and the remaining shares by the interveners and others named in a list attached to the complaint. The directors of the corporation were at all times named in the complaint Yarnell, Threlkeld, Graves, Forrester, Witmar, Hubbard, and Cochran, and of these directors it is alleged that Yarnell, Threlkeld, Witmar, and Graves hold each one share only, conveyed to them respectively by Porter to qualify them to serve as directors, and that they have at all times acted in the interest of Porter, and as his agents and trustees. On the 29th day of March, 1895, the corporation was indebted, over and above its indebtedness to Porter, in the sum of about \$50,000, and on said date, at a meeting of the directors of the corporation, for the alleged purpose of concentrating all the indebtedness, a resolution was passed to borrow from the Los Angeles Savings Bank the sum of \$100,000, and that the corporation execute its note and mortgage for the amount, with interest at the rate of 7 per cent. per annum net; and the board of directors further adopted the following resolution: "In consideration of the guaranty by George K. Porter of this company's note to the Los Angeles Savings Bank for one hundred thousand dollars: Resolved, that this corporation pay to said George K. Porter the amount due him under the contract of date June 29, 1887, at this time, out of money borrowed this day, instead of waiting until the same can be paid out of the proceeds of land sales, the amount now due being \$45,650 or thereabouts; the said George K. Porter to rebate interest on the amount paid him at the rate of one per cent. per annum, until said loan of \$100,000 is paid off." It is further alleged that in pursuance of the said resolution the said loan was effected, and that the said note and mortgage of \$100,000, and some interest thereon, still remains due and unpaid; that the agreement of Porter to guaranty the payment to the Los Angeles Savings Bank was without substantial value; and that Porter received \$45,650 of the said money so borrowed by the corporation. It is alleged that in the passage of the said resolution a majority of the directors were acting under the influence of Porter, and for his interest, and under his direction and control; that the resolution was secured by the undue influence of Porter, and was the result of a fraudulent contrivance and combination between the

said directors and Porter, "in order to pay the debt of the said Porter that was not due, and that would come due only upon the sales of land." It is further alleged that on the 19th day of March, 1897, the plaintiff demanded in writing of the directors of said corporation "to take steps at once to procure the rescission of said contract, and to compel the said Porter to account to the said corporation for the money received by him, as aforesaid, or, upon his refusal, to take the proper legal proceedings to compel him to do so"; that the directors refused to take any such steps, or to institute any legal proceedings, and for this reason the plaintiff, as a stockholder, brings this suit, and makes the corporation a defendant. The prayer of the complaint is that the resolution of March 29, 1895, be rescinded and set aside, and also the contract thereby made between the said corporation and the said Porter, and that Porter be required to pay the said sum of \$45,650, with interest thereon at the legal rate, to the corporation, or that the same be credited and paid upon the note and mortgage held by the Los Angeles Savings Bank.

The complaint was filed some two years after the resolution complained of, and after the note and mortgage had been executed, and guarantied by Porter. There is no allegation that any interest has been paid upon the note and mortgage, and we must, therefore, assume that the note, and interest thereon since the 29th day of March, 1895, still remains due and unpaid and guarantied by Porter. The complaint expressly alleges that the guaranty by Porter of the \$100,000 note was made in consideration that the corporation pay to Porter the \$46,650, and that the money was paid to him. While the corporation still has the loan secured by the guaranty of Porter, it is sought to recover back the consideration for which the guaranty was given, and still hold Porter as guarantor. Relief is asked as to that portion of the resolution that is injurious to the corporation, while the benefit that was given by Porter in consideration of the resolution is to be still retained. No offer is made to pay the \$100,000 note and interest, and nothing to show any intention to release the defendant Porter therefrom. But, nevertheless, it cannot be held, as appellants argue, that, before plaintiff could maintain this action for a rescission, he must have placed, or offered to place, Porter in the position which he occupied at the time the transaction was consummated; or, in other words, that plaintiff must have relieved Porter from his guaranty to the bank, and reimbursed him for any loss which he may have sustained by reason of his guaranty. Under the peculiar facts of this case it would be impossible for the plaintiff, who, after all, is acting but in a representative capacity on behalf of the corporation, so to do. As plaintiff is suing on behalf of the corporation, his recovery can be no other than that which the corporation it-

self might obtain were the cause prosecuted by its own officers. The court is not limited, in this equitable action, by the mere offers and demands of the parties. It may do exact justice between them all. The decree as entered is clearly inequitable in compelling Porter to return the \$46,000, with interest, while at the same time leaving him as guarantor upon the corporation's debt for the full amount of that debt. But, if this were the only difficulty which the case presented, it could easily be remedied by a modification of the decree compelling Porter within a fixed, reasonable time to restore the money upon condition that the corporation itself either extinguish the debt upon which he was guarantor, and thus relieve him from his contract, or in some other equally efficacious manner accomplish the same result. But the difficulty with this action is more serious than the mere form of the decree. It goes to the right of plaintiff to maintain it at all. Prompt action upon the part of the complainant is essential to the right of rescission. It is provided in section 1691, Civ. Code, that: "Rescission when not effected by consent, can be accomplished only by the use on the part of the party rescinding of reasonable diligence to comply with the following rules: (1) He must rescind promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and (2) he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same upon condition that such party should do likewise, unless the latter is unable or positively refuses to do so."

The complaints of plaintiff and interveners, as amended, allege that when the resolution was passed and the acts consummated the complainants had no notice thereof, and no knowledge that any such acts had been consummated. They do not say when they obtained knowledge thereof, and their silence is significant of the fact, or at least justifies the presumption, that they acquired this knowledge immediately afterwards. But two years elapsed from the date of this contract to the date of the commencement of this suit, and no explanation at all is offered for such unreasonable delay. Moreover, it appears affirmatively by the complaint that, after the consummation of the agreement, the lands of the corporation decreased in value. The result, then, so far as Porter is concerned, was that he parted with the absolute title and control of the property, was lulled into security, and into the belief that no objections were made or to be made to the contract for fully two years, at the end of which time, without reason shown for the delay, he is to be subjected to the penalty of a heavy money judgment, and have the lands which he had sold turned back under the earlier agreement with depreciated value, while dur-

ing all of this time he has been held as guarantor upon the corporation's debt. Clearly, plaintiff and interveners have not acted promptly, or used due diligence, in bringing this action. 2 Pars. Cont. p. 680; *Barfield v. Price*, 40 Cal. 542. In the case of *Marten v. Wine Co.*, 99 Cal. 355, 33 Pac. 1107, it was held that a delay of three months in an offer to rescind a purchase of stock after discovery of the facts constituting fraud in the purchase was fatal to a rescission. In *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868, it was held that a delay of four months after the discovery of fraud in a partnership contract was fatal to the right to rescind. In this case, as has been said, the unexplained delay was for a period of two years. We think, therefore, that the demurrers to the amended complaint should have been sustained. The judgment and order appealed from are therefore reversed, with directions to the trial court to sustain defendants' demurrers, with leave to plaintiff and interveners to amend if they shall be so advised.

I dissent: TEMPLE, J.

BEATTY, C. J., did not participate in the foregoing.

132 Cal. 599

SECURITY SAV. BANK v. CITY AND COUNTY OF SAN FRANCISCO.

(S. F. 1,267.)

(Supreme Court of California. May 1, 1901.)

TAXATION—ASSESSMENT—LOANS—NOTES—
NONTAXABLE SECURITY.

Under Const. art. 13, § 1, providing that "moneys, credits, dues," etc., shall be taxed, loans are taxable, though secured by property exempt from taxation.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the Security Savings Bank against the city and county of San Francisco. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Sidney V. Smith (A. N. Drown, of counsel), for appellant. Harry T. Creswell and Franklin K. Lane, City Atty., for respondent.

VAN DYKE, J. This action was brought to recover the amount of certain taxes for the fiscal year 1896-97 paid by the plaintiff corporation under protest. There was due to the plaintiff in May, 1896, upon outstanding solvent loans theretofore made by it, and secured by pledge of divers stocks and bonds, the sum of \$578,200, and the further sum of \$30,000, evidenced only by the promissory note of the borrower. In the statement delivered to the assessor by said plaintiff of its property subject to taxation for said fiscal year, no mention was made of said outstanding loans. The assessor thereupon notified the plaintiff that he had discovered the omission in the statement furnished, and that, un-

less reason could be shown to the contrary, he should add the same to the assessment roll. Said credits were assessed accordingly, —the loans on stocks and bonds for the amounts stated, to wit, \$578,200, and the loan of \$30,000 evidenced by the promissory note, at \$22,500. Judgment in the court below went for the defendant, from which plaintiff appealed.

It is not claimed on the part of the plaintiff and appellant that there was any error committed by the assessor as to the amount or value of the property assessed, but it is contended that said property is exempt from taxation. While this appeal has been pending the question under consideration has been determined by this court, and the decision is adverse to the contention of the appellant. *Savings & Loan Society v. City and County of San Francisco* (Cal.; opinion filed Jan. 14, 1901) 63 Pac. 665; *City and County of San Francisco v. La Société Francaise D'Epargnes et de Prevoyance Mutuelle* (Cal.; opinion filed Feb. 19, 1901) 63 Pac. 1016. In the first case the court say: "We cannot see any reason for holding that, because the security happens to be of some kind of property exempt by law, that the debt secured thereby should also be exempt." In the second case it is said: "We are of opinion that loans or solvent credits secured by pledge on nontaxable property are taxable. Section 1 of article 13 of the constitution provides that 'all property,' with certain exceptions therein stated, 'shall be taxed in proportion to its value.' It further provides that the word 'property,' as used in said 'article and section,' shall include 'moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership.' The admitted credits or outstanding loans of defendant come clearly within the above constitutional definition of taxable property, and the fact that such loans are secured by pledge of nontaxable personal property in no way affects the question." In the same case it was also held to be the duty of the assessor to add such credits and property to the assessment roll, if omitted in the statement furnished by the owner thereof. Judgment affirmed.

We concur: McFARLAND, J.; TEMPLE, J.; HENSHAW, J.; HARRISON, J.; GAROUTTE, J.

132 Cal. 656

WAHLGREN v. MARKET ST. RY. CO.
(S. F. 2,226.)

(Supreme Court of California. May 9, 1901.)

TRIAL—INSTRUCTIONS—REFUSAL.

A requested instruction, which was but an elaboration of a legal proposition which the court in different parts of its charge had several times declared to the jury, was properly refused.

In bank. On rehearing. Affirmed.

For former opinion, see 62 Pac. 308.

HENSHAW, J. Upon the argument following the rehearing in this case, it was urged, first, that the evidence showed beyond a conflict that plaintiff was guilty of contributory negligence. This matter is considered in the opinion heretofore rendered in department, and the conclusion was there expressed that the question of the contributory negligence of the plaintiff was one which, under the facts, was proper for the determination of the jury. Further consideration serves only to confirm the soundness of the department's conclusion in this regard.

Appellant's second complaint is that the following instruction proposed by it was refused by the court: "A defendant cannot be charged with damages for injury to a plaintiff, notwithstanding the contributory negligence, if there be such, of the plaintiff, unless the danger of the plaintiff was actually known to the defendant in time, so that the injuries could have been avoided by the exercise of ordinary care; and a defendant, under such circumstances, is not liable in damages merely because he ought to have known of the plaintiff's danger, and could have known of it but for remissness on his part. A defendant in such a case must have actually known of the plaintiff's danger. If, therefore, the plaintiff in this case, by using her senses with ordinary care, as she approached the track, could have observed the car moving on such track in time to avoid danger, but failed to look or to listen, in the exercise of ordinary care, even though you should find that the defendant did not know of her presence prior to the accident, and should further find that the defendant by keeping a lookout, or using any other precaution, in the exercise of ordinary care, could have made itself aware of her danger, your verdict,

none the less, should be for the defendant." This instruction, it may be conceded, is a correct exposition of the law governing the rather rare and exceptional cases to which it applies. See *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 53 Pac. 651. But in the present instance the giving of this instruction would have been the injection into the case of no new element. It was but the elaboration of the legal proposition which the court in different parts of its instructions had several times declared to the jury. Thus the jury were instructed: "Assuming the duty of the railroad company to anticipate that persons would walk along the sidewalk and cross the track at the car-house door, there is also, and there was, a duty on the part of this plaintiff, under the evidence here, to exercise reasonable and ordinary care in approaching and crossing the track; and if it should appear that the railroad company, in the exercise of ordinary care, could have observed, but did not observe, the plaintiff as she approached the track, in time to avoid accident, nevertheless if it should further appear that the plaintiff herself, in the exercise of ordinary care, by using her eyes or ears before she was struck, could have observed the approach of the car on such track, and so have avoided the accident, her failure to exercise such care, and thus to make use of her eyes and ears, is contributory negligence, and in such event the verdict must be for the defendant." And again they were told: "If you find from the evidence that the plaintiff failed to use ordinary care in approaching the track at the car-house door, up to the time that she was struck, and if you should further find that the railroad employes did not observe her, then, even though no bell whatever was rung, the verdict must be for the defendant. But the question whether a bell was rung is for the jury to determine, upon a fair consideration of the entire evidence, and the question whether the bell should have been rung is also for you." And still further they were advised: "If you find from the evidence that the plaintiff was injured while attempting to cross this track at the car house, in front of a car approaching dangerously near, which she knew, or by using her faculties with ordinary care could have known, was dangerously near, and which might have passed her in safety, had she paused for a few seconds before making the attempt to cross, then she was guilty of contributory negligence, and your verdict must be for the defendant, even though you should believe that the railroad company did not ring any bells or maintain any lookout at the place of this accident." Indeed, reading and considering the instructions as a whole, they omitted no point of law to the giving of which defendant was entitled, and were as favorable to the defendant as justice could permit. Therefore the opinion heretofore rendered in department (62 Pac. 308) is

adopted and approved, and the judgment and order appealed from are affirmed.

We concur: HARRISON, J.; VAN DYKE, J.; GAROUTTE, J.; McFARLAND, J.

132 Cal. 618

STEEN v. MARCH et al. (S. F. 1,487.)

(Supreme Court of California. May 7, 1901.)

JUDGMENTS—FRAUD—PERJURED TESTIMONY—
SUIT TO SET ASIDE—EQUITY—
BILL OF REVIEW.

1. The fact that a judgment is obtained by means of perjured testimony is not sufficient to support a suit in equity to set it aside on the ground of fraud.

2. A bill of review will not be considered unless filed within the time in which an appeal or writ of error could have been filed.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; Lucas F. Smith, Judge.

Suit by Jacob Steen against Alvaretta L. March, as administratrix of the estate of William F. March, deceased, and another, to set aside a judgment for fraud. From a judgment in favor of the defendants, the plaintiff appeals. Affirmed.

Z. N. Goldsby, for appellant. W. D. Storey, for respondents.

HAYNES, C. Action to set aside a judgment, and to restrain its enforcement. Defendants' demurrer to the complaint was sustained, and, plaintiff having failed to amend, judgment was entered against him, and he appeals.

Pending the action, William F. March, the principal defendant, died, and the administratrix of his estate was substituted.

The complaint is very long, but a statement of the facts, so far as requisite to a decision of the material questions involved, is as follows: In December, 1888, William F. March and George Olive and John Ross were mutually interested in the construction of a steam schooner, and were endeavoring to obtain money therefor. The amount required was \$32,000, and this was divided into shares of \$500 each. These parties proposed to plaintiff that if he would execute his note for \$500, payable to the order of Ross, at one year after date, that upon the completion of the vessel within that time, and the payment of the note, they would procure a certificate for one share in said vessel to be issued to him. The note was thereupon executed by Steen, and placed in the hands of Olive. Afterwards Ross indorsed and delivered said note to March, and March, before its maturity, for the face value thereof, sold, indorsed, and delivered it to one O. M. Button. These transfers were made without the knowledge of Steen, the maker of the note, and it is alleged that March gave Ross no consideration for the note, and it is also alleged that Steen received no interest in the vessel, and that the consideration of the note

wholly failed at the maturity thereof; that in February, 1892, Button obtained judgment upon said note against March and Steen, and afterwards assigned said judgment to one Joseph Blum, who caused execution to be issued and levied upon certain property of March, which was afterwards sold, and the net proceeds, amounting to \$596.10, were credited upon said judgment, leaving a deficiency of \$89.65. Afterwards, in December, 1892, March brought suit against Blum, Steen, and the sheriff to recover damages for the sale of his property, and obtained judgment against Steen for \$943.41, and this action is prosecuted by Steen against March and Devoe, his assignee, to vacate said judgment and enjoin its collection, upon the ground that in the action of Button against March and Steen upon said note, and in the action of March against Button, Steen, and the sheriff, in which the judgment was rendered that is now sought to be vacated, March falsely and fraudulently testified that he paid Ross full value for the note; that he (Steen) had no personal knowledge upon that subject; that Ross had left this state before Blum brought suit; that during the pendency of each of said actions he had made diligent efforts to ascertain where Ross was, but without success until December 1, 1896, some two or three weeks before commencing this action.

I think the demurrer was properly sustained. Appellant apparently relies upon the proposition, which he states without qualification, that "equity will grant relief against fraudulent judgments." Among the authorities cited are *Hayden v. Hayden*, 46 Cal. 333; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336; and *Mining Co. v. Mitchell*, 59 Cal. 168. But the fraud alleged in the complaint does not bring his case within the requirements of either of those cases. In each of those cases it is held that judgments are impeachable for those frauds only which are extrinsic to the merits of the case. In *Pico v. Cohn* it was said that "the fraud which Cohn committed was the production of perjured evidence in support of his defense," but the court refused to set aside the judgment. In *Allen v. Currey*, 41 Cal. 318, 321, a case almost identical with the one before us, it is said: "The fraud imputed to the defendant is his alleged failure to disclose at the trial the fact that he had authorized the plaintiff to bid in the land in his own name and for his own benefit; but it is said that instead of admitting this fact, as he ought to have done, the defendant denied it, when testifying in his own behalf; and it is proposed to prove the truth of this allegation by the testimony of Emeric, in addition to that of the plaintiff himself." It was held that the action, which was in the nature of a bill of review to set aside the judgment, would not lie; that, if a judgment could be set aside as fraudulent upon such a showing,

litigation would be interminable. See, also, *In re Griffith's Estate*, 84 Cal. 113, 23 Pac. 528, 24 Pac. 381, and *Pico v. Cohn*, 91 Cal. 135, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, and cases there cited.

Respondent also makes the point that a court of equity will not entertain a bill of review for a new trial after the time within which an appeal or writ of error may be prosecuted. This contention is sustained by the following cases: *Allen v. Currey*, 41 Cal. 321; *Whitney v. Kelley*, 94 Cal. 154, 29 Pac. 624, 15 L. R. A. 813; *Thomas v. Brockenbrough*, 10 Wheat. 146, 6 L. Ed. 287; *Evans v. Bacon*, 99 Mass. 213. Whether a bill of review will lie to set aside a judgment or decree for fraud discovered after the limitation above stated (which is not statutory, but is fixed in analogy to the statute limiting the time for appeals) is not considered, as that question does not arise in the present case. In view of the foregoing, it is not necessary to notice other grounds of demurrer pointed out by respondent. The judgment should be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(132 Cal. 619)

GUSTAFSON v. STOCKTON & T. O. R. CO.
et al. (Sac. 707.)¹

(Supreme Court of California. May 7, 1901.)

ASSIGNMENTS—EVIDENCE—SUFFICIENCY.

At a meeting of about 50 persons who had been working for the defendant company, all present agreed that plaintiff should present their claims; and plaintiff sued on his own claim and those of 45 others, and alleged that they were assigned to him, which defendant denied. *Held*, that the evidence of an assignment was not sufficient to justify a verdict in favor of plaintiff as assignee, under Code Civ. Proc. § 1835, defining satisfactory evidence as that which ordinarily produces moral certainty or conviction in an unprejudiced mind.

Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by Gus Gustafson against the Stockton & Tuolumne County Railroad Company and another. From a judgment in favor of defendant corporation, and in favor of plaintiff on a personal demand against defendant Riker, plaintiff appeals. Affirmed.

W. W. Middlecoff, for appellant. McNoble & McNoble (J. J. Burt, of counsel), for respondents.

TEMPLE, J. Plaintiff brought this suit on his own behalf and for 45 others, whose assignee he claims to have been. Judgment was rendered in favor of the corporate defendant, but plaintiff recovered the amount of his personal demand against the defendant Riker. He failed to recover the amount

of the assigned claims, the court holding that they had not been assigned to him. Except some objections to the sufficiency of the specifications as to alleged failure to specify wherein the evidence failed to support the findings, this is the only matter urged on the appeal. The claims alleged to have been assigned were the demands of day laborers engaged in grading a railroad. The plaintiff, who was one of them, stated, in his testimony, the conclusion of law, "They all assigned to me." In particularizing as to what was done in regard to making the assignment, his testimony amounted to nothing more than that at a meeting of some 50 of the workmen it was agreed that he should present their claims. They left it all to him. He does not testify as to each one, but only all at the meeting. Another witness, Peterson, who kept the pay roll, produced a list showing the amount due each, and stated that all assigned. Cross-examined, however, he plainly shows that he did not know as to each person. The fact was, the crowd consented, and none objected. The assignment was denied, and the court found upon the issue in favor of the defendant, and, I think, correctly.

The respondent earnestly contends that the claims not being evidenced by any writing, and the debtor not being present or notified, or requested by the creditor in any form to pay the assignee, the assignment was not complete. There was no delivery of anything, symbolical or otherwise, and the alleged assignors were not concluded by anything said or done to deny, after the claims had been paid, that there had been an assignment. It may be that this position cannot be maintained as broadly as it is stated; but, surely, in the case of a suit brought on an oral assignment, if the fact be denied, the proof should be clear, positive, and in every way satisfactory, to justify a court in rendering judgment. In this case the evidence was slight and vague. It would not have justified a verdict for plaintiff. Section 1835, Code Civ. Proc. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(132 Cal. 609)

IN RE FATH'S ESTATE. (S. F. 2,324.)

(Supreme Court of California. May 6, 1901.)

HOMESTEAD—HUSBAND AND WIFE—SURVIVORSHIP—DEATH OF HUSBAND—EFFECT—TRANSFER BY WIFE—STATUTES—CONSTRUCTION—BILL OF EXCEPTION—FORM.

1. Under Code Civ. Proc. § 1474, providing that homesteads shall vest, on the death of the husband or wife, absolutely in the survivor, a wife's ownership in fee of homestead property by virtue of her survivorship was not affected by an order of the superior court, on the death of the husband, setting apart the property to her as a homestead.

2. Where a husband and wife properly claimed the separate property of the husband as a

¹ Rehearing denied June 6, 1901.

homestead, the homestead character of the property and its exemption from forced sale was not affected by the husband's death.

3. Under Code Civ. Proc. § 1474, providing that homesteads shall vest, on the death of husband or wife, absolutely in the survivor, and section 1485, adopted at the same time, providing that persons succeeding by purchase or otherwise to homesteads have all the rights and benefits conferred by law on the person whose interests and rights they acquire, a wife succeeding to a homestead right by the death of her husband may dispose of the property by will, free from any claim of the creditors of either herself or husband.

4. Homestead legislation, being of a remedial character, should receive liberal construction.

5. Under Code Civ. Proc. § 648, declaring that "no particular form of exception is required, but, when the exception is to the verdict or decision on the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient," a statement in the bill of exceptions "that evidence does not show" certain facts is equivalent to saying that it "is insufficient to justify" a finding of such facts, and hence is sufficient.

Department 1. Appeal from superior court, Alameda county; S. P. Hall, Judge.

Petition for distribution of the estate of Mary Fath, deceased. From an order denying the same, distributees appeal. Reversed.

Thos. C. Huxley, for appellants. Modena I. Scott and G. W. Langan, for respondents.

HARRISON, J. December 29, 1865, Adam Fath was the owner of certain real property in Alameda county, and on that day he filed in the office of the county recorder a declaration, properly executed and acknowledged by him, of his intention to claim and use the same as a homestead. The property so claimed was his separate estate, and of less than \$5,000 in value, and he and Mary Fath, the above-named decedent, were husband and wife, and resided thereon with their family. A portion of the land covered by the declaration was conveyed by them in his lifetime, and on July 28, 1894, he died, leaving five children, who were at that time past majority. July 22, 1895, the superior court of Alameda county, wherein his estate was in process of administration, made an order setting apart the said homestead premises to his surviving widow, the above-named decedent, absolutely, for her sole use and benefit as a homestead. She died December 27, 1898, leaving surviving her the above-named five children, and a last will and testament wherein she devised a portion of said premises to one of her daughters and the remainder to the other four children in equal shares. Her will was admitted to probate, and, after letters testamentary had been issued thereon, a notice for the presentation of claims against her estate was given by the executor, and certain claims were presented and allowed by him, and approved by the judge, and filed in court. After the time for the presentation of claims had expired, a petition to the superior court for

the distribution to the devisees under her will was filed by certain of said devisees, and an objection thereto was filed on behalf of one of the creditors of the estate, whose claim had been presented and allowed. Upon the hearing of this petition and objection the court made an order denying the same, upon the ground that said property was subject to be applied in satisfaction of all unpaid claims presented and allowed against the said estate. From this order the present appeal has been taken.

Section 1474, Code Civ. Proc. provides: "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property or from the separate property of the person selecting or joining in the selection of the same, it vests on the death of the husband or wife absolutely in the survivor." This section in its present form is the latest expression of the legislative will upon the subject, and supersedes the provisions thereon in section 1265, Civ. Code. *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254. Under this provision of the section Mrs. Fath upon the death of her husband became the owner in fee of the homestead property by virtue of her survivorship, and the title thus acquired was not affected by the subsequent order of the court setting the property apart to her as a homestead. *Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852; *In re Croghan's Estate*, 92 Cal. 370, 28 Pac. 570; *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011. The descent of the property is governed by the law in force at the death of her husband. *Tyrell v. Baldwin*, 78 Cal. 470, 21 Pac. 116. The effect of that order was to withdraw the property therein named from administration, and to this extent relieve the executor from the necessity of accounting therefor; but it did not qualify or affect the title that had vested in Mrs. Fath at the instant of her husband's death. *Rich v. Tubbs*, 41 Cal. 34; *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. 375; *In re Ackerman's Estate*, 80 Cal. 208, 22 Pac. 141. The homestead character of the property and its exemption from a forced sale was not affected by the death of her husband, but continued so long as it remained a homestead. *Dickey v. Gibson*, 113 Cal. 26, 45 Pac. 15; *Robinson v. Dougherty*, 118 Cal. 299, 50 Pac. 649. Upon the death of Mrs. Fath leaving no minor child, there ceased to be any family for whose benefit the exemption existed, and the homestead itself ceased to exist. It was subject to her testamentary disposition, and, in case she had died intestate, it would have descended to her heirs under the laws of succession.

Section 1485, Code Civ. Proc. provides: "Persons succeeding by purchase or otherwise to the interests, rights and title of successors to homesteads, or to the right to have homesteads set apart to them as in this chapter provided, have all the rights

and benefits conferred by law on the persons whose interests and rights they acquire." The clause in the section referring to the "right to have homesteads set apart" is not involved herein, and the provision in the section for persons succeeding "by purchase or otherwise" is universal in its terms. The question, then, presented is whether those who acquire the title of a successor to a homestead hold the property under the same exemption as did the person to whose interest they have succeeded. "Succession" is defined in section 1383, Civ. Code, to be "the coming in of another to take the property of one who dies without disposing of it by will"; and section 1386, Id., gives the rule of succession, "unless otherwise expressly provided in this Code and the Code of Civil Procedure." The aforesaid provision of section 1474, Code Civ. Proc. is a special rule of succession provided for homesteads, and under its terms Mrs. Fath took the title to the homestead as "successor" to her husband. Section 1485, Id., was adopted by the legislature at the same time as section 1474, and under its provisions those who succeed to the title of Mrs. Fath "have all the rights and benefits conferred by law" on her. One of these rights and benefits was its exemption from being appropriated against her will in satisfaction of any indebtedness incurred by her. If the owner of the homestead incurs any indebtedness, or if any credit is given to him by another, it is with full knowledge on the part of the creditor that the homestead cannot be subjected to sale for their payment. The owner can sell and convey the homestead in his lifetime freed from all liability for any indebtedness incurred by him, and a voluntary conveyance by him cannot be impugned by his creditors, since such conveyance is in no respect in fraud of their rights. Civ. Code, § 3441; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045. No injustice is in either case done to the creditors, since they have it always in their power to protect themselves, either by refusing credit, or by demanding such security upon the homestead as will protect them from loss.

The object of all homestead legislation is to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors. Such legislation, being of a remedial character, is to receive a liberal construction. *Keyes v. Cyrus*, 100 Cal. 322, 34 Pac. 722. Mrs. Fath could have made a deed of gift of the property to her children in her lifetime in the same form as she devised it in her will, and they would have taken it freed from any claim of her creditors. The provisions of section 1485, Code Civ. Proc., however, extend to persons who succeed "by purchase

or otherwise," and we must hold that her testamentary disposition of the property is attended with the same result. This question was presented in the case of *Myers' Guardian v. Myers' Adm'r*, 89 Ky. 442, 12 S. W. 933, and the same conclusion was there reached, although it does not appear that there was in that state any statutory provision of this nature. The court says in its opinion: "It would, therefore, seem no more injury to creditors, nor in contravention of the purpose and reason of the homestead law, for the debtor to pass the title by will than by deed; for if, as has been held, he can by deed, and for merely love and affection, convey the remainder interest to his children, reserving a life estate to himself, we see no reason why he may not do practically the same thing by will, because his creditors are prejudiced in one state of the case no more than the other. In fact, they are not wronged in either; but in both the object of the law, which is to secure to every housekeeper with a family the certain and uninterrupted enjoyment of a homestead, is accomplished."

The objection on the part of the respondent to a consideration of the statement, for the reason that the specification of the particulars wherein the evidence is insufficient is defective, must be overruled. The appeal is from an order denying an application for an order. The court made no findings of fact, nor was there any motion for a new trial. The provisions of section 659, Code Civ. Proc., have, therefore, no application. Section 648, Id., declares that "no particular form of exception is required, but, when the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." The statement in the present bill of exceptions that "the evidence does not show" certain facts is equivalent to saying that the evidence "is insufficient to justify" the decision upon those particular facts. The order is reversed.

We concur: VAN DYKE, J.; GAROUTTE, J.

132 Cal. 621

CARPENTER et al. v. COOK et al.
(S. F. 1,234.)

(Supreme Court of California. May 9, 1901.)

TRUSTS—VALIDITY—DETERMINATION—REMAINDER IN TRUST.

1. The question whether or not a trust may be effective by virtue of re-enactment in the will of the grantor, the deed of trust being void, is to be determined by the probate court in the first instance.

2. Grantor conveyed realty to trustees to hold to his sole use, and, whenever directed by him, to convey and deliver the same to persons he should direct, and to hold the proceeds received in exchange therefor, to grantor's use. *Held*, that such trust being merely a trust to hold for

the grantor's use, and not within the uses authorized by Civ. Code, § 857, was invalid.

3. Where an attempted life trust in certain property is void, the trust to take effect on the death of the settlor, as to the residue of such property, will fail.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by E. W. Carpenter and others, as trustees, against E. V. S. Cook and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed. See 60 Pac. 475.

Mastick, Belcher & Mastick and W. B. Treadwell, for appellants. T. J. Lyons and C. W. Slack, for respondent Cook. John H. Durst, for respondent Willey.

HENSHAW, J. This action was prosecuted by plaintiff to quiet against defendants their title to certain real estate, plaintiffs claiming the legal title to the estate as trustees—First, under a deed of trust executed by one Amasa P. Willey in his lifetime; and, second, as trustees under the will of said Willey, by the terms of which he devised to them the property in question upon the trusts declared in a deed of trust executed by him in his lifetime. By its judgment the court decreed that the trusts created by the deed of trust were void, and that, consequently, under this instrument, the trustees had no title; second, that whether or not they had title by virtue of the will was a question to be resolved in the first instance by the court in which administration of the estate of Willey was pending. From the judgment thus rendered against them, plaintiff's appeal.

Upon this appeal we are concerned solely with the question of the validity or the invalidity of the trusts declared by the deed. Of those trusts, one was to operate during the lifetime of the settlor; the others were to operate upon and after the death of the settlor upon the "residue" of the trust property remaining at his death. As has been said, by his will the testator conveyed his property to these same trustees upon the trusts declared in his deed of trust. The first of those trusts having terminated by his death, the trusts which could be operative under the will necessarily are only those designed to follow thereafter. Whether or not these trusts, even though the deed of trust be void, may still be effective by virtue of their re-enactment in the will, is a question in the first instance to be determined by the court in probate (see *In re Willey's Estate*, 128 Cal. 1, 60 Pac. 471), and therefore not the subject of consideration here. We deem it important to say this in emphasis of the fact that upon this appeal the court is dealing only with the question of the validity of the trust scheme created by Willey's deed.

In his lifetime, Willey conveyed all the real estate which he owned or possessed to

these plaintiffs, as trustees, in trust "for the uses and purposes following, that is to say: First. During the lifetime of the said party of the first part to hold the same, and all the rents, income, profits, and proceeds thereof, and all property received in exchange therefor, to the sole use and behoof of the said party of the first part; and, whenever directed by the party of the first part, to bargain, sell, convey, assign, transfer, and deliver said property, or any part thereof, to such person or persons as the said party of the first part shall direct, and to hold the proceeds of any such sale, or any property received in exchange therefor, to the sole use and behoof of the said party of the first part. Second. Upon and after the death of the said party of the first part, to have, hold, and possess all and singular the residue and remainder of said property and effects, to lease and demise the same, and to receive the rents, income, and profits thereof." Following this is an elaborate trust scheme, unnecessary here to be set out.

Manifestly, the trust declared in the first clause of the deed is a trust designed to continue through the life, and to terminate upon the death, of the settlor. It must be an express trust permitted by section 857 of the Civil Code or it is void. That section is divided into four subdivisions. Subdivision 2 permits a trust in real property to mortgage or lease it for the benefit of annuitants or other legatees, or for the purpose of settling any charge thereon. Clearly, the trust here created is not referable to this subdivision. Subdivision 4 permits a trust to receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed in title 2, pt. 2, Civ. Code. This has to do with accumulations during minorities of beneficiaries, and of course the trust in question does not belong to this class. Subdivision 1 permits a trust to sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust. In such a trust the essential elements are—First, an imperative duty upon the trustee to sell, which means a disposition of the property for money; and, secondly, an equally imperative duty to apply or dispose of the proceeds in accordance with the instrument creating the trust. To apply or dispose of the proceeds is a plain direction and command that the trustee must part with the moneys obtained by the sale. Subdivision 3 permits a trust "to receive the rents and profits of real property, and pay them to or apply them to the use of" a specified person. Here, too, it is of the essence of the trust that there should be imposed upon the trustee the active duty of applying, distributing, and apportioning the rents and profits in accordance with the directions of the trust. The trust here created is not a trust referable to any one or more of these specified classes.

It is a trust, primarily, "to hold" the property, and its rents and income, "to the sole use and behoof of the settlor." A trust to hold property is not a trust to sell and dispose of the proceeds. A trust to hold rents and profits to the sole use and behoof of a person is not a trust to receive rents and profits, and pay them or apply them to the use of any person. It is a mere passive trust. It is a trust not specified by section 857, and therefore void. *Jarvis v. Babcock*, 5 Barb. 139; *Verdin v. Slocum*, 71 N. Y. 347; *Hagerty v. Hagerty*, 9 Hun, 175. It cannot be successfully argued that this is a trust under subdivision 3 of section 857. The language of the trust is to hold the rents, income, and profits of the property to the sole use and behoof of the party of the first part, not to pay or apply them to his use. The trustees are to do with them as the settlor may direct, and he might direct them to hold and accumulate them in an unlawful manner and to an unlawful extent.

It is equally impossible to find in this language a valid trust, under subdivision 1 of section 857. First, because, as has been said, it is essential to such a trust that the duty upon the trustees to sell should be imperative. *Cooke v. Platt*, 98 N. Y. 35; *Morfew v. Railroad Co.*, 107 Cal. 587-595, 40 Pac. 810. Here no such duty is imposed. The trustee is not to sell at all, either all or any part of the property, unless directed by the settlor, and then he is not alone to sell to such person or persons as the settlor may direct, but he may exchange property for other property, as clearly appears from the language, "to hold the proceeds of any such sale or any property received in exchange therefor to the sole use and behoof of the party of the first part." We think it too plainly apparent to need further exposition that the trust or trusts attempted to be created in the first clause of this deed are, one and all, wholly without the purview of section 857, Civ. Code, and we pass on to the consideration of the effect of the invalidity of this life trust upon the trusts to commence upon the death of the settlor.

It is a familiar principle that if several trusts are so inextricably interwoven, so mutually interdependent, that the destruction of one mutilates and maims in essential particulars the trust scheme, the whole must fall. In this case, the dependence of all succeeding trusts under this deed results, if it results at all, from the language above quoted from paragraph 2: "Upon and after the death of the said party of the first part, to have, hold, and possess all and singular the residue and remainder of said property," for certain specified uses and trusts. Here it is apparent that it is only the "residue"—a legal phrase of well-defined meaning—which after the settlor's death is to be devoted to

the purposes of the succeeding trusts. In *Limbrey v. Gurr*, 6 Madd. & Gel. 151, the rule applicable to this case is laid down in the following language: "Where a residue is given to a valid purpose, it will fall with the prior void purpose if not capable of being ascertained except by the actual execution of that purpose;" and as *Jarman* expresses it (2 *Jarm. Wills* [6th Ed.] p. 236): "A gift of the residue after providing for an illegal object is void." In *Cowen v. Rinaldo* (Sup.) 31 N. Y. Supp. 554, will be found a learned discussion of the question here arising, and the court concludes: "But we have failed to find any case in which the primary trust has been held to be invalid, and the ulterior trusts or dispositions of the will have been held to be good. * * * The primary objects may still remain, and those that follow may be cut off. But, if you cut off the primary object, upon what do the ulterior provisions depend?" In instance of the rule that when the primary trust has been adjudged void the trusts and limitations over have uniformly fallen, may be cited *Rice v. Barrett*, 102 N. Y. 161, 6 N. E. 898; *Beekman v. Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269; *Dodge v. Pond*, 23 N. Y. 69; *Hone's Ex'rs v. Van Schaick*, 20 Wend. 564; *Smith v. Edwards*, 88 N. Y. 92; *Fowler v. Ingersoll* (N. Y. App.) 28 N. E. 471. It follows, therefore (and this language has exclusive application to the trust scheme created and attempted to be set in operation by the deed of trust alone), that the trial court correctly decided that no title vested in the trustees by virtue of the deed of trust, and the judgment appealed from is, therefore, affirmed.

We concur: VAN DYKE, J.; HARRISON, J.; GAROUTTE, J.; TEMPLE, J.; BEATTY, C. J.

McFARLAND, J. (concurring). I concur in the judgment and in the opinion of Mr. Justice HENSHAW. It is well to notice, however, that in *Re Willey's Estate*, 128 Cal. 1, 60 Pac. 471, the first clause of the deed to Carpenter and Boericke was not attacked on the ground that it attempted to create a trust not permitted by section 857 of the Civil Code. Moreover, in *Re Willey's Estate*, which dealt entirely with the will, the question whether or not said first clause of the deed was valid was immaterial. The will, of course, did not take effect until after the death of the testator, and the reference in the will to the deed embraced only those trusts declared in the deed which became operative after the testator's death; and for the uses and purposes of these latter trusts he devised and bequeathed to Carpenter and Boericke "all the property, real and personal, * * * of which I may die seised or possessed."

(132 Cal. 523)

In re FAIR'S ESTATE. (S. F. 1,491.)**ANGUS et al. v. FAIR et al.¹****(Supreme Court of California. April 30, 1901.)**

WILLS—REAL PROPERTY—TRUST—VALIDITY—SURPLUSAGE—ESTATE IN REMAINDER—USE—EXECUTION—ACTIVE TRUST—POWER IN TRUST—INSEPARABLE TRUST—QUANTUM OF ESTATE—LIMITATION—ESTATE FOR LIFE—LIMITED FEE—TESTATOR'S INTENTION.

1. Since all uses and trusts in relation to real property are abolished by Civ. Code, tit. 4, § 847, except those specified in that title, and those enumerated therein do not include a trust to convey real property to beneficiaries, a devise of the residue of testator's property to trustees, to have and to hold during the lives of testator's children, and to be transferred and conveyed on the death of the surviving child to certain beneficiaries, was void.

2. Testator devised the residue of his property to trustees, to have and to hold in trust during the lives of testator's children, and that on the death of the surviving child the trustees should transfer and convey the trust property to certain named beneficiaries. *Held*, that the contention that the words "transfer and convey" should be eliminated, as surplusage, and the trust considered as devising estates in remainder to the persons designated as beneficiaries, cannot be sustained, since if the words "transfer and convey" were eliminated the beneficiaries named would not take the estate at all, as there are no other words operative to create an estate in remainder.

3. The contention that the trust to convey, though invalid, should be considered merely as a use executed by the English statute of uses (27 Hen. VIII., c. 10), and hence as vesting a fee in the beneficiaries, cannot be sustained, since the English statute of uses executed only valid passive trusts, and the trust to convey was both active and invalid.

4. The contention that, though the trust to convey was void, it should be held good as a power in trust to convey, cannot be sustained, since a power to convey is a trust to convey, and hence is also void, as prohibited by the statute.

5. Testator devised the residue of his estate to trustees during the lives of testator's children, in trust to hold and manage the trust property, and to pay the income therefrom monthly to his children, in certain portions, and, on the death of his children and the survivor of them, to transfer and convey the trust property to certain named beneficiaries, which did not include testator's son. *Held* that, where the trust to transfer and convey the trust property on the death of the surviving child was void because prohibited by statute, the whole trust must fail, since the trust to convey and the trust to manage the estate and pay over the income were inseparable parts of one entire scheme, and to hold one valid and the other invalid would lead to a result contrary to the purposes of the will.

6. Testator devised the residue of his estate to trustees, "to have and to hold" during the lives of testator's children and the survivor of them, and on the death of the survivor to transfer and convey the trust property to certain named beneficiaries. *Held*, that the words "to have and to hold" did not diminish the quantum of estate vested in the trustees to an estate during the life of testator's children, but merely fixed a date on which the trustees should convey the fee vested in them.

7. The contention that the will created an estate for life in the trustees, with a direct devise to testator's beneficiaries, notwithstanding testator's intention to create a trust to convey the fee on the death of the surviving child, cannot be sustained, since, where the method used by the testator to give his estate to his

beneficiaries is illegal, the courts have no power to substitute a legal mode in lieu thereof, and hence words creating a void trust cannot be considered as creating a valid direct devise.

8. Civ. Code, § 863, provides that, except as thereafter provided, every express trust in real property shall vest the whole estate in the trustee, subject only to the execution of the trust, and the beneficiaries shall not take any estate or interest, but may enforce the performance of the trust; and section 864 declares that, notwithstanding anything contained in section 863, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong in the event of the failure of the trust. Testator devised the residue of his estate to trustees, to have and to hold during the lives of the testator's children and the survivor of them, and on the death of such survivor to transfer and convey the trust property to certain named beneficiaries. *Held*, that the contention that, notwithstanding the trust to convey was void, the estate should go to the beneficiaries named, by virtue of the prescription contained in section 864, cannot be sustained, since the testator made no attempt to prescribe to whom the property should go in case the trust failed, and the language creating the trust itself cannot be treated as the prescription mentioned in the statute.

9. The contention that the fee devised to the trustees was one of a limited character, and vested in them only in case they decided to sell the property, and that therefore the trust was valid, cannot be sustained, since the fact that the testator gave the trustees power to convey the fee shows conclusively that he intended to vest an absolute fee in them.

Beatty, C. J., and Temple and Harrison, JJ., dissenting.

In bank. Opinion in department (60 Pac. 442) reversed, and opinion of lower court affirmed.

Wm. M. Pierson, Geo. E. Crothers, and Garrett W. McEnerney, for appellant executors and trustees. Van R. Paterson, for certain minor legatees and devisees. Knight & Heggerty, Lloyd & Wood, and Bishop & Wheeler (Wilson & Wilson and Garber, Boalt & Bishop, of counsel), for respondents.

GAROUTTE, J. This is an appeal from a decree of partial distribution. Upon the former decision of this case Justice McFARLAND rendered the following opinion, which is now adopted as the opinion of the court upon the questions therein discussed:

[The opinion here referred to is published in full in 60 Pac. 453-460.]

The foregoing opinion disposes of what may be termed the technical legal phases of the case, and we pass to the consideration of questions which largely have presented themselves upon the last arguments, and which were called forth by reason of the views of the various justices promulgated in the former decision.

The will provides: "All the rest, residue, and remainder of my estate, property, and effects, real, personal, and mixed, whatsoever and wheresoever situated, I give, devise, and bequeath unto my trustees herein-after named, and to the survivors of them, and to their successors in office, in trust for the following uses and purposes: That is to

¹ Rehearing denied May 30, 1901.

say, to have and to hold the same in trust during the lives of my daughters Theresa A. Oelrichs and Virginia Fair, and of my son, Charles L. Fair, and during the life of the survivor of them, and upon the death of said survivor to transfer and convey to the children or descendants of my said daughter Theresa A. Oelrichs the one-fourth of said trust property and estate," etc. We are now directly confronted with a question of construction, namely, does this provision of the will place in the trustees a trust to transfer and convey this estate to certain of Fair's kindred, or may it be construed as a direct devise to those kindred? Simplifying the proposition, yet leaving it exactly the same in principle, aside from the question of perpetuities, let us assume the provision to be: "All the rest and residue of my estate and property I give, devise, and bequeath unto my trustees in trust for the following uses and purposes: That is to say, to have and to hold in trust for six months, applying the rents and profits thereof to the care of my children, and upon the expiration of the six months to transfer and convey said property and estate to my kindred [naming them]." Does this provision create a trust in the trustees to transfer and convey the estate? Thus presented, this question does not seem to be a big one. Yet a wonderful amount of argument, of learning, and of law, by most eminent counsel, has been advanced to aid the court in giving the true answer. In construing this language of the will, it must be kept in mind that the court is not allowed to force the construction of a sentence, or even a word, in order that a particular result may be reached; and this is the rule, even though such construction be absolutely necessary to save the document from complete condemnation. In the *Walkerly Case*, 108 Cal. 656, 41 Pac. 772, it is said: "Where the language of the provisions of the will is plain and unambiguous, the courts are not permitted to wrest it from its natural import in order to save it from condemnation. * * * It may be said of all wills that the testator's intent is to make a valid disposition of his property. * * * But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court, had he known his own attempt was invalid." Now, this property, under the illustration, was devised to the trustees in trust for certain uses and purposes. What are these uses and purposes? They are: (1) To hold the property for six months, and apply the income to the care of the children; (2) at the period of time fixed, to transfer and convey the property to certain kindred. It is conceded that the trustees took the property in trust for certain uses and purposes; yet the trust to transfer and convey appears as plain and palpable from the language used, as the trust to hold

the property for six months, and apply the income to the care of the children. If there be a trust created to do one of these things, there is a trust created to do the other. The testator's intentions must be determined from the words he used. He said he desired the trustees to hold the property in trust for a fixed period, and then transfer and convey it. He certainly intended by these words that they should make a deed of conveyance of the property. And, if he intended that they should make a deed of the property, he only could have intended that they should by the deed pass the fee of the property. The words used indicating a conveyance are words of simple, ordinary legal import, and are the words always used in an instrument where a party desires property to pass by deed. A layman would not hesitate a moment in the declaration that Fair intended by this language that the trustees should pass title to the property by deed. It is only the astute lawyer who can see any other intention. While Fair's intention as to the creation of a trust in the trustees to convey stands out so that all may see, we find nothing in the instrument anywhere showing a contrary intention. Indeed, when the pleadings in this case were prepared and filed by the trustees, we find a verified allegation in those pleadings to the effect that these trustees were the owners in fee simple absolute of this property, in trust, etc.

Stress is laid by appellants upon the effect of the words "to have and to hold in trust during the lives of * * *," as fixing the estate of the trustees; yet it is plain the simple purpose and effect of that clause is only to fix the time when the trustees shall make the conveyance,—shall transfer and convey the estate. These words were not used to diminish the quantum of the estate of the trustees, but to fix the day when the fee should be conveyed to the beneficiaries. If the estate were devised to the trustees in trust to have and to hold for six months, and then to transfer and convey to the beneficiaries, would the estate in the trustees be an estate simply for years? We hold not, but, on the contrary, are assured that the words "to have and to hold in trust for six months" were used for the purpose, and should have the effect, alone, of marking the time when the property should be transferred and conveyed, and would in no degree diminish the quantum of estate devised by the instrument to the trustees in trust. These words not having any effect upon the quantum of the estate, there are no other words in the instrument having any tendency to diminish that quantum. It would seem, under these circumstances, that, if a complete and perfect fee ever could vest in a person, it has vested in these trustees. It follows from these views that the contention of appellants to the effect that the trustees took only an estate for the lives of Fair's children, or an estate for life, with an inci-

dental fee which allowed them to sell and transfer the property during that period, cannot be maintained.

Another view of this contention, closely allied to the one just considered, is found in the claim that the will creates an estate for life in the trustees with a direct devise to Fair's kindred. And this claim is based upon the concession (for the purposes of the case only) that Fair intended to create a trust to convey, but, the means or mode provided by him for vesting the estate being illegal, in order to carry out his general intent to vest the property in certain of his kindred a legal means and mode will be substituted by the court. In other words, the contention is that notwithstanding Fair's intention to create a trust to transfer and convey his property may appear upon the face of the will as plain as a blazing fire in the darkness of night; notwithstanding Fair may have said in his will, "I hereby intend in and by this will to create a trust in the trustees, to transfer and convey my property to my beneficiaries,"—notwithstanding all this, the court will give no concern to that expressed intention, the trust being void, but, in order that these particular beneficiaries may secure the property, will hold that it passes to them by direct devise. Courts will look askance at such a proposition, for it is startling in the extreme. In the first place, we do not find any general or ultimate intent upon the face of the document indicating that these beneficiaries shall take this property by hook or by crook. The only intent we find is an intent that they shall take it in a certain specified way, namely, by way of a trust to transfer and convey. Can counsel or court say that, from the face of this instrument, there is a plain intent that these beneficiaries shall have this property, regardless of the way provided by the testator for them to take it,—indeed, regardless of everything? Upon the contrary, it would seem that they were only to get it by way of the route pointed out in the will. If that route be blotted out, how may they get it at all? Who can say, from the words of the will, but what the testator intended that they should get it by way of the trust, or not get it at all? This court is not wise enough to say that Fair did not know he was creating a trust to transfer and convey when he made his will. In *re Young*, 123 Cal. 343, 55 Pac. 1011, it is said: "One of these rules, firmly established and never departed from, nor even criticised, is that the expressed intent will not be varied, under the guise of correction, because the testator misapprehended its legal effect. The testator is presumed to know the law. If the legal effect of his expressed intent is intestacy, it will be presumed that he designed that result. The inquiry will not go to the secret workings of the mind of the testator. It is not, what did he mean? but it is, what do his words mean?" Let it be conceded that

a general intent may be found in this will indicating that these beneficiaries should have the property; still the only mode provided by the testator for them to get it is illegal,—prohibited by the law,—and this court has no power to provide a legal mode. In attempting to vest an estate, if the only mode prescribed for the purpose by the testator is illegal, courts cannot close their eyes to that mode, and substitute in lieu thereof a legal mode. A valid power in trust, coupled with a statute of uses, might do it, but without the power and the use it cannot be done. If the mode provided by the testator was legal, but defective in substantial, the court could not create a new mode. Then, when the mode created is illegal, void, amounts to nothing, how may the court create a new and legal mode? The law says to Senator Fair, "You shall not create a trust to convey your property." Fair says, "I will create a trust to convey my property." The court says, "The trust you created to convey your property is void because prohibited by law, but your wishes as to the disposition of your property will be carried out through the medium of a direct devise, exactly the same as though the trust you created was entirely valid; and the words you used to create the void trust will be held to create a valid direct devise." This construction of the instrument renders the law forbidding trusts of this character absolutely nugatory, and demands the exercise of an accommodating spirit upon the part of the court, which the law forbids. Under the law of this state, a devise to A. in fee in trust to convey to B. cannot be the equivalent, by any possible rules of construction, of a direct devise to B. That is the substance of this contention, but to so declare would shock the statute forbidding the creation of trusts of the character here involved. In this illustration with equal propriety it may be said that there is a general intent B. should have the property, yet by no judicial construction could he ever get it. It is not the right of the court, by construction or in any other way, to evade a rule of law in order that some particular result may be reached. The court may only declare the law as it finds it, whatever the result of that declaration may be.

Some importance by appellants is attached to section 864 of the Civil Code. That section provides, "Notwithstanding anything contained in the last section, the author of a trust may in its creation prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property subject to the execution of the trust." The facts of this case do not call for an analysis in detail of this section of the Code. In the creation of the trust here involved the trustor has made no attempt to prescribe to whom the property shall belong in the event of the failure or termination of the trust. He has not said,

as he may have said under this section, "If the trust I have hereby created in the trustees to transfer and convey my property is not a valid trust, and for that reason shall fail, then I direct that this property shall pass," etc. A provision of that character in this will would bring the case directly within the section. But the testator wholly fails to insert the provision. He makes no attempt to do it. Again, the section cannot be construed to mean that, the trust provided for by the instrument being void, the language creating it will be treated and deemed the prescription mentioned in the section, and therefore the property will pass exactly as it would have done if the trust had been valid. Certainly this construction of the section was never contemplated by the lawmakers, for it would be holding that every void trust to convey could be transformed into a valid prescription. If you eliminate the words "transfer and convey" from the will, then the beneficiaries named would not take the estate at all; for the heirs of Fair would be entitled to inherit it. Hence the interest of the beneficiaries in the estate can only come to them through the words "transfer and convey"; and if the beneficiaries are to take the fee, and take it only through the medium of those words, the trustees must have the fee vested in them, in order that they may transfer and convey it. The will demands that they shall transfer and convey to the beneficiaries; that is, make a conveyance of the property to them; that is, vest the title of the property in them by a conveyance. To hold otherwise—to give the words "transfer and convey" some other meaning—is to wrest words from their usual and ordinary import, and give them a forced meaning wholly unjustified by anything contained in the instrument. The favor of the law in the direction of supporting testacy cannot go to these lengths. If the document under consideration had been a deed, and not a will, would this court hold that these named kindred would take the estate by direct grant, the trust being void? We apprehend not. Yet, the intent in both cases being the same, the rules of law as to the construction of deeds and wills stand the same. We cannot imagine that an estate created by will would be valid, while the same estate created by deed would be invalid. The rights of devisees are no more sacred and are entitled to no more protection than are the rights of heirs. The trustees had the power under Fair's will to convey away the fee of this property. This power was granted to them in express words. However, it is said by appellants that this fee was of a limited character,—a fee simply feeding that portion of the trust which authorized the trustees to sell. In another form, the contention may be stated to be that the trustees had the fee vested in them if they decided to sell the property, but had no fee vested in them if they decided to hold the property.

It may well be said that such a fee is of a nondescript character. The fact, standing alone, that the trustees were authorized to sell the property and convey a fee, points directly and unerringly to the fact that the fee was cast in them; for, if they had no fee, they could convey no fee. And this power vested in the trustees to convey the fee points with equal certainty to the fact that when the testator said, "I devise my estate to my trustees in trust to hold for the lives" of my children, vesting in the trustees the power to convey the fee during that period of time, and, if they do not convey during that period, then they shall transfer and convey my property to certain of my kindred," he meant, and could only mean, by every rule of construction, that the trustees were vested with the fee of his property, which fee they could convey to third parties during the lives of his children, and, if not so conveyed, then they should convey it to these kindred.

The court concludes that the fee to Fair's property was cast in the trustees in trust to transfer and convey to certain of his kindred, that his intention to so place the fee stands out plainly from the face of the entire will, that no contrary intention whatever appears therefrom, and that the will must fall by reason of this prohibited trust. We are more satisfied with this result, when it is considered that a contrary conclusion would perpetuate a trust of this vast estate probably for a period of 50 years or more, and also result in a disinheritance of Fair's children. Notwithstanding a man has a right under the law to make a will, still the law is not kindly disposed to either of these things; and, if this were a closely-balanced case, these threatened results would furnish reasons for a decision the other way.

We concur: VAN DYKE, J.; McFARLAND, J.

HENSHAW, J. (concurring). Upon the former hearing of this case I gave my assent to the conclusion reached by Mr. Justice HARRISON, that an equitable remainder in the estate of Fair was devised to the persons to whom the trustees were directed to convey upon the death of his last surviving child. That the will created a trust to convey I never entertained any doubt. Not only is the language apt and well chosen for that purpose, not only have its phrases been selected and employed with sedulous care, not only was it the opinion of the astute attorneys who prepared the pleadings of appellants that a fee was devised by the will to the trustees, but, in addition to all this, the question propounded upon the last argument of the case has remained without satisfactory answer, and is, to my mind, unanswerable: "If this language does not create a trust to convey, what different words

would you or could you employ to create such a trust?" In the light of the arguments, oral and printed, upon the last hearing, and after a more detailed and exhaustive consideration of the authorities, I am convinced that, in a natural desire to uphold the last will of the deceased, due weight was not given to the clear and explicit intent of the testator. While always of the opinion that a trust to convey was clearly meant and created in the will, and that such a trust, under the laws of this state, is absolutely void, it then seemed to me that the provisions of the will could be sustained in accordance with the doctrine of the cases holding that under such a trust an equitable interest or estate or remainder passes to the beneficiaries. The error of this position came from a failure to give due recognition to the fact, emphasized and demonstrated upon the last argument, that only in those courts where a trust to convey is valid, as in England, or in those like New York, where its purpose is effectuated by an enabling statute, as a power in trust, has this rule or doctrine ever been declared. It is because the trust is valid, and that consequently a legal estate vests in the trustees, that an equitable interest or estate, *eo instanti*, following the legal, vests in or passes to the beneficiaries. But where, as in this state, the trust is void, and where consequently no legal estate can ever vest in the trustees, there can be no estate in law to support the equity. The whole trust is void. The legislature has prohibited a trust to convey. It has declared such a trust to be void. It has forbidden the separation of the equitable from the legal interest by this mode, and a court can no more say that the equitable estate under such a void trust passes to the beneficiaries, than it can say that the legal estate passes to the trustees. Such, I think, is the unanswerable argument in every jurisdiction where, as with us, a trust to convey is prohibited and declared void by express law; for, if it can be said that equitable estates may vest in the beneficiaries notwithstanding that they owe their existence to trusts prohibited by and void in law, it can only mean that the legislative inhibition against certain trusts is made utterly vain and nugatory. If the trust violates the rule against restraints on alienation, for example, as in the *Walkerly Case*, the solution then would be not, as there declared, that, the trust being void, all estates, legal and equitable, attempted to be created, were likewise void, but rather that, notwithstanding the trust is void, it is plain what the testator intended, and it will be held that equitable estates passed to the beneficiaries, by reason of which they will be permitted to draw to themselves the legal title. Such, of course, cannot be the law.

To uphold the terms of the will, as creating a power in trust, presents equally

formidable obstacles: First, because the testator's plain and obvious intent, it seems to me, was to create, not a power, but an explicit trust; but, if that point be waived, still the power is a power in trust, and it either must be held that the repeal of powers in trust by the legislature of this state abolished any such power if it did exist, or else that notwithstanding the declaration of section 847, Civ. Code, that uses and trusts in relation to real property are those only which are specified in this title, powers in trust, as known to the common law, with all their labyrinthal difficulties and sinuosities, are in full force and effect with us, and that, while the legislature has, at great pains, simplified trusts and estates, it has designedly and intentionally perpetuated the most intricate and difficult subject of common-law and equity cognizance, and, through powers in trust, has preserved all the difficulties which it attempted to eliminate in dealing with trusts. It is unquestionable that it was because powers at common law were abstruse and full of uncertainty that the New York codifiers recommended the abolition of all not expressly declared and reserved. *Jennings v. Conboy*, 73 N. Y. 233. The design was to simplify the cumbersome system which had grown up at common law. Our own code commission followed the example of New York, and adopted bodily their proposed scheme. As part of this scheme were the following sections:

Civ. Code 1874, § 860: "Where an express trust in relation to real property is created for any purpose not enumerated in the preceding sections, such trust vests no estate in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers contained in title V of this part."

Civ. Code 1874, § 861: "Nothing in this title prevents the creation of a power in trust for any of the purposes for which an express trust may be created."

Civ. Code 1874, § 862: "In every case where a trust is valid as a power in trust, the real property to which the trust relates remains in, or passes by succession to, the persons otherwise entitled, subject to the execution of the trust as a power in trust."

They were properly placed, under the chapter on "Uses and Trusts," which begins with the declaration that "uses and trusts in relation to real property are those only which are specified in this chapter," for powers in trust are trusts. As Sugden says, "Powers, as we have seen, are mere declarations of trust" (*Sugd. Powers*, p. 119); and Lord Hardwicke declared that "such powers [where any person other than the holder has an interest in its execution] ought rather to be called 'trusts' than 'powers.'" 1 Perry,

Trusts, § 248. These sections were repealed with other sections, and, recommending their repeal, our learned codifiers reported to the legislature as follows: "We have proposed to strike out the whole chapter on 'Powers,' as wholly unsuited both to the wants and habits of the people, retaining one or two sections by amendment of other portions of the Code in places where the provisions of those sections properly belong." What, then, was the effect of these repeals? Can it be said that they meant the revivification of the abstruse common-law system? Can it be fairly argued that that incomprehensible scheme was better suited to the wants and habits of our people than the simpler one taken from New York, and by us afterwards abolished? And if this was in the mind of the revisers and legislature, and, if in their contemplation, the common-law system was revived by these repeals, why, in expunging those sections, were they so careful to preserve, and to report their preservation of, certain other necessary powers? The re-enactment of these carefully preserved powers was unnecessary, because they were existent common-law powers. Can any other conclusion logically be reached than that the repeal meant, not the restoration of common-law powers, but a further simplification and advance over even the New York system, by the abolition of many of the powers which that state had preserved, and the perpetuation of only such as were considered suitable to the simpler wants and habits of the people of this state?

But, if it be conceded that common-law powers in trust do exist in this state, still another difficulty confronts us. In England there would not be, and never has been, any occasion to resort to a power in trust to save a will like this; for the trust to convey would be valid and operative as a legal, active trust. The English courts uniformly and unhesitatingly have upheld such wills as creating valid trusts. What those courts might do if their law declared such trusts illegal—whether they would convert the trust into a power in trust, and thus uphold it—is a question that, as it has never been asked of them, it would be mere speculation to declare what their answer might be. As the necessity never arose at common law for declaring that such language created a power in trust, there is no common-law decision to act as guide. And this was appreciated in New York, where such trusts, as here, are admittedly void, and are saved only by force of their enabling statute,—a statute which we have not, and which effectuates the void trust under an express grant of power. That the void trust may still be treated as valid to the extent that the testator must be held to have prescribed the persons or class to whom the property shall go upon the failure or termination of the trust (Civ. Code, § 864) is, to my mind, also an untenable proposition. There is never, or seldom, any difficulty in

determining to whom or in whom the testator or settlor means that his trust property shall descend or vest upon the termination of the trust; but it does not follow from this that, because in indicating this intent he has prescribed an unlawful means for its accomplishment, the result will be assured without regard to the mode. In the case of trusts that violate the rule of restraints on alienation, there is never any doubt to whom the testator meant that the remainder or reversion should go; but in such cases no court has ever selected the designated beneficiaries, and declared that, notwithstanding the fact that their sole claim to title is through a void trust, nevertheless the testator has sufficiently indicated that upon the failure of the trust the trust property is to go to them, and, the trust having failed, they shall take at once. There was no difficulty in the Case of the Estate of Walkerly in determining to whom the testator meant that the land should go; but the thought was never entertained that after failure of the trust these persons should still be regarded within the testator's intent as prescribed and designated by him, to take in the event of the failure of the trust. There, as here, they were to take in conformity with the terms of the trust, or they could not take at all. So that, if it be considered in this case that there was an attempt to prescribe the class, it was an attempt either by a void trust or an unauthorized power in trust; and, if the mode be invalid, the heirs may not be disturbed in their rights. In Estate of Walkerly it is said: "A testator must do more than merely evince an intention to disinherit, before the heir's right of succession can be cut off. He must make a valid disposition of his property." We cannot in this case, more than in any other, substitute a valid method for the invalid one so plainly designated.

For reasons amplified in the preceding opinions, it seems apparent that the failure of the trust to convey defeats the testator's trust scheme. It leaves the whole beneficial interest and the whole reversion in his children living at the time of his death,—a result essentially and radically at variance with that which he sought to accomplish. The consequence, then, in these particulars, is the same as though he had died intestate. The property will descend to his heirs at law, as provided by the rules of succession in this state, so that those who are the immediate and direct offspring of his blood will succeed by inheritance. For these reasons, I concur in the judgment.

TEMPLE, J. I dissent. Convinced that powers have not been prohibited in this state, but that the right to create them is unlimited, I am not able to read the will as my associates do. In the first place, I see no force in the proposition that we must first construe the will as though trusts to convey were not prohibited, and then enforce

the prohibition ruthlessly. All contracts, all conveyances, and other instruments in writing are to be construed with reference to the laws in force where they were made, and with the idea constantly in mind that they were made in view of such laws, and to be enforced under them. If we fail to do this, we do not place ourselves in the position of the contracting parties, and could not expect to understand the language found. They are presumed to know the law, and to have ordered their affairs with reference to it. There is no reason why this universal requirement to presume that parties contract in view of the law should be relaxed as to wills unless we seek for a pretext to avoid them. If there is any difference, the reason for applying the rule to the construction of wills is more cogent. They are generally more deliberately prepared, and are to be executed by others than the persons who made them, and usually there are those who would gladly defeat their execution. The testator can rely only upon positive law for its execution. I think, then, since a trust to convey cannot be created in this state, and a power in trust for that purpose is perfectly valid, that the obvious intent of the testator, as shown by the clear language of the will, was to convey to his trustees a life estate only, and that the direction to his trustees, "upon the death of such survivor to transfer and convey," was intended as a power in trust. The language is certainly as appropriate and apt for the creation of a power as for a direction to execute a trust. If the eminent counsel for respondents could believe that powers can be created under our laws, I cannot doubt but they would have so construed it. This proposition once admitted, in my opinion, the language of the will cannot be understood in any other way. The will having been probated, all presumptions are in favor of testacy and against intestacy. The presumptions in favor of the heirs then cease. The duty of the courts then is to so construe the will, if in reason it can be, as to prevent intestacy, total or partial. Keeping in view, therefore, these propositions, to wit, that the testator knew that a trust to convey cannot be created in this state, and that a power in trust can be, and also that an estate in trust cannot be created for a period unmeasured by lives in being, let us read the will. It is, in effect: "I give my estate to trustees in trust for the following uses and purposes: That is to say, to have and to hold the same in trust during the lives of my children and of the survivor of them, and upon the death of such survivor to transfer and convey," etc. "In trust, further, during the lives of my children and of the survivor, to manage and control the said trust property and estate." Here it is expressly declared that the purpose of the trust is that his trustees shall hold the estate during the mentioned lives, and during such lives, and only for that period, the trus-

tees are expressly authorized to manage and control, to collect rents, etc. There are no further duties as trustees, and no further authority save to transfer and convey at the termination of the trust. This authority has all the attributes of a power, although it might also have been appropriate as a direction to trustees had not such trusts been prohibited. Being equally appropriate for both, if one course is unlawful and the other lawful, we must presume the testator meant to do that which only he could lawfully do. Nor do I see how the express declaration that the trustees shall hold during the lives of his children can be regarded otherwise than as also containing the condition that they shall not hold beyond that time, and this is rendered more plausible by the fact that such limitation was required to make the trust legal. The power was to be executed eo instanti upon the death of the survivor. If not then executed, the persons and the interests to be conveyed were ascertained. At that instant, if not before, the entire estate became alienable. I understand respondents to contend that the direction to hold during the lives of the children of the testator is a mode of indicating when the conveyances are to be made. But it seems to me the only purpose of the trust was to deprive his children of all power to control, manage, or dispose of his estate, while enjoying the profits thereof, and to deprive the children of his son of all interest in it. All this was accomplished by the life trust. The direction to convey was adopted as a mode of ending the trust; so the estate then passed to the beneficiaries in full property, the purpose of the testator in that regard was accomplished.

To repeat: We cannot doubt that the testator desired to accomplish these ends: First, to provide ample revenue for each of his children during his or her life; second, to prevent the descendants of his son from inheriting any part of his estate; third, upon the death of all his children to give one half of his estate to the descendants of his daughters, and the other half to his brothers and sisters and their descendants. Aside from some special legacies these are all, or the main, purposes sought to be accomplished. This can all be done without violating any law, and without giving an unnatural or strained construction to any language contained in the will. This will be admitted if the concession be made that it was competent for him to create a power.

Originally, in the second division of the Civil Code, part 2, tit. 4, treated of "Uses and Trusts," and title 5 of "Powers." Title 4 commenced with section 847: "Uses and trusts in relation to real property are those only which are specified in this title." Title 5 began: "Sec. 878. Powers in relation to real property are those only which are specified in this title." It is not contended that title 4 conferred upon any one the power to create

uses and trusts. The sole purpose of the provisions originally found in that title was to limit and restrict the power of the owners of real property in that regard. This intent is manifest. And similarly title 5 was an express limitation upon the power of the owners of real property. The language, powers "are those only which are specified," is not a vesting of authority to do that which before could not be done. It is an express restriction. I understand this to be admitted, as, indeed, it must be. The two titles were parts of one statute, which recognized the right to create uses and trusts and powers, and limited such rights or authority to certain specified purposes. Two years afterwards the legislature repealed title 5. So far as affects this matter, the language of the repealing clause is only, "Title V is repealed." Two sections were retained, however, by being transferred to the title in regard to trusts. Section 900 was re-enacted as section 860, without the change of a word, and section 895 was re-enacted as section 858. Section 860 provides for the event of the death of one of several donees of a power. Section 858 provides for a power of sale in a mortgagee. This is the only instance in the Code, as it now exists, where any power is expressly authorized. The reason for this authorization is not far to seek. Supposing the right to create powers to be in all other respects unlimited, the right to create such a power, but for this section, would be forbidden by the policy in this state in regard to mortgages, which is that the mortgagee shall have, whatever the form of his contract may be, the right of redemption. This section declares an exception to that rule, and hence its necessity. Other sections recognize the existence of powers, but cannot be considered as authorizing them. Section 860 I have referred to. By section 781, a power of appointment does not prevent a future estate limited to take effect in case such power is not executed. This does not authorize any power, but regulates the effect. It does not state the purpose of the supposed power, except that it must refer to a power to convey land. Section 1229 refers to a case where power to modify or revoke an instrument affecting real property is reserved to the grantor or given to another. The section assumes the right to create such power, and states its effect in certain cases. Section 1330 refers to a power to devise. It assumes the existence of the power, and states one case in which the power shall be deemed executed. Not a word in the section can be construed as authorizing such a power. These provisions existed when title 5 was in the Code, and should have gone with it if the repeal of that section was to be deemed the abolition of powers. If, on the other hand, the repeal merely did away with a restriction upon the right to create powers, they are still properly in the Code, and have their proper use. It seems to be argued that the

title on "Powers" was in reality an exception to the prohibition of uses and trusts contained in title 4, and that powers are trusts. For many reasons, this cannot be so. Section 648 forbids this construction. All trusts which could be created were specified in that title. Powers were not there specified, but were in the same statute regulated, and limited in another title. I suppose all will admit that title 4 has reference only to real property held in trust for certain purposes.* And it will not be contended that a power is real property, or that in an instrument creating the power any interest is conveyed to the donee of the power. The donee of a power has no estate or interest in land, legal or equitable. And in this state there need be no equitable estate in any one, either in the creation or the execution of a power. An example of this is the case of an executor. He may be the donee of a power to sell land and may execute it, but no equitable estate need be created in any one. *Morffew v. Railroad Co.*, 107 Cal. 587, 40 Pac. 810. Section 857, it must be confessed, did not, when it was first passed, prohibit powers; for the use of powers was regulated in the same statute. How can a new meaning be put into it, then, by a statute which does not refer to it or the title in which it is found, and only says of title 5, "It is repealed"? Legislative policy can only be deduced from some language used by the legislature. The whole argument consists in denunciations of uses and trusts and powers, as though powers were part of the same thing, and in contending that the legislature would not strictly limit trusts and leave powers at large. It did once restrict the use of powers, and then repealed the statute, in the face of section 4468, Pol. Code. In so doing it declared that the common law of England would furnish the rule upon the subject. Certain expressions of law writers are cited in which powers are declared to be trusts. Of course, powers, when given to be executed in the interest of another, are trusts. The power of an ordinary agent is a trust, and he holds it in trust for another. A public office has been said to be a public trust. A power in trust is a trust in the same precise sense, and in no other. Will any one contend that these are the sort of trusts dealt with in title 4?

But it is contended that powers cannot exist in this state, for we have no statute of uses, and a power was but the right to appoint a use, which, under the statute, drew to it the legal title. I presume it was never contended before that powers did not exist at common law, and most likely the learned counsel for respondents do not wish to be understood as contending for that proposition. If they did not exist at common law, when were they authorized? Certainly not by the statute of uses. That statute recognized that they were in common use as to equitable estates, and its purpose was to

crush out both trusts and powers. If the right to create a power did not exist, one could not have been made to dispose of equitable estates. Why were they efficacious as to equitable estates and of no avail as to legal estates, and how did the statute enable the landowner to dispose of freehold estates through the medium of a power? No doubt, powers, as known to the profession, are those which depended for their efficacy upon the statute of uses; and the reason why, in England, powers depended for their efficacy upon the statute of uses, was because of the restrictions upon conveyancing which existed at common law. This is most conclusively and elaborately shown by Sugden in the introduction to his work on Powers. It was not only or principally because a freehold estate could be created only by livery of seisin, or by some other solemn and public transfer, but because freehold estates could not be created to commence in futuro; nor could a power be reserved to the grantor, or given to any other person, to limit the estate or create any charge upon it in derogation of the estates created by the original feoffment. The author proceeds to show some devices resorted to at common law, and how, by changing the beneficiary interest into mere equities, almost perfect freedom of alienation was attained, and then how by the statute of uses almost a like freedom of alienation resulted as to freehold estates; and finally he sums up the effect of the statute upon conveyancing in the following words, which are not altogether in accord with the vehement denunciation of trusts and powers by the learned counsel for respondents: "The statute is generally considered as having had only the effect of enabling the conveyancer to shift the legal estate from one to another by mere words, in a way which ill accorded with the common law, but is excellently adapted to the increased opulence of the country. It, however, also gave legal effect to modifications of property which were repugnant to the common law, but are admirably suited to the varying wants and wishes of mankind. It has, moreover, had the beneficial operation of introducing an unrivaled code of equitable jurisprudence, which every admirer of the law of real property must wish forever to remain sacred and unconfounded with the strict rules of law. In comparing what the statute was intended to perform with what it actually has performed, one can hardly doubt that almost any other legislative measure which opposed the confirmed habits of the people in disposing of their property would have led to the same results. This should operate as a lesson to the legislature not vainly to oppose the current of general opinion; for, although diverted for a time, it will ultimately regain its old channel in spite of accumulated acts of parliament, which become a dead

letter, and have a strong tendency to bring the most wholesome laws into disrepute." I repeat, therefore, that powers were not created by the statute of uses, but as they existed in England they depended for their efficacy upon the statute, because, and only because, by means of that statute they were relieved from the restrictions upon alienation which existed at common law; and, of course, where these restrictions do not exist, no statute is needed to give efficacy to powers. It is not a matter of interest to inquire whether everything could be done here under a power which could have been accomplished in England after the statute of uses. Doubtless the use of powers is subject to the restrictions which exist in this state upon conveyancing, and in this case to all limitations upon testamentary disposition of property. The direction in this will is to convey to ascertained persons, upon the expiration of a lawful trust, definite and fixed interests in the estate which had been the subject of the trust. The estates to be conveyed were present estates in fee simple. No reason occurs to me why such a power should be held invalid.

I do not deem it necessary to discuss at length the assumed implication from the authority given the executors in paragraph 17 to sell property. That cannot affect my argument that the testator intended to confer upon his executors a power in trust. If the estate in fee did pass to the executors to enable them to sell, surely the power ended upon the death of the surviving child, and then the estate of the trustees would necessarily end. There is nothing inconsistent in regarding them as trustees for the purposes of the lawful trust, and donees of a power to convey the property when the trust estate ends. I have only to add that I still concur with Mr. Justice HARRISON in the view that the will may also be maintained as a direct devise, if powers do not exist in this state.

HARRISON, J. I dissent from the order of affirmance upon the grounds stated in the opinion given by me at the former hearing of the cause. I also concur in the foregoing opinion of Mr. Justice TEMPLE.

BEATTY, C. J. (dissenting). A careful consideration of the arguments advanced upon the rehearing of this case has convinced me that the opinion which I formerly expressed requires modification, and especially that my conclusion that the intent of the testator might be given effect as a direct devise of the remainder cannot be sustained upon the concession that the only means chosen by him for effecting the transfer was unlawful. There are decisions which sustain, and others which in their expressions seem to sustain, such a conclusion; but I am satisfied that the weight of authority is the other way, and that, when-

ever it appears that a testator has attempted to transfer his estate by a method clearly unlawful, the attempt must fail. His lawful intention cannot be carried into effect by disregarding the unlawful means chosen by him for its accomplishment. It therefore becomes essential for me, in order to reach a conclusion in the case, to determine the question which in my former opinion was treated as unimportant. That question, as it presents itself to my mind, may be stated thus: If in the creation of a valid testamentary trust the testator directs and empowers his trustees upon the termination of the trust to convey the remainder, is that an unlawful means of transferring the property to the objects of his bounty? A trust to convey is, of course, forbidden by statute; and, if the will of Senator Fair attempts to create a trust to convey, it must, at least to that extent, fail. If his grandchildren and brothers and sisters can take only through the medium of such unlawful trust, they cannot take at all. But to me it seems a misuse of terms to say that this is a trust to convey. It is a perfectly valid trust for other purposes and for a lawful term. The conveyance which the trustees are directed to make at the termination of the trust is a mere incident. I still adhere to my original opinion that although, upon its more obvious construction, the will was designed to create an invalid trust to convey, in addition to the valid trust or trusts, it is nevertheless susceptible of a construction more favorable to testacy, which for that reason it is our duty to adopt. I still think it can be construed as a devise to the trustees of a life estate only, with an added power to convey the remainder; and I am not shaken in this opinion by the argument so much insisted upon in the opinion of the court,—that an estate in fee in the trustees was essential to enable them to carry out the evident purposes of the testator. If he could create a lawful power to convey, as distinct from a trust to convey, the trustees could, under such power, not only transfer and convey the remainder to the grandchildren and brothers and sisters, but they could also sell and convey, and reinvest the proceeds of, any of the property embraced in the trust, as by one clause of the will they were authorized and empowered to do. In *Morffew v. Railroad Co.*, 107 Cal. 587, 40 Pac. 810, it was held by this court that the donee of a testamentary power could make an effectual conveyance of an estate in which she had no interest. It is true that the power in that case would have been lawful as a trust, and the case is only cited to prove that this court has heretofore approved the doctrine—which it would seem difficult to deny—that an estate may be conveyed under a power as effectively as by a trustee in whom the estate is vested. It only remains, therefore, to inquire whether, under the laws of California, it is com-

petent for the creator of a trust, whether by will or deed, to empower his trustee, at the expiration of the trust term, and upon the completion of his trust duties, to transfer and convey the property to the person or persons to whom the grantor or testator desires it to go. Unless such power is denied or forbidden by positive law, there is no conceivable reason why it should be held unlawful. It contravenes no policy declared or implied in any of the statutory law of the state, and is sanctioned by the most elementary principles of the common law. It is one mode, and a perfectly natural, just, and unobjectionable mode, of doing what is expressly authorized by section 864 of the Civil Code, with reference to which I can only repeat what I said in my former opinion. Upon these grounds, I dissent from the judgment of affirmance.

against the Market Street Railway Company and others. From a judgment dismissing the action, the plaintiffs appeal. Affirmed.

Tirey L. Ford, Atty. Gen., and Geo. A. Sturtevant, Dep. Atty. Gen. (N. Blockstock, of counsel), for appellants. Wm. F. Herrin (John Garber, of counsel), for respondents.

COOPER, C. This is an application by the board of railroad commissioners of the state of California for a writ of mandate to compel the defendant corporation to produce to the plaintiffs, and to permit plaintiffs to examine, the books, records, and papers of said corporation. The court below refused the writ, and ordered the action dismissed, and judgment was accordingly entered. This appeal is from the judgment. The question to be here determined is as to whether or not the defendant corporation is subject to the supervision of plaintiffs, under the provisions of an act of the legislature entitled "An act to organize and define the powers of the board of railroad commissioners," approved April 15, 1880 (St. 1880, p. 45). The constitution provides for and defines the duties and jurisdiction of the railroad commissioners. Article 12, § 22. The language is: "The state shall be divided into three districts as nearly equal in population as practicable, in each of which one railroad commissioner shall be elected. * * * Said commissioners shall have the power and it shall be their duty to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies." Do the words, "railroad and other transportation companies," include a street-railway company in a municipality engaged in the business of carrying passengers on street-railroad cars? In order to correctly determine this question, we must look to the words used, the context, the object in view, and the evils that were intended to be remedied. In this manner we should, if possible, arrive at the intention of the convention in using the words, and give to them the same meaning and effect as was intended by the people through their representatives in framing the constitution.

It is a matter of common knowledge that among the evils, or supposed evils, under which the people of the state were suffering, and for which they demanded redress, was that of exorbitant and discriminating charges by railroad corporations engaged in transportation of freight and passengers. The political agitation of the times resulted in calling a constitutional convention, and the people, through their representatives, framing the present constitution, in 1879, which was afterwards, in the same year, adopted by the people by the expression of their will at the ballot box. The constitution in no place mentions street-railroad corporations, although there were many such corporations in existence at the time it was framed. The

(132 Cal. 677)

**BOARD OF RAILROAD COM'RS OF STATE
OF CALIFORNIA et al. v. MARKET
ST. RY. CO. et al. (S. F. 2,034.)**

(Supreme Court of California. May 15, 1901.)
**STREET RAILROADS—RAILROAD COMMISSION—
JURISDICTION—CONSTITUTIONAL
INTERPRETATION.**

1. Const. art. 12, § 22, defining the judgment and jurisdiction of the railroad commission, and authorizing it to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies, does not give the commission jurisdiction and control over street-railroad companies, since such companies are not railroad or transportation companies, within the meaning of the act.

2. A legislative interpretation of a constitutional provision contemporaneous with its adoption may be considered by the courts in an interpretation of a doubtful provision thereof.

Temple, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Application for a writ of mandate by the board of railroad commissioners and others

Civil Code of the state, at the time, in title 3, §§ 454-491, contained many provisions in regard to "railroad corporations," and in title 4, §§ 497-511, treated of and provided for "street-railroad corporations." Those sections of the Code so treating railroad corporations and street-railroad corporations, under separate and distinct titles, had long been a part of the law of the state. Therefore we must presume that the convention, in which there were many lawyers of ability, knew that the two classes of corporations had long been known by the legal profession, and treated by the people through their legislatures as separate and distinct,—the one being engaged in the commercial business of carrying freight and passengers over the quasi public ways from one part of the state to another; the other, in carrying passengers only in the larger municipalities of the state; the one obtaining its franchise from the state, the other, from the municipal authorities of the town or city in which it was carrying on its business. It is therefore a significant fact that no mention is made in the constitution of "street-railway corporations," and we cannot resist the conclusion that such omission was not unintentional. There was no public demand for the regulation of fares of street railways in municipalities. The convention consisted of delegates chosen from all parts of the state. In the section of the constitution quoted the power is given to establish rates for passengers and freight. And it is further provided that "the rates of fares and freights" established by the said commission shall be conclusively deemed just and reasonable. It is further provided, in section 23 of the same article, that the state shall be divided into three "railroad districts," naming the counties in each district. This is consistent with the idea that the entire people of the state were interested in the great corporations engaged in the carrying of freight and passengers from one portion of the state to another, or from sister states into or through the state.

It is inconsistent with the idea that the entire people of the state were interested in the rates for carrying passengers within the corporate limits of a town or municipality. It was the policy of the constitution that such matters as concerned the inhabitants of a particular subdivision of the state or county should be governed as far as practicable by local laws. That the people of the state, through their representatives, understood the said sections of the constitution not to apply to street-railroad corporations, is apparent from the contemporaneous construction given to them by the legislature in the act providing for the organization and defining the powers of the railroad commission, approved April 15, 1880, before cited. This act was passed for the purpose of providing machinery to carry into effect the constitutional provision creating the railroad commission. It was passed at the first meeting of the legis-

lature after the constitution was adopted, and by the representatives of the people who had been elected for the purpose of providing for carrying it into effect. In this act it is provided in section 14: "The term 'transportation companies' shall be deemed to mean and include—First. All companies owning and operating railroads (other than street railroads) within this state. Second. All companies owning and operating steamships engaged in the transportation of freight or passengers from and to ports within this state. Third. All companies owning and operating steamboats used in transporting freight or passengers upon the rivers or inland waters of this state."

It will thus be seen that street railroads are expressly excepted from the act. While the interpretation given to the act by the legislature is not controlling upon this court as to the meaning of a provision of the constitution, yet, where it is doubtful, the courts may, very properly, look to the contemporaneous interpretation given such provision, either by the legislature or the courts. Particularly is this the case where that interpretation has been upon the statute books unchallenged for 20 years. The interpretation placed upon the constitution by the legislature of 1880 has ever since been acquiesced in, and legislation has been in accord with such interpretation. Thus, the legislature by an act approved March 23, 1893 (St. 1893, p. 288), made provision, among other things, for granting of franchises to operate railroads along public streets and highways by the board of supervisors or common council, only after public notice by advertising in one or more daily newspapers and then to the highest bidder. Again, on March 13, 1897 (St. 1897, p. 135), it was enacted that a franchise to construct or operate street railroads, except steam railroads, upon any public street or highway, shall be granted by the governing or legislative body of the city or town, only after public notice by advertising, as provided in said act, to the highest bidder, for a stated per cent. of the gross annual receipts, which shall in no case be less than three per cent. of such receipts. Thus, under the interpretation given to the act, and as it always appears to have been interpreted by the legislature, franchises for street railroads have been granted and rights have accrued. In the case of *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115, the constitutional objection was made that the judges of the supreme court had no right to sit as circuit judges, not being appointed as such, nor having commissions for that purpose. In passing upon the question the supreme court of the United States said: "To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is

a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." In *End. Interp. St.* § 527, it is said: "The greatest deference is shown by the courts to the interpretation put upon the constitution by the legislature, in the enactment of laws and other practical application of constitutional provisions to the legislative business, when that interpretation has had the silent acquiescence of the people, including the legal profession and the judiciary, and especially when injurious results would follow the disturbing of it. The deference due to such legislative exposition is said to be all the more signal when the latter is made almost contemporaneously with the establishment of the constitution, and may be supposed to result from the same views of policy and modes of reasoning that prevailed among the framers of the instrument thus expounded." This court said in *Re Warfield's Will*, 22 Cal. 71, 83 Am. Dec. 58: "Courts feel themselves constrained to uphold, where it is possible, contemporaneous interpretation of statutes, under which interpretation rights of property have for many years been acquired." In the case of *Manufacturing Co. v. Ferguson*, 113 U. S. 733, 5 Sup. Ct. 741, 28 L. Ed. 1138, in speaking of an act of the legislature as interpreting a provision of the constitution of Colorado, the court said: "The act was passed by the first legislature that assembled after the adoption of the constitution, and has been allowed to remain upon the statute book to the present time. It must, therefore, be considered as a contemporary interpretation entitled to much weight."

But, independent of the contemporaneous interpretation so given to the constitution by the legislature, we think the interpretation correct, and that the words "railroad company" were not intended to mean street railway. In the ordinary acceptance of the term "railroad company" or "railroad," it is not understood to mean a street railway engaged in the business of carrying passengers the entire distance, or any part of the distance, over which the road runs, for one and the same fare. In the late case of *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023, this court had under consideration a provision of the constitution of Kansas exempting from statutory liability the stockholders of railroad corporations, and it was held that the provision did not extend to stockholders of the Electric Rapid-Transit Company, which was a street-railway corporation. In the opinion it is said: "It is not so easy to believe that the purpose of that constitution was to exempt from liability the stockholders of street railways, which are designed merely to facilitate travel and communication upon the public highways of a municipality. * * * In this state the difficulty is much relieved by the distinction which our

Codes make between railroad corporations proper and street-railroad corporations. This consideration, however, is entitled to weight, * * * and we therefore conclude that the provision of the constitution of Kansas was not designed to apply to stockholders of street-railroad corporations." In *Gyger v. Railway Co.*, 136 Pa. 96, 20 Atl. 399, it was held by the supreme court of Pennsylvania that section 4, art. 17, of the constitution of the state, providing that "no railroad, canal, or other corporation * * * shall consolidate * * * with or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning * * * a parallel or competing line," is not applicable to street-railway companies. In the opinion it is said: "It is perfectly clear that the convention did not regard the word 'railroad' as synonymous with 'railway' or 'street passenger railway' when this section of the article was framed." In *Louisville & P. R. Co. v. Louisville City Ry. Co.*, 2 Duv. 175, it was held by the court of appeals of Kentucky that a provision in a railroad charter that no other railroad should be constructed between two named points in a city did not prohibit the construction of street railways. In the opinion the court said: "A railroad is for the use of the universal public, in the transportation of all persons, baggage, and other freight; a street railway is dedicated to the more limited use of the local public, for the more transient transportation of persons only and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad." In *Bloxham v. Railroad Co.*, 36 Fla. 539, 18 South. 446, 29 L. R. A. 509, it is said: "The word 'railroad,' as generally used, applies to commercial railways engaged in the transportation of freight and passengers for long distances, and, as a general rule, having steam engines for motive power, and making stops at regular stations for the receipt and discharge of freight and passengers. The term 'street railroad' applies only to such roads the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public are not excluded from the street as a public highway, which runs at a moderate rate of speed compared with commercial railroads, which carries no freight, but only passengers from one part of a thickly-populated district to another in a town or city and its suburbs." In *Trust Co. v. Douglas*, 104 Iowa, 536, 73 N. W. 1040, in a very late case it is said: "The words 'railroad' and 'railway' may undoubtedly be so used as to mean a street railway, but by popular usage, when used without qualifying words, they are understood to refer to commercial railways; the word 'street' being almost invariably used in connection with 'railway' to designate a street railway." The same has been substantially held in other states in the discussion of the various uses of the

words "railroad" and "street railway." Funk v. Railway Co., 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208; Sears v. Railway Co. (Iowa) 23 N. W. 150; Railway Co. v. Johnson (Wash.) 25 Pac. 1084, 11 L. R. A. 693. And the same rule has been laid down in the federal courts. Manhattan Trust Co. v. Sioux City Cable R. Co. (C. C.) 68 Fed. 82; Trust Co. v. Hamilton, 32 C. C. A. 46, 88 Fed. 588; 1 Foote & E. Incorp. Co. p. 668, note 5.

It is claimed that the words, "other transportation companies," include street-railway companies. We think, by reference to the context and other sections of the same article, it clearly appears that the words refer to transportation companies engaged in the business of common carriers of freight and passengers. The section refers to and speaks of "the rates of fares and freight" established by the commission. And in section 21 of the same article it is provided: "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state." In section 20 reference is made to the consequences of lowering rates "for transportation of passengers or freight from one point to another." Companies engaged in draying, running freight wagons, delivery wagons, delivering parcels, teaming, or running elevators, are engaged in the business of "transportation," but it surely could not be contended that they are subject to the jurisdiction of the "railroad commission." The people of the state would not have agreed to pay the salaries and expenses of the railroad commissioners selected from different geographical sections of the state for the purpose of regulating the charges of the "United Carriage Company" of San Francisco. Yet it is a transportation company. It clearly is not a transportation company whose "fares and freights" are subject to regulation by the railroad commissioners of the state. It follows that the judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

TEMPLE, J. (dissenting). This is an appeal from a judgment refusing a mandate to compel the corporate defendant to produce for the inspection of the plaintiffs its books, records, and other papers. The plaintiffs claim the right to inspect said records under their authority as railroad commissioners conferred by section 22, art. 12, of the state constitution. They do not contend that any such power is given by the act of the legislature defining the powers of the board passed April 15, 1880. Section 22, art. 12, provides

for the formation of the districts, each to elect one commissioner, the commissioners to be qualified electors of the district, and not interested in any railroad corporation or other transportation company; and then said commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such changes as they may make; to examine the books, records, and papers of all railroad and other transportation companies; and for this purpose they shall have power to issue subpoenas and all other necessary process; to hear and determine complaints against railroad and other transportation companies; to send for persons and papers; to administer oaths, take testimony, and punish for contempt of their orders and processes in the same manner and to the same extent as courts of record, and enforce their decisions and correct abuses through the medium of the courts. Said commissioners shall prescribe a uniform system of accounts to be kept by all such corporations and companies. Any railroad or transportation company which shall fail or refuse to conform to such rates as shall be established by such commissioners, or shall charge rates in excess thereof, or shall fail to keep their accounts in accordance with the system prescribed by the commission, shall be fined, etc. It was further declared that the legislature may confer such further power on the commissioners as shall be necessary to enable them to perform the duties enjoined upon them by the constitution.

The question here is whether the jurisdiction of the commissioners, as thus defined, extends to street railroads. That the phrase, "railroad and other transportation companies," does include street railroads in its natural and most obvious sense, and also by common usage of the words, is not and cannot be denied. The phrase is repeated five times in the section, and nowhere is there a suggestion that anything comprehended in the phrase is to be excluded, and the constant repetition of the more extensive accompanying term, as though fearing and desiring to forestall an adverse construction which might limit the usefulness of the commission, is significant of a determination that there should be no doubt as to the extent of the power of the board. The five preceding sections of the article are upon the same general subject, and each contains the same or an equivalent phrase. The slight change in verbiage, while still showing an effort to comprehend all engaged in the transportation business, makes that effort still more evident. In section 17, all railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control. Certainly this may well apply to street railroads. Section 18 prohibits the officers and employes of railroads and canal

companies from being interested personally in certain affairs of such companies. No reason is perceivable why this should not apply to street railroads. It includes them as railroads. Section 19 prohibits free passes to certain officials by railroads or other transportation companies. It has always been supposed that this provision applies to street railroads. Section 20 declares that no railroad company or other common carrier shall combine, etc. The phrase "other common carrier" is used instead of "other transportation companies," and is a phrase of similar import and as comprehensive. In section 21 it is provided that no discrimination shall be made by "any railroad or other transportation company." The phrase, as already stated, clearly includes within the plain and unambiguous meaning of the words "street railroads." No reason has been suggested why it should not be held to apply to them. This section is expressly referred to in section 22, and the board is expressly enjoined to enforce its provisions. If it applies to street railroads the power of the commissioners must be held to extend to them.

And so of the use of the words in all of these sections. In the nature of things, some of the rules laid down could not apply to all such companies; such, for instance, as the right given to railroad companies to make connections in certain cases, as provided in section 17. Such is the case with nearly every general law applicable to a variety of subjects. Particular provisions apply only to matters which come within their special scope, and that some provisions cannot apply to all furnishes no argument for the contention that the entire law is limited to these special matters to which they apply. Street railroads come clearly within the usual and ordinary import of the terms used. There can be no doubt as to the meaning of the words, and the constitution will be searched in vain for a qualification or limitation of the terms. "If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L. Ed. 97. Street railroads are not specially mentioned, because included in the general language. If it were not intended to include them they should have been mentioned, as they were in the act of 1880 (St. 1880, p. 45). Written laws will lose their usefulness, if unequivocal terms in them can be limited to what courts may think ought to have been included.

It is said that to give the words, "and other transportation companies," any meaning whatever will lead to absurd consequences, and one must limit the term, so far as railroads are concerned, to a particular species of them, to wit, what counsel call commercial railroads, and it is said if these words mean anything there was no occasion to mention railroads at all, as they are also transportation companies. By what rule of

construction are these words, repeated in section 22 five times, and in article 12 many times more, to have no effect whatever? If the words serve no other purpose, they demonstrate that the jurisdiction of the commission was not to be confined to commercial railroads, although they were thought to be the principal offenders. Their use should conclude this question. Such repetitions are quite common in statutes, going from the less to the more comprehensive. The words, "lands, tenements, and hereditaments," are often used together, although the last includes both the others.

To give these words any meaning, it is suggested, will bring under the control of the commission elevators, hacks, etc. If that be so, it will be time enough to so construe the law when a case of that kind shall arise. The question now is as to street railroads. Elevators make no charges, and hacks have always been under municipal supervision, and have not generally been owned by companies. There are reasons why the commission should not control them which do not apply to street railroads. Telegraph companies do not, in their usual acceptance of the term, carry freight or passengers. Perhaps the terms may be limited to companies which were popularly considered transportation companies when the constitution was adopted. Street-railroad companies were then, as now, so considered, and up to that time the limit of charges on street railroads had been fixed by the legislature, and not by the municipalities.

The constant repetition of the words "other transportation companies," in connection with the word "railroad," takes all force from the argument that in the popular usage the word "railroad" refers only to commercial railroads; and here, again, the use and necessity of the words is shown. Upon this subject it is only necessary to make an extract from a well-considered opinion by Judge Hawley (*Trust Co. v. Hamilton*, 32 C. C. A. 46, 88 Fed. 588): "The words 'railroad' and 'railway' are synonymous, and, under all ordinary circumstances, they are to be treated as without distinction of meaning. As said by Justice Green in *Gyger v. Railway Co.*, 136 Pa. 96, 20 Atl. 399: 'When either one or the other of these words is used in a statute, and the context requires that a particular kind of road is intended, that kind of a road will be held to be the subject of the statutory provisions; but if the context contains no such direction, and either of the words is used in describing the subject-matter, the statute will be held applicable to everything which is embraced within the general sense of the words used,' etc. (citing authorities). But if the provision were conceded to be unreasonable, and to lead to absurd or unjust consequences, still if it is clear, unambiguous, and its terms are not capable of some other meaning, and no suggestion of a limitation can be found in the

context, we could not set up our own ideas of policy against the clearly-expressed sovereign will.

The argument here is simply that the only meaning which can be given to the language cannot be allowed, because it leads to absurd results. Cooley says, in his work on Constitutional Limitations (page 87): "Such provisions, when free from doubt, must receive the same construction as any other. I do not say, however, that, if a clause should be found in a constitution which should appear at first blush to demand a construction leading to monstrous and absurd consequences, it might not be the duty of the court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the general purposes and aim of these instruments." The language found in constitutional provisions is naturally more general than that used in statutes. The constitution only creates a government by outlines. It calls into being governmental departments, declares their functions in the most general terms, and in the same way imposes restrictions. The legislature is expected to supply details and to put the scheme into operation. A statute providing for the incorporation of railroad companies, or providing rules for running railroads, might well be expected to deal separately with steam and with street railroads. In regard to these matters there are essential differences, which might suggest that when treating specifically of street railroads they would be named as such. I am not contending that as to such matters general terms, even when not ambiguous, may not be limited by the context. Doubtless even a constitutional provision could be so limited. Here not only is there nothing in the context from which a limitation can be inferred, but extraordinary pains have been taken to prevent such a construction by the careful iteration of the enlarging phrase, whenever the word "railroad" is so used that a restriction could be asserted.

But it is said section 22, art. 12, has received a practical and contemporaneous construction by the act to organize and define the powers of the board of railroad commissioners, passed April 15, 1880. The act provides for the organization of the board, and that its members and employes, when in performance of their official duties, shall be carried free over all railroads, steamboats, etc., and in all vehicles employed in or by any railroad or other transportation company, etc.; and in section 14 that the term "transportation companies" shall be deemed to mean and include, "first, all other companies owning and operating railroads (other than street railroads) within this state." Contemporaneous construction can have no weight whatever where there is no doubt or ambiguity in the terms used, and none arises by implication from the context. This is clearly laid down by Cooley, Const. Lim. p. 80, et seq.

The authorities are carefully collected and elaborately discussed in *Morris v. Wrightson*, 56 N. J. Law, 126, 28 Atl. 56, 22 L. R. A. 548. It would serve no useful purpose to go over that subject, especially as I think there has been no contemporaneous or practical construction of this constitutional provision.

If the declaration that the phrase, "other transportation companies," includes all railroads except street railroads, was intended as a declaration of the meaning of the constitution, and not as a restriction upon the operation of the statute, then it was a usurpation of judicial powers. We cannot attribute such motive to the legislature, especially as the presumption is all but conclusive that the motive was merely to limit the operation of the law. There was reason for this, if the phrase in the constitution would otherwise have been construed to include street railroads. If the contrary was the natural construction, there would have been no occasion for this express restriction as to the operation of the statute. This limitation has its excuse, if it was merely intended to limit the right to free passes to railroads other than street railroads.

But the probability is that the legislature did intend to limit the action of the board by this provision. Still the presumption is conclusive, as I think, that it was not an attempt to declare the meaning of the constitutional provision. Section 22 defines with minuteness many powers which are thereby conferred upon the commissioners. No one would contend that the legislature could limit these express grants of power. The section further declares that the legislature "may confer such further powers on the commissioners as shall be necessary to enable them to perform the duties enjoined on them in this and the foregoing section." All that could be justly concluded, then, is that the legislature restricted the additional powers by them granted the commissioners to transportation companies other than street railroads. This, perhaps, they could do; more, they certainly could not. This would not be a construction of the constitution, unless the implication would be that but for the provision street railroads would be included.

But for another reason the act cannot be deemed a practical construction of section 22. The legislation did not depend for its validity upon the supposed meaning attributed to the language of section 22. If the language of the statute merely limited the operation of the statute, operating under it could not amount to a practical construction. To illustrate: In *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115, the right of the justices of the supreme court of the United States to sit as circuit judges was called in question. An act of congress expressly authorized them so to do, and for a series of years the circuit court had been so held. The constitution was silent upon the subject. The court treated the question as though it was simply

whether the justices should be specially appointed and commissioned as circuit judges. The practical construction here consisted of the fact that, if the contention were sustained, the practice for years had been illegal, and many judgments of the circuit courts were void. No such consequence would follow here. Whichever construction is adopted, the validity of no act of the commissioners will be affected. I think a similar comparison could be made with every case cited by respondents upon this point.

132 Cal. 666

In re MARTI'S ESTATE.

MARTI v. ANDERSON et al. (S. F. 1,872.)
(Supreme Court of California. May 11, 1901.)

In bank. On rehearing. Reversed.

For former opinion in department, see 61 Pac. 964.

HARRISON, J. The appeal herein was originally heard in department 1, and an opinion filed therein, upon which an order was made reversing the judgment of the superior court. 61 Pac. 964. Upon the petition of the respondents a rehearing was granted, and the cause was afterwards argued before the court in bank. The opinion rendered in department is now adopted by the court in bank, and, for the reasons therein stated, the judgment is reversed, and the superior court is directed to enter a decree distributing the entire residue of the estate to the appellant.

We concur: McFARLAND, J.; VAN DYKE, J.; GAROUTTE, J.

132 Cal. 453

UNION SAV. BANK v. BARRETT. (S. F. 2,580.)

(Supreme Court of California. May 11, 1901.)

ACTION—ABATEMENT—PERSONAL REPRESENTATIVE—JURISDICTION.

Code Civ. Proc. § 385, provides that an action does not abate by the death of a party if the cause of action survives. *Held*, that the fact that defendant in an action to foreclose a mortgage died more than a year after the commencement of the action, and before the service of summons on her, did not prevent the court from acquiring jurisdiction of her personal representative, since the cause of action did not abate, and the court had implied power to order a new summons to bring in the new party.

In bank. On rehearing. Denied.
For former opinion, see 64 Pac. 713.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (concurring). In their petition for a rehearing counsel for appellant complain that the real grounds of their appeal have not been considered in the opinion affirming the judgment. The two propositions to which their argument was address-

ed may be stated as follows: First. That, the court never having acquired jurisdiction of Nellie Ryan, and she having died more than a year after the commencement of the action, it had become legally impossible for the court to acquire jurisdiction of her executrix; and, if so, second, that her executrix had no right or authority, by a voluntary appearance in the action, to revive against the estate a claim legally extinct. It is true that these propositions are not met by the department opinion, but I think the first—which is essential to the appellant's case—is unsound. If the action did not abate on the death of Nellie Ryan, as clearly it did not (Code Civ. Proc. § 385), the power expressly conferred upon the court to continue the proceeding against her personal representative, carried with it an implied power to order a new summons to bring in the new party. If this is a correct view of the first proposition, the second need not be considered. I concur in the order denying a rehearing.

132 Cal. 673

LAND v. CLARK. (Sac. 818.)

(Supreme Court of California. May 11, 1901.)

ELECTIONS—STATEMENT OF EXPENSES—FORFEITURE OF OFFICE.

Purity of Elections Act (St. 1893, p. 15) section 4, declares that one elected to an office shall forfeit it if he neglects to file a statement of election expenses, as prescribed by section 3, which provides that he shall give an itemized statement, showing in detail all moneys expended by him in aid of his election, giving the names of persons to whom such moneys were paid, and the specific nature of each item; and section 13 provides that on the trial under the act of the right to an office, if it appear that the offenses complained of were trivial, unimportant, and limited in character, the candidate shall not be deprived of his office by reason thereof. *Held*, that an election was not rendered void by the candidate putting down as a single item, "Sundries and incidentals, \$22.65;" the statute providing that the candidate may expend \$100 for necessary incidentals, and dispensing with vouchers for expenditures in amounts less than \$5.

In bank. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by William Land against George H. Clark. From an adverse order, plaintiff appeals. Affirmed.

Holl & Dunn, for appellant. Chas. T. Jones, Hiram W. Johnson, and Albert M. Johnson, for respondent.

GAROUTTE, J. Defendant was elected to the office of mayor of the city of Sacramento, and plaintiff was his predecessor in office. When the time arrived for defendant to take possession of his office, plaintiff refused to give him possession, and this litigation thereupon arose. The action is in the nature of a proceeding in injunction, and many questions of law are raised upon this appeal. But the court only finds it necessary to consider a single one of these ques-

tions. Plaintiff relies upon various provisions of the purity of elections act to support his conduct in declining to give the office to his successor, Clark, and especially upon section 4 of the act (St. 1893, p. 15). Among other matters, that section provides: "Any candidate for a public office who shall refuse or neglect to file, or who makes a false statement of moneys received or expended, as prescribed by section 3 of this act, shall in addition to the punishment for such offense prescribed by the laws of this state, forfeit any office to which he may have been elected at the election with reference to which this statement is required to be made. If a candidate elected to a public office refuses or neglects to file the statement prescribed by section 3 of this act, * * * the incumbent of the office, unless he is himself a defaulting candidate, must not surrender or deliver up said office, but shall continue to discharge the duties, and shall receive the emoluments thereof." Plaintiff, resting upon the authority which he claims is found in this section, declined to give up the office, and now declares that defendant refused and neglected to file the statement of moneys expended as required by the section aforesaid, and for that reason he alleges that defendant forfeited his right to the office, and that he (plaintiff), as the present incumbent, is entitled to continue in the discharge of its duties. Does the statement filed by defendant substantially comply with the law? If it does, the whole case against him falls to the ground, and the consideration of other questions is not demanded. Section 3 of the act declares that the statement filed shall be "an itemized statement showing in detail all moneys paid, loaned, contributed, or otherwise furnished to him, or for his use, directly or indirectly, in aid of his election, and all moneys contributed, loaned or expended by him directly or indirectly, by himself or through any other person, in aid of his election. Such statement shall give the names of the various persons who paid, loaned, contributed or otherwise furnished such moneys in aid of his election, and the names of the various persons to whom such moneys were contributed, loaned or paid, the specific nature of each item, the service performed, and by whom performed, and the purpose for which the money was expended, contributed or loaned." Let us test the statement filed by these requirements of the law, and in doing so our attention will only be directed to those items contested by plaintiff. Under the head of "Receipts" the statement says, "No money received." This declaration goes even beyond the demands of the statute. The statute only contemplates a record of affirmative matters. It does not contemplate negative declarations. And, if no moneys had been received by the defendant, either directly or indirectly, no mention of that fact need be included in the statement. The purity of

elections act is not concerned in things the candidate did not do, but only in those things he did do. Under the head of "Expenditures" we find the item of \$200 contributed to the Republican city central committee for campaign purposes. We have in this statement the nature and amount of the items, to whom contributed, and the purpose for which it was contributed. A contribution to the regularly constituted committee of a political party for campaign purposes is allowable, and perfectly proper, under the law; and, the money being given for campaign purposes, it will be assumed it was to be expended in a legitimate and lawful way. A statement of the candidate, showing such a contribution, is in substantial compliance with the law. The remaining item to which objection is made is one of "Sundries and incidentals, \$22.65." The statute provides that the candidate may expend an amount not exceeding \$100 for necessary incidental expenses; and it also further provides that vouchers are not required for expenditures in amounts less than \$5. This act should receive a construction, if possible, which will not render it an absurdity; and to declare this statement filed by the candidate, by reason of this last aforesaid entry, to be violative of the law in substance, and thus invalidate the election, would have that effect. To the honest, conscientious candidate a literal rendition of the statement required by law, accompanied by the oath also required, is difficult indeed. But as to the rendition of the statement by the candidate not honest, and not conscientious, the law presents no difficulties. As to items of money so small as not to demand a voucher, and coming under the head of incidental expenditures, possibly it might be held that the provisions of the law requiring the statement to set forth a history in detail of expenditures does not apply; but it is unnecessary to so hold here. For the court to annul the election of a mayor of the city of Sacramento by reason of a defect in a single item in his statement of expenditures, that item being of the character above described, would be to give the law a construction which might well be termed "sticking in the bark." The act does not contemplate that kind of a construction. Its tenor and spirit is opposed to it. By section 13 thereof, among other matters, it is provided: "Where, upon the trial of any action or proceeding under the provisions of this act for the contesting of the right of any person declared elected to an office, or to annul or set aside such election, or to remove a person from his office, it appears from the evidence * * * that the offenses complained of were trivial, unimportant, and limited in character, * * * and in any case did not arise from any want of good faith, and under the circumstances it seems to the court to be just that the said candidate should not forfeit his office, * * * then the election of such candidate shall not,

by reason of such offense or omission complained of, be void, nor shall the candidate be removed from or deprived of his office." It thus appears that the trial court is vested with a large discretion in these matters, and successful candidates are not to forfeit their offices merely for technical violations of the act. This case was heard upon affidavits. The statement of the candidate was attached as an exhibit to one of these affidavits. By its face the trial court was entitled to say, and should have said, this defect in the statement, if it be a defect, is trivial, and unimportant, and did not arise from any want of good faith. For the foregoing reasons, the order is affirmed.

We concur: MCFARLAND, J.; VAN DYKE, J.; HENSHAW, J.; TEMPLE, J.

(132 Cal. 627)

IOWA & CALIFORNIA LAND CO. v. HOAG
et al. (L. A. 685, 686.)

(Supreme Court of California. May 9, 1901.)
FOREIGN TRUSTEE—MORTGAGE SECURITY—
RIGHT TO FORECLOSE—COMITY BETWEEN
STATES—HOLDER OF LEGAL TITLE.

1. Where an Iowa court appoints a trustee in place of one created by articles of trust securing the debenture bonds of an insolvent Iowa corporation, and empowers him to collect the mortgage securities constituting the trust, such trustee may sue in a California court to foreclose such a mortgage, through the comity extended to a sister state, though Iowa courts have denied a like privilege to the same officers appointed by courts of other states.

2. Where the assignee for the benefit of creditors of an Iowa corporation has transferred the corporation's remaining title and interest in mortgage securities, deposited in trust to secure its debenture bonds, to a trustee appointed by an Iowa court in lieu of the original trustee, such trustee may sue in a California court to foreclose such a mortgage as the holder of the legal title to the security by virtue of such transfer.

In bank. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Opinion in department (62 Pac. 189) reversed, and opinion of trial court affirmed.

Charles R. Gray, for appellants. E. W. Freeman, Rolfe & Rolfe, and W. J. Hunsaker (Joseph H. Call, of counsel), for respondent.

HENSHAW, J. These actions were both actions to foreclose mortgages executed by the defendants to secure their promissory notes. The notes and the securities passed by sundry transfers and assignments to this plaintiff. The questions involved upon these appeals are identical, and the cases may therefore be considered and decided together.

The defendants executed their promissory notes, secured by mortgages, upon lands in California, to the Union Loan & Trust Company, a foreign corporation, organized under the laws of the state of Iowa. The Union

Loan & Trust Company, to secure its debenture bonds, deposited with one Garretson, as trustee, certain notes and mortgages, among which were the ones executed by these defendants. Thereafter the Union Loan & Trust Company became insolvent, and made an assignment to one Hubbard, as assignee for the benefit of its creditors, of all of its remaining right, title, and interest to the securities under the control of Garretson, trustee. Garretson in turn became insolvent, and the creditors of the Union Loan & Trust Company filed a bill in equity in the district court of the state of Iowa for the county of Woodbury, a court of general jurisdiction, setting forth these facts, and praying for the removal of Garretson, and the appointment of some fit and proper person in his place. The Iowa court rendered its decree in accordance with the prayer of its petitioners, ousting Garretson from his trusteeship, and appointing F. B. Hutchins in his place, and empowered him to use all proper means to enforce the collection of the securities so intrusted to him. Under this appointment, Hutchins, as trustee, commenced his action in the superior court of this state to foreclose these mortgages. Before commencement of this action, Hubbard, the assignee for the benefit of creditors, had assigned the notes to Hutchins. Thereafter, and during the pendency of this action in this state, certain other creditors of the Union Loan & Trust Company, and holders of the debenture bonds of that company, attacked and opposed the order and decree of the court appointing Hutchins as trustee, upon the particular ground that the court, by its order and decree, had enlarged the powers of Hutchins as trustee over and above the powers conferred by the articles of trust under which Garretson had been appointed. They pleaded that the court's order authorizing and empowering Hutchins to employ counsel and maintain suits to enforce collections of securities intrusted to him was null and void. After hearing, the district court of Iowa—the same court which had appointed Hutchins trustee—declared and adjudged that its former decree in the premises was a nullity; that Hutchins was without authority or capacity to sue; and revoked its order appointing him trustee, and in place thereof appointed him receiver of the property of the insolvent corporation, conferring upon him the powers with which such an officer is usually clothed. Hutchins then in turn sold and transferred the notes and mortgages here in question to other parties, and by mesne transfer they came into the ownership of the Iowa & California Land Company, a corporation organized under the laws of the state of Iowa. These matters having been shown to the California court by amended and supplemental pleadings, an order of substitution on behalf of the Iowa & California Land

Company in the place of Hutchins, trustee, was asked for and obtained. By this substituted plaintiff these actions were prosecuted to judgment.

The questions upon this appeal may be thus stated: (1) May a trustee, as such, commence and maintain an action in a foreign jurisdiction, or is his power and authority so to do coterminous with the jurisdiction or law to which he owes his appointment? (2) Legal titles to these choses in action having been vested in Hutchins by assignment, may he not maintain these actions by virtue of such legal title, the allegations of trusteeship so far as may be necessary being treated as mere surplusage?

1. The early rule denied to such officers any standing in a foreign court, but the courts of late, influenced by a spirit of comity, have inclined to much more liberal views, and it may fairly be said that the prevailing doctrine permits the maintenance of such actions by foreign receivers and like officers, where the rights of domestic creditors are not interfered with. *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.*, 123 N. Y. 37, 25 N. E. 198; *Comstock v. Frederickson*, 51 Minn. 350, 53 N. W. 713; *Boulware v. Davis*, 90 Ala. 207, 8 South. 84, 9 L. R. A. 601; *Winans v. Manufacturing Co.*, 48 Kan. 777, 30 Pac. 163; *Hurd v. City of Elizabeth*, 41 N. J. Law, 1; *Wilson v. Keels*, 54 S. C. 545, 32 S. E. 702; *Gilman v. Ketcham*, 84 Wis. 60, 54 N. W. 395; *Sands v. E. S. Greeley & Co.*, 31 C. C. A. 424, 88 Fed. 130; *Parker v. Mill Co.*, 91 Wis. 174, 64 N. W. 751; *Beach, Rec.* (Alderson's Ed.) § 665; *Smith, Rec.* p. 165; *High, Rec.* § 241. The modification of the rule, as has been said, rests upon the principle of comity,—a principle which the court was reluctant to apply in this particular case, by reason of the fact that the supreme court of Iowa in *Ayres v. Siebel*, 82 Iowa, 347, 47 N. W. 989, had refused to recognize the principle, and denied to a foreign trustee the right to maintain an action in its courts.

Mutuality of operation is of the essence of comity, and therefore, since a California trustee would not be permitted to maintain his action in the courts of Iowa, little reason could be perceived for the invocation of the principle of comity to permit an Iowa trustee to maintain a like action in the courts of this state. In the latter case of *Hale v. Harris*, 83 N. W. 1046, the supreme court of Iowa evinces a disposition to modify its views in this regard. But, apart from that, we think that the rule permitting the maintenance of such actions in our courts, where the rights of domestic creditors are not interfered with, is both just and reasonable, and should be enforced without distinction; and therefore regardless of the rule which may prevail in Iowa, and of the fact that the trustee in this case is a trustee under the laws of Iowa, as we are not hampered by the principle of *stare decisis*, and as the rights of domestic creditors are not involved, we

hold that he may, as matter of comity, maintain this action.

2. As has been stated, Hubbard's assignment to Hutchins of the choses in action was made before he commenced his suit in this state, so that when he instituted his action he held legal title to the property, and this title was sufficient warrant and authority for his suit. As directly in point upon this proposition may be cited the Iowa case above mentioned. *Hale v. Harris*. The defense to these actions is purely technical. The mortgages were given, the money loaned upon the security of them, and the money has not been repaid. A payment by the defendants of the amount due would exonerate them from any possible claims by other parties. As was said by this court (*Philbrook v. Superior Court*, 111 Cal. 31, 43 Pac. 402): "A defendant's right is to have a cause of action prosecuted against him by the real party in interest, but, as has been elsewhere pointed out (*Giselman v. Starr*, 106 Cal. 651, 40 Pac. 8), his concern ends when a judgment for or against the nominal plaintiff would protect him from any action upon the same demand by another, and when, as against the nominal plaintiff, he may assert all defenses and counterclaims available to him, were the claim prosecuted by the real owner." See, also, *McPherson v. Weston*, 64 Cal. 275, 30 Pac. 842; *Grant v. Heverin*, 77 Cal. 263, 18 Pac. 647, 19 Pac. 493; *Toby v. Railroad Co.*, 98 Cal. 490, 33 Pac. 550; *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611; *Greig v. Rlordan*, 99 Cal. 316, 33 Pac. 913. The judgments and orders appealed from are therefore affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN DYKE, J.; GAROUTTE, J.; HARRISON, J.; TEMPLE, J.

(132 Cal. 602)

MOORE v. GRAYSON. (S. F. 1,804).¹

(Supreme Court of California. May 4, 1901.)

APPEAL—FINDINGS—REVIEW—EVIDENCE.

1. Written admissions of a party before any controversy, as to what a contract was, outweigh his oral testimony in contradiction thereof, given after the controversy arose.

2. Findings will not be disturbed on appeal, there being a substantial conflict in the evidence.

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by Robert E. Moore against G. W. Grayson. Judgment for defendant. Plaintiff appeals. Affirmed.

Henry E. Monroe (William B. Treadwell, of counsel), for appellant. Garber, Bolt & Bishop and William Rix, for respondent.

VAN DYKE, J. The complaint alleges: That the plaintiff and defendant entered into a parol contract,—no writing or note or memorandum of the same having ever been made,

¹ Rehearing denied June 4, 1901.

—by which the defendant agreed to sell, and the plaintiff agreed to purchase, a certain tract of land in the state of Nevada, consisting of 2,445 acres, being a cattle ranch, with a certain band of horses and cattle thereon, for the sum of \$60,000. That the plaintiff, in pursuance of said contract, paid to the defendant at the time \$14,000 of the purchase price, and thereafter various sums, amounting, with the first payment, to \$59,154.47. That the defendant delivered to the plaintiff the cattle and horses, and delivered to him conveyances for about 1,200 acres of the land in question. That the land so conveyed consisted of scattered parcels, the remainder unconveyed being necessary to make a continuous tract. That the defendant subsequently refused to make further conveyances or to comply with his contract. That before the commencement of the action the plaintiff demanded a conveyance of the lands not theretofore conveyed, which demand was by the defendant refused. That thereupon the plaintiff tendered to the defendant a reconveyance of the lands theretofore conveyed to him, and offered to surrender possession thereof, and demanded of him the repayment of the sum so paid, less \$28,180, the value of the horses and cattle which he had received from the defendant, and had theretofore disposed of for that amount, which offer the defendant declined, and refused to repay said sum or any portion thereof. The answer denies specifically the allegations of the complaint; and it is contended on the part of the defendant that the transaction was made by him for and on behalf of his brother, Nathan Grayson, and that said Nathan Grayson and his son George W. Grayson, Jr., were the owners of said land constituting said stock ranch and said cattle and horses; that the proceeds of the sale of the same to the plaintiff were to be received by the defendant as the amount of the indebtedness due him from his said brother, Nathan Grayson. The judgment below went for the defendant, from which, and from an order denying a new trial, plaintiff takes this appeal.

The findings of the court below sustain the contention of the defendant that the defendant, as the agent for his brother, Nathan Grayson, entered into a parol agreement with the plaintiff by the terms of which Nathan Grayson agreed to sell to plaintiff the lands referred to, with the horses and cattle, and that said defendant in such transaction did not act for himself, but as the agent of his brother, which fact was known to the plaintiff.

The main, and in fact the only, contention on the part of the appellant is that the findings are not supported by the evidence. There are about an equal number of witnesses on each side, the material witnesses on the part of the plaintiff being the plaintiff and his wife, and on the part of the defendant the defendant and George W. Grayson, Jr., Nathan Grayson having died prior

to the trial. The plaintiff is the nephew of the defendant and of Nathan Grayson, deceased, and the cousin of his son, George W. Grayson, Jr. The appellant seeks to destroy the force of the defendant's testimony on the ground that there is a conflict between his deposition taken some time prior to the trial and his testimony at the trial. The defendant, however, at the trial, in advance, voluntarily explained discrepancies and misstatements in his deposition, which explanations seem to have been satisfactory to the judge before whom the cause was tried, and who had an opportunity of witnessing the conduct and demeanor of the defendant as a witness on the stand, and was much better prepared to determine the credibility of his testimony than the appellate court. Besides, the testimony of the plaintiff is very much weakened, if not entirely destroyed, by a letter written by him to his uncle entirely inconsistent with his testimony and theory of the agreement. The trade or sale was entered into in June, 1885, and the plaintiff thereupon immediately entered into possession of the ranch and cattle, had received conveyances for over 1,200 acres of the lands purchased, and was anxious to get conveyances for the balance, and for that purpose wrote the following letter: "Reno, Nevada, May 23, 1892. Mr. N. Grayson—Dear Sir: I sent to you a deed, and hope that you will have it filled out, and properly signed and acknowledged, and return to me, at your earliest opportunity. It is a piece of real estate that you applied for when you were in this state, and which I bought from you in 1885, but have never had a deed from you yet. I saw cousin George, your boy, some two months ago. He is quite lame yet from his smashup on the train. I don't know anything of any interest to you, as I have not been to California for some time. My family are all well at present. With kind regards, I am yours, respectfully, Robert Moore." The "piece of real estate" mentioned in this letter is one of those embraced in the sale referred to. Before this letter was produced, plaintiff, while giving his testimony, had denied that he ever told Nathan Grayson that he bought the land from him, or that he ever considered or thought so. The admissions in the letter are entirely inconsistent with the claim of the plaintiff that he bought from George W. Grayson, Sr., instead of Nathan Grayson. The written admissions of a party before any controversy has arisen, as to the meaning and effect of a contract, manifestly outweigh oral testimony in contradiction of same, given after the controversy has arisen. In *Re Irvine's Estate*, 102 Cal. 606, 36 Pac. 1013, it is said: "The rule is well established that oral testimony in contradiction of the plain terms of a written instrument, or of written admissions, should be clear, full, and precise, and that the weight to be given to any such testimony diminishes with its distance from the date of the instrument which it purports

to contradict or overcome." In this case the letter, as shown, was written May 23, 1892, and the trial of the cause in which the oral testimony was given was had in March, 1896. But, without detailing in full the testimony on the respective sides, it is sufficient to say that there was a substantial conflict, with a preponderance in favor of the defendant. Under the general rule that this court will not disturb the findings of the court below where there is even a substantial conflict in the evidence, the judgment and order denying a new trial in this case must be affirmed. It is so ordered.

We concur: GAROUTTE, J.; HARRISON, J.

6 Cal. Unrep. 675

GARNER v. JUDD. (S. F. 2,361.)

(Supreme Court of California. May 4, 1901.)

ADMINISTRATORS—RIGHT TO LETTERS—ILLEGITIMATE CHILD—ADOPTION.

Under Civ. Code, § 230, providing that the father of an illegitimate child, by publicly acknowledging it as his own and receiving it into his family, adopts it and makes it, for all purposes, legitimate from the time of its birth, the acknowledging of an illegitimate child by a father without receiving it into his family is not sufficient for its adoption, and such child can confer no right to administer her father's estate.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Proceeding by Georgina Garner, in the matter of the estate of William Goodman, deceased, for letters of administration, against A. R. Judd. From a judgment in favor of petitioner, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Henry L. Ford, E. M. Frost, and L. M. Burnell, for appellant. Mahan & Mahan, for respondent.

McFARLAND, J. This is a contest for letters of administration of the estate of William Goodman, deceased, between Georgina Garner, a niece of defendant, and A. R. Judd, who claims under a written request of one Maggie Goodman-Phillips, an illegitimate daughter of decedent. Judgment went for Garner, and from the judgment and an order denying a motion for a new trial Judd appealed.

The only question in the case is whether or not the said Maggie was adopted and rendered legitimate under the provisions of section 230 of the Civil Code, which is as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all pur-

poses legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." Maggie was the illegitimate daughter of an Indian woman named Mary; and the court found that at the time of her birth, in 1878, and from 1874 to 1897, the decedent, Goodman, had a family, and was living with his family, and with another Indian woman, named Annie, as his wife; that he acknowledged Maggie as his child, "but he did not receive her as such into his family, or otherwise treat her as if she was a legitimate child during her minority." It is quite clear that the evidence supports the finding that "he did not receive her as such into his family" during her minority, and, this being so, the judgment must be affirmed. Section 230 applies only to minors. In *re Pico's Estate*, 52 Cal. 84. It is contended that the findings that Goodman had a family and lived with Annie as his wife are unwarranted by the evidence, but we need not inquire into the correctness of these findings. If he had a family, then he must have received Maggie into it, in order to adopt her under section 230. If he had no family, then the section had no application to the case. If he had no family, of course, he did not take her into it, and therefore did not comply with the section in question. Whether or not an unmarried man can establish a family, within the meaning of the Code, by taking an illegitimate child to live with him in a home provided for that purpose, is a question not here involved. If a man who has no family, and makes no attempt to have one, desires to adopt an illegitimate child, he can do so by a written acknowledgment under section 1387 of the Civil Code, and not otherwise. There can be no compliance with section 230 in the absence of the conditions contemplated by that section, and absolutely necessary to give it effect. There is nothing contrary to this conclusion decided in *Blythe v. Ayres*, 96 Cal. 552, 31 Pac. 915, 19 L. R. A. 40. The part of the opinion in that case relied on by appellant was concurred in by only three of the judges participating in the decision, and was dissented from by the others, and the judgment was affirmed by the court upon the ground that there had been a compliance with section 1387. In *Re Jessup's Estate*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, there is an expression favorable to appellant's contention in an opinion concurred in by four of the justices; but that expression was entirely unnecessary to the decision of the case, and one of the four justices afterwards expressed the opinion that it was erroneous. It cannot, therefore, be taken as authority on the question. See *Blythe v. Ayres*, 96 Cal. 593, 31 Pac. 915, 19 L. R. A. 40. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

132 Cal. 606

JOHNSTONE v. MULCAHY. (S. F. 1,777.)
(Supreme Court of California. May 4, 1901.)
SALE OF LAND—PAYMENT—EVIDENCE—
RECEIPTS.

Where defendant sold land to plaintiff by agreement in form of a lease, deed to be given on payment of 72 monthly installments of \$45.07 each, and a note of \$1,350, payable 9 years from date, receipts given by defendant to plaintiff 9 years thereafter, at a time subsequent to any payments on the 72 installments and when all payments were on the note, and reciting, "I received \$55 rent in advance" for said premises, will, in the absence of explanation or proof of mistake, be conclusive of payment of all the previous installments.

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by Thomas Johnstone against James Mulcahy. From the judgment, plaintiff appeals. Reversed.

Charles Wesley Reed, for appellant. Naphtaly, Friedenrich & Ackerman, for respondent.

PER CURIAM. Suit by vendee of real property in possession against the vendor for accounting and for specific performance. The judgment was that there was due on the contract the sum of \$3,869.54, and that, on default of payment for 30 days, plaintiff should be foreclosed of his interest, and defendant have restitution of the premises. It is claimed by the appellant that the amount adjudged against him was excessive, and this is the only point that need be considered. The contract of sale was in the form of a lease and accompanying agreement of date May 17, 1878. The lease provided for the payment of 72 monthly installments of \$45.07 each, amounting to \$3,245.04; and the agreement—as written—was for a conveyance, upon the payment of these installments, and of a promissory note of \$1,350, payable nine years from date, with interest at 9 per cent. per annum, compounding semiannually. Fifty-two of the monthly installments (it is found) were paid, amounting to \$2,343.64, and on the promissory note the sum of \$3,125; and it is found generally that "the amount owing at the time of the commencement of this suit from plaintiff to defendant over and above all payments made by plaintiff to defendant on account thereof, together with interest on all such payments at the rate of seven per cent. per annum, is * * * \$3,869.54." The points made by the appellant are: (1) That the remaining monthly installments (20 in number) were also paid; (2) that a larger amount was paid on the promissory note than is credited; and (3) that the balance due at the commencement of the suit was much less than found.

(1) With regard to the first point, we think the payment of the 20 installments found to be unpaid is very clearly established by the evidence. The absence of re-

ceipts is accounted for by the fact that the plaintiff was in the habit of making payments without taking receipts. He testifies that in 1887, at a settlement between him and the defendant, the amount found to be due on the note was about \$2,800, and that it was agreed that there was \$200 more due for money paid by the defendant for taxes, etc. This statement is not denied by the defendant, but is apparently admitted. The amount stated to be due (\$2,800) is about the amount that would have been due on the note, calculated with compound interest, subject to two payments shown by receipts of date December 1, 1878, and June 30, 1879. It is also asserted by both parties, in effect, and expressly found by the court, that the payments made subsequent to 1887 were all on the note, and that the receipts given for the amounts paid were in the same form as for the monthly installments originally provided for; as, for example, the following: "San Francisco, Dec. 1, 1887. Received of Thomas Johnstone fifty-five dollars rent in advance for house 1757 Ellis street. James Mulcahy." These receipts, taken in connection with the finding and other circumstances in the case, must, in the absence of explanation or proof of mistake, be taken as conclusive of the payments of previous installments. 2 Whart. Ev. § 1362.

2. The finding that only \$3,125 was paid on the note is also in conflict with the evidence. According to the account of the defendant attached to his answer there was admittedly another payment of \$243, and receipts were in evidence showing other payments.

3. It follows that the amount found due was excessive in failing to credit the plaintiff with the amounts last referred to, and in charging him with the amount of the 20 installments found to be unpaid, and with the interest thereon. But it also appears that it was otherwise excessive. In this regard the findings themselves are insufficient. The referee finds the aggregate of the payments on the note, but does not find the dates of the several payments. Without these the amount due cannot be determined, and it cannot be perceived how, or on what theory, he arrived at his conclusion as to the aggregate amount due. But there is at least enough in the finding to show that the referee proceeded on a wrong theory; for, while the plaintiff is charged with the principal of the note with interest compounding semiannually at 9 per cent. per annum, he is credited only with interest at 7 per cent. on his payments. The finding is also in conflict with the defendant's answer, where, from the account attached, it appears that, as claimed, the amount due at the date of filing the answer, November 5, 1896, was \$3,869.54,—precisely the amount found by the referee to be due at the commencement of the action, December 17, 1895, nearly a year before. It may also be inferred, from

the precise coincidence of the amount found with the amount shown by the defendant's account, that the finding is in fact based on the account; and, assuming this to be the case, and accepting pro hac vice the items of the account, it is obvious that the estimate of the amount due was grossly erroneous, and largely in excess of the true amount. The judgment and order appealed from must therefore be reversed.

But there is another peculiarity of the case to which, with a view to the further proceedings, attention should be directed. The contract, as stated by the defendant in his testimony, is quite different from the contract as written; and it seems clear, on the evidence appearing in the record, that there was a mistake of the parties in reducing the contract to writing. According to the defendant's explicit statement, the price agreed on for the property was \$3,850, and the agreed monthly rental value was \$35. Seventy-two payments of this rental would amount to \$2,520, which, added to the amount of the note, would exceed the amount named by the plaintiff by \$20 only. Of the nominal rent of \$45.07, to be paid monthly, there was, therefore, an excess of \$10.07, to go as payment of the note, which, adding the excess of \$20 in the monthly installments, was about sufficient to pay the interest, and, with the continued payment of \$45.07 after the expiration of the term named in the lease, to satisfy the note when it became due at the end of nine years. It is therefore impossible—at least on the evidence in the record—to resist the conviction that the real agreement was as stated by the defendant; and this conclusion is confirmed by the credit of \$243 allowed by him on the note for the first two years' interest, and by the fact that in making the credit compound interest is not charged. The difference between the amount that should have been credited (\$241.68) and the amount actually credited (\$243) is readily accounted for by the inaccuracy of the defendant's accounts everywhere apparent. Under the actual pleadings, the failure of the court to credit the plaintiff on the note with the excess of \$10.07 over the rent in the monthly installments, were there no other errors, could not, perhaps, be considered; but, as the case is to be tried anew, the pleadings can be amended. The judgment and order denying a new trial are reversed, and the cause remanded, with directions to allow the plaintiff to amend his pleadings, if he be so advised, and for a new trial.

(132 Cal. 510)

VANCE v. SMITH. (S. F. 2,113.)¹

(Supreme Court of California. April 30, 1901.)
APPEAL—REMAND—JURISDICTION OF TRIAL COURT.

Where a money judgment against an administrator, which failed to direct that it be

paid out of the estate in due course of administration, on appeal was modified to so direct, as so modified it was a final adjudication, and on remittitur the trial court was without jurisdiction to make an order directing payment of a certain sum in money, and a delivery of certain articles claimed by the judgment creditor.

Department 1. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Proceedings by Clara M. Vance, administratrix, against Bertha A. Smith, administratrix. From an order in defendant's favor, plaintiff appeals. Reversed.

L. L. Cory and E. E. Sheperd, for appellant. George B. Graham, for respondent.

VAN DYKE, J. In February, 1895, S. L. Vance was appointed administrator of the estate of his deceased wife, Eliza M. Vance, but died before any accounting had. For the purpose of having his account as administrator of the said estate settled, the plaintiff, as administratrix on his estate, brought this action in the nature of a suit in equity against Bertha A. Smith, the daughter of his deceased wife, Eliza M. Vance, by a former marriage, and who had been appointed administratrix of her mother's estate. On the hearing of the case the court below found that said S. L. Vance, deceased, had in his hands as administrator, and belonging to the estate of his deceased wife, Eliza M. Vance, a balance in money of \$1,093, and personal property, a watch and chain and some trinkets, amounting to \$11.50,—in all \$1,104.50; and thereupon the court entered judgment in favor of the defendant, as administratrix of the estate of Eliza M. Vance, and against the plaintiff, as administratrix of the estate of S. L. Vance, for said sum, but failed to direct how or by whom such judgment should be paid. On appeal to this court the cause was remanded, with directions to modify the judgment by adding thereto the following: "And that said judgment be paid in due course of administration," and, as so modified, the judgment was affirmed. 124 Cal. 219, 56 Pac. 1031. Upon the remittitur going down, the court below, June 6, 1899, on motion of the defendant, and after hearing the parties, entered an order directing "the plaintiff, Clara M. Vance, as administratrix of the estate of S. L. Vance, deceased, to pay to the defendant, Bertha A. Smith, as administratrix of the estate of Eliza M. Vance, deceased, the amount of the judgment heretofore given and entered in said action in favor of said defendant and against said plaintiff for the sum of \$1,093, with interest thereon at the rate of seven per cent. per annum from June 12, 1897, on or before the 12th day of June, 1899; and said plaintiff is further ordered to deliver to said defendant, on or before the 12th day of June, 1899, one certain bird cage, certain trinkets, and one watch and chain, all of which are named and specified in said judgment." The present appeal is taken from this order.

¹ Rehearing denied May 31, 1901.

The vice of the judgment from which the former appeal was taken was that it appeared to have been rendered against the plaintiff as administrator, and failed to direct that it be paid out of the estate in due course of administration, and for that reason the cause was remanded, with specific directions to modify the judgment accordingly, and, when so modified, the judgment was affirmed. "A judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due." Code Civ. Proc. § 1504. The judgment, as modified according to directions, was a final adjudication of the rights of the parties in this action, and the court was without jurisdiction to make any further judgment or order. *Barry v. Superior Court*, 91 Cal. 486, 27 Pac. 763; *White v. White* (Cal.) 62 Pac. 1062; and cases there cited. Order appealed from reversed.

We concur: HARRISON, J.; GAROUTTE, J.

132 Cal. 512

HAINES v. YOUNG et al. (S. F. 2,137.)

(Supreme Court of California. April 30, 1901.)

EVIDENCE—TAX DEED—EJECTMENT—TRIAL—REOPENING CASE—DISCRETION—ABUSE—DISTURBANCE ON APPEAL.

1. Since the Dupont street act (St. 1875-76, p. 433), authorizing the widening of Dupont street, assessment therefor, and sale for nonpayment of the same, does not include that part of the act for collection of taxes (Pol. Code, § 3786) declaring matters of which a general tax deed shall be evidence, a tax deed given for the nonpayment of assessments for improvements on such street is not prima facie evidence of the validity of all steps prior to its issuance.

2. Plaintiff claimed title under a tax deed, to the introduction of which in evidence defendant objected, in the absence of proof of all the steps from the inception of proceedings under such act authorizing the sale to and including execution of deed. Plaintiff refused to submit such evidence, and the case was submitted on proofs, after which plaintiff applied to reopen, and for leave to submit the omitted evidence, on the ground that same was omitted through inadvertence. *Held*, that there was no abuse of discretion in refusing to grant the motion.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by E. A. Haines against William W. Young and others. From a judgment in favor of defendants, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Pringle & Pringle, for appellant. Olney & Olney, for respondents.

CHIPMAN, C. Ejectment. Defendants had judgment, from which, and from the order denying motion for new trial, plaintiff appeals.

1. Plaintiff claims title to the lot in question by virtue of a deed from the tax collector of the city and county of San Francisco for delinquent taxes, under the act for the widening of Dupont street, in San Francisco, approved March 23, 1876 (St. 1875-76, p. 433). The deed was admitted in evidence on the offer of plaintiff against defendants' objections. No other evidence of title in plaintiff was offered. The only question presented is whether this deed, under section 3786 of the Political Code, is prima facie evidence of all the steps recited in it. Plaintiff's contention that the deed constituted such evidence cannot be maintained. *Phe-lan v. City and County of San Francisco*, 120 Cal. 1, 52 Pac. 38.

2. The motion for a new trial was made on the ground that the court abused its discretion in refusing to open the case after the evidence was closed and the cause submitted, and allowed plaintiff to prove the steps leading up to the deed. When plaintiff offered his deed in evidence, counsel for defendants objected on several grounds, and among them was the point now before us, namely, that the deed is not admissible "without proof having first been made of all the steps from the inception of the proceedings under the * * * Dupont street act to and including the execution of the deed." The court having admitted the deed, plaintiff rested without offering to submit the evidence pointed out by defendants as necessary. Defendants then submitted evidence of their title, and counsel remarked that in ordinary tax cases the deed makes a prima facie case, but that this is not the rule in the Dupont street assessments, and concluded by saying, "If counsel does not put in any other testimony I will not introduce any testimony." The cause was then submitted on briefs to be thereafter filed; five days being given to plaintiff, five to defendants to answer, and two to plaintiff to reply. This was on May 15, 1899. On May 19th following, counsel for plaintiff gave notice of motion to reopen the case and for leave to submit the omitted evidence, on the ground that such proof "was omitted through inadvertence, and that the ends of justice required the same to be submitted to the court." The motion was supported by an affidavit of one of the counsel for plaintiff, in which he states "that he stood ready at the time to prove the steps leading up to the tax collector's deed * * * but was of the opinion that the deed was prima facie evidence of such steps," and was sustained by the ruling of the court in admitting the deed over objection; "but, after further consideration of the case and the law applicable thereto, affiant now desires and is ready and willing and offers to prove each succe-

sive step leading up to said tax deed, with leave of the court first had." Defendants' counsel make counter affidavits showing that plaintiff's leading counsel, the attorney who made the above affidavit, was informed by defendants' counsel before the trial began that the proof of steps preceding the deed was necessary to be made, and therefore he could not have omitted such proof through inadvertence, and that affiant read to the court the decision in *Phelan v. City and County of San Francisco*, supra, before the cause was submitted. These facts are not denied, and were hardly necessary, as the record shows that plaintiff submitted the case with ample warning that he was taking all the chances of suffering by his error, if it should turn out so to be. Furthermore, plaintiff's affidavit does not set forth what the steps were which he stood ready to prove, nor even generally that they were such as are set forth in the deed. It does not follow that, because "he stood ready to prove the steps leading up to the tax collector's deed," such steps were those required by law to be taken. It is altogether probable that, if the court had allowed the deed to be admitted in evidence under a mistaken impression of the plaintiff that no other proof was necessary, the court would and should, in all fairness, have allowed the proof to be made before it was too late, after he was advised of the decision of this court. But we do not find evidence in the record that the deed was admitted solely on plaintiff's theory, or under any misapprehension as to the law. The evidence on the motion shows that counsel persisted in submitting the case, claiming that what was said in *Phelan v. City and County of San Francisco* was dictum, and not decisive of the point here. It was within the discretion of the court to grant or refuse the motion, and we can disturb its ruling only on a clear showing of abuse of that discretion, which we cannot say has been shown in this case. The judgment and order should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(132 Cal. 801)

GALLAGHER v. MCGRAW. (Sac. 864.)

(Supreme Court of California. May 3, 1901.)

SUPERIOR COURT—JURISDICTION—PECUNIARY LIMITATION—SUIT AGAINST ADMINISTRATRIX—ACCRUED INTEREST—PRESENTATION OF CLAIM—EFFECT.

Const. art. 6, § 5, limits the jurisdiction of superior courts in cases at law, with certain exceptions, to those in which the demand, exclusive of interest, amounts to \$300. Code Civ. Proc. § 1500, provides that no holder of any claim against an estate shall maintain action thereon unless the claim is first presented to the executor or administrator. *Held*, that the

fact that a note of \$200 principal against a decedent, when presented to the administratrix in accordance with section 1500, with accumulated interest, amounted to over \$300, did not give the superior court jurisdiction; the action still being on the note, and not on the claim as presented and rejected.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Action by Anthony Gallagher against Catherine McGraw, administratrix. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Chas. Tuttle and L. L. Chamberlain, for appellant. J. J. Kincaid and W. H. Curtin, for respondent.

COOPER, C. This appeal is from the judgment. The court below ordered judgment dismissing the case upon the ground that it had no jurisdiction. The findings show that the note upon which suit was brought was for the sum of \$200 principal, with interest from date. The demand, exclusive of interest, did not amount to \$300, and hence the superior court had no jurisdiction. Const. art. 6, § 5; *Christian v. Superior Court*, 122 Cal. 119, 54 Pac. 518. The fact that the claim upon the note, with accrued interest, amounted to over \$300 when presented to the administratrix, does not change the result. The action is upon the note. It is made necessary under the statute, to present a claim of this kind to the representative of deceased before an action can be maintained upon it, but when the action is brought it is upon the original claim or note. The presentation of the claim in no way changes the nature of the demand, nor the form in which the action must be brought. After the claim is presented, then the holder, in case of rejection, may maintain an action thereon. Code Civ. Proc. § 1500. He can recover only upon the claim so presented and rejected. *Lichtenberg v. McGlynn*, 105 Cal. 47, 38 Pac. 541; *Etchas v. Orena*, 127 Cal. 592, 60 Pac. 45. The judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(132 Cal. 507)

SHARPSTEIN v. EELLS et al. (S. F. 2,340.)

(Supreme Court of California. April 30, 1901.)

ACTIONS—PROCESS—SUMMONS—SERVICE AND RETURN—LIMITATION—DISMISSAL—STATUTES—INTENTION.

1. Code Civ. Proc. § 581, subd. 7, providing that all actions shall be dismissed unless the summons shall be served, and return thereon made, within three years after the commencement of the action, is mandatory; and, where the summons is not so served and returned, the defendant is entitled to dismissal, though his motion therefor was not made until after his default was entered.

2. Code Civ. Proc. § 581, subd. 7, as enacted in March, 1889, provided that all actions shall be dismissed unless summons shall be issued within one year, and served and return made thereon within three years, after the commencement of the action. In March, 1895, such subdivision was amended to read, "That all actions shall be dismissed unless summons shall be issued within one year and all such actions shall be in like manner dismissed unless the summons shall be served and return thereon made within three years." *Held*, that the amendment was merely to free the statute from ambiguity, and not made in order to oust the court of jurisdiction in those cases only in which the summons had not been issued within the year; and the statute therefore applied to all cases in which the summons had not been served and returned within three years from the beginning of the action.

Commissioners' decision. Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by W. C. Sharpstein against Emma P. Eells, Fannie A. Morton, and others. From an order dismissing as to defendant Fannie A. Morton, plaintiff appeals. Affirmed.

J. J. Dwyer and T. B. Hutchinson, for appellant. Webber & Rutherford (H. C. Gesford, of counsel), for respondent.

COOPER, C. This is an appeal from an order dismissing the action as to respondent. The summons was issued October 26, 1895, but was not served until February 6, nor returned until February 17, 1900. On the last-named day, the respondent not having appeared or answered, her default was entered. On March 12, 1900, upon motion of respondent's counsel, the court made an order dismissing the action as to her upon the ground that the summons was not served, filed, or returned within three years after its issuance, as required by Code Civ. Proc. § 581, subd. 7. The action of the court was correct. The question has so often been discussed by this court that we deem it useless to do more than refer to the cases. *Vrooman v. Li Po Tai*, 113 Cal. 305, 45 Pac. 470; *Davis v. Hart*, 123 Cal. 385, 55 Pac. 1060; *Cooper v. Gordon*, 125 Cal. 297, 57 Pac. 1006; *White v. Superior Court*, 126 Cal. 247, 58 Pac. 450; *Modoc Land & Live-Stock Co. v. Superior Court of Modoc Co.*, 128 Cal. 255, 60 Pac. 848.

It is urged that the respondent did not make the motion until after her default had been entered, and that it was then too late. The language of the statute is plain and mandatory. No action "shall be further prosecuted, and no further proceedings shall be had therein," unless the summons shall have been issued within one year; and all actions shall be dismissed "unless the summons shall be served and return thereon made within three years after the commencement of said action." The only exception is that, where appearance has been made within the three years, the action may be prosecuted in the same manner as if summons had been issued and served. Here no appearance was made,

except for the purposes of the motion. The method of obtaining jurisdiction of the person of a defendant is statutory. The statutory mode not having been pursued in time, the right given to respondent to have the action dismissed was absolute. Subdivision 7 of said section 581, as amended in 1895, is as follows: "And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced on its own motion or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and *all such actions shall be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action.*" Said subdivision was added to section 581 by the legislature in March, 1889, with the exception of the words in italics, which were added in March, 1895. It is insisted that by the amendment of 1895, adding the words, "all such actions shall be in like manner dismissed, unless the summons shall be," the meaning of the section was materially changed. It is said in appellant's brief: "It now clearly appears that, as the subdivision was originally enacted, the court was denied jurisdiction just as much in one case as in the other; but that the legislature, with the evident intent of ousting the jurisdiction of the court in those cases only in which the summons has not been issued within a year, inserted the language in italics." We do not think the appellant's contention as to the construction of the amendment correct. The original words—"and served and return thereon made"—had reference to the summons. The words as amended—"and all such actions shall be in like manner dismissed unless the summons shall be served and return thereon made"—refer to the summons and also to the action. Under the section, prior to the amendment, it was made the imperative duty of the court to dismiss the action, unless the summons was served and return thereon made within three years after the commencement thereof. The section, as amended, makes it the imperative duty of the court to so dismiss the action unless the summons shall be served and return thereon made within three years. The amendment was intended to make the legislative intent free from ambiguity. Under the statute, the summons not having been served and return made within the three years, it was the imperative duty of the court to dismiss the action. The cases herein cited, with the exception of *Vrooman v. Li Po Tai*, were all decided after the amendment of 1895. What is said by Mr. Justice Temple in *Cooper v. Gordon* is not in conflict with the conclusion herein. The effect of the decision in that

case is that, if defendant voluntarily appears, and answers, and demands a trial, after the three years the court has jurisdiction to proceed. In this case the respondent did not so appear. The fact that plaintiff, after three years, had the summons served upon her, and that default was entered, did not show any consent or voluntary appearance. When she appeared it was for the purpose of asking that the action be dismissed as to her. She had the right to have it dismissed. The order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

132 Cal. 637

BASSETT et al. v. FAIRCHILD et al. (S. F. 1,366.)

(Supreme Court of California. May 9, 1901.)

APPEAL AND ERROR—WAIVER—DISCUSSION IN BRIEF—CORPORATIONS—OFFICERS—RIGHT TO COMPENSATION—BOARD OF DIRECTORS—QUORUM—INTEREST OF DIRECTOR—RATIFICATION.

1. An assignment of error, not discussed in appellant's brief, will not be reviewed.

2. Where a director of a corporation performed services as its manager, not pertaining to his duties as director, he is entitled to recover the reasonable value of such services, though no rate of compensation was fixed by the board of directors prior to performance of the services.

3. No legal quorum of directors of a corporation is present when action is attempted to be taken on a matter as to which one of the directors necessary to make the quorum is interested.

4. Resolutions passed at such meeting cannot be ratified by the stockholders.

Beatty, C. J., and Harrison and Temple, JJ., dissenting.

In bank. On rehearing. Reversed.

Frank Shay, C. H. McFarland, C. H. Wilson, and E. W. McKinstry, for appellants. O. K. McMurray and Gunnison, Booth & Barnett, for respondents.

McFARLAND, J. The following parts of the opinion delivered in this case in department (61 Pac. 791) are hereby adopted:

It is averred in the complaint that each of the plaintiffs is the owner of at least five shares of the capital stock of the corporation defendant, the Bitumen Consolidated Mining Company, the capital stock being \$300,000, divided into shares of \$100 each, and that this action is brought on behalf of themselves and other stockholders. It is also averred that during the times when the alleged wrongs were committed defendants Fairchild, Perine, Walrath, and Miles were directors of the corporation defendant; the whole number of directors being six, and the other two being plaintiff Bassett and one Swift. It is further averred that said defendants, being a majority of the board of directors, improperly expended certain mon-

neys of the corporation, and the purpose of the action is to recover from them the amount of money alleged to have been thus expended. The court rendered judgment against Fairchild, Perine, and Walrath for \$10,729.90, which sum consists of \$8,665.80 found to have been improperly expended, and legal interest thereon for several years; and against defendant Miles for \$7,129.90 for money, and interest thereon, found to have been improperly expended by the directors by acts in which he participated. From the judgment, and from an order denying their motion for a new trial, the defendants appeal. The court found the appellants liable for \$1,888.05 paid out by them as expenses incurred in defending a certain action brought in the superior court by the San Luis Bituminous Rock Company against the defendant corporation herein and certain others of the individual defendants herein. The ground of this finding is that, owing to the nature of that action, the defendants therein, other than the corporation, should have borne the expenses of the litigation, and, as this finding is not discussed in appellants' brief, it may be dismissed without further notice.

The chief item of appellants' liability allowed by the court, which is contested by appellants, is \$6,475 paid defendant Fairchild for services as general manager of the corporation defendant before his compensation therefor had been fixed, which sum, with interest thereon, makes up the main amount of the judgment. The record shows that, after the case had been submitted to the trial court, that court made an order on August 29, 1896, that judgment be entered for plaintiffs for \$1,888.05 alone. (In a written opinion attached to one of appellants' briefs the learned judge of the lower court gives his reasons, which we think are exceedingly cogent, for not allowing judgment for the \$6,475 paid to Fairchild.) But afterwards the court made findings and ordered judgment for the \$6,475 and interest, in addition to the said \$1,888.05, and, under an amendment to the complaint, gave judgment also for an additional \$332.25, which will be referred to hereafter, and ordered that \$2,000 be allowed plaintiffs as a counsel fee, to be paid out of the judgment by a receiver, who was appointed to collect the same.

There is no averment, or proof, or finding of any fraud committed by appellants, but the theory of the complaint seems to be that in authorizing the payment of the said money to Fairchild the appellants acted with gross negligence. The appellants admit the payment of this money, and justify it. The findings seem to follow the theory of the complaint; but so far as they may be construed to find that appellants were guilty of such negligence as would render them liable on the ground of negligence alone, or that they willfully intended to injure the corporation for their own personal gain, they are not

supported by evidence. However, the findings on these points need not be closely scrutinized; for the order denying the motion for a new trial contains this language: "There is no evidence in this case that either of the defendants Perine, Walrath, or Miles acted for their own private gains. If any finding bears that construction I regret it, and, if it were necessary to support the judgment, I would grant a new trial. Neither, under my views of the law, is the finding as to negligence material. Perine, Walrath, and Miles are held liable upon the ground that they voted money of the corporation to Fairchild without authority of law. If it be assumed that the corporation was indebted to Fairchild for past services, none of the defendants are liable for the money paid to him. * * * Upon the main question whether Fairchild had any legal claim for compensation before his salary was fixed by the board, I see no reason to change the views expressed by me in deciding the case." It is apparent, therefore, that the judgment was based on the principle that the payment of the money to Fairchild was unlawful because it was paid before his salary as general manager had been fixed, and that, as will be seen hereafter, it was so entirely illegal and ultra vires that it could not be ratified or made valid by any subsequent act of either the directors or the stockholders.

The corporation defendant was organized in September, 1891. Its main purpose was to control the mining and marketing of bituminous rock to be taken from several different mines or deposits of bitumen. It appears that these several mines were mainly owned by the persons who formed the corporation defendant, and became its stockholders and directors. The corporation took leases from the owners of these several mines, by the terms of which it was to give them a royalty of one dollar a ton for every ton of bitumen taken from the mines. It seems quite apparent that the main profit which the organizers of the corporation expected to receive was to come through the royalty of one dollar per ton to be paid for the rock taken from the mines which they owned; and, in this connection, we think that the court erred in sustaining an objection to the question asked Fairchild on the witness stand, whether at the time of the organization of the corporation "it was designed, intended, or expected by the directors of the Bitumen Consolidated that, outside of the royalties, there would be large earnings or dividends." Immediately after the organization of the corporation, and in September, 1891, Fairchild was duly elected vice president and general manager, and remained such during the time mentioned in the complaint. He immediately commenced to perform his duties as general manager, which duties were numerous and onerous, and occupied almost his entire time. The various kinds of work which he did as man-

ager fully appear in the evidence, and need not be here given in detail. It is sufficient to say that his work included direction and supervision of the mining operations in the various leased mines; the supplies required; contracting for hauling rock from mines to cars; purchasing sacks for the rock; attending to shipping receipts and collecting moneys; securing transportation facilities; chartering vessels for shipping rock to points on the northern Pacific coast; seeing that cars which came to San Francisco were properly loaded and delivered in proper shape to purchasers; looking after office management, and attending to all "business of the corporation which come along from day to day." Before his employment he had visited points as far north as Vancouver, British Columbia, in the interest of the use and sale of bituminous rock, and had become acquainted with public officials and others having control of street paving, and was thus enabled to procure contracts with them for sale of the rock of the corporation. There is no doubt that his services were highly valuable, and there is no doubt that they were of such a character as to preclude any reasonable supposition that they were to be gratuitous. But there was no resolution of the board of directors and no express contract determining what compensation he should have for his services as manager prior to November 9, 1892, and for this reason it is contended by respondents that he cannot legally have any compensation prior to that date. Fairchild expected to receive compensation for his work as manager, the amount to depend somewhat upon the volume of business that would be developed, and the testimony of Walrath, president, and Perine, treasurer, of the corporation, shows that it was not expected by them or the other directors that he was to work gratuitously. Moreover, his work as manager was done with the knowledge of the directors, but there was no formal action taken on the subject until November 9, 1892. Some time before that date the president paid Fairchild, on account of his services, out of the money of the corporation, \$3,600; and on November 9, 1892, the board of directors passed a resolution which, after reciting that Fairchild had been in the employ of the corporation since its organization "as managing agent and manager," and had been paid by the president \$3,600 for his services, declared that "the acts of said president in advancing and paying said J. A. Fairchild said sum of \$3,600 on account of his services be, and the same is hereby, approved, ratified, and confirmed." There were present at this meeting four directors, who constituted a quorum. Fairchild was one of the four, but he did not vote on the resolution, which was passed by the votes of the other three. At this same meeting a resolution was passed reciting that Fairchild had been elected general manager in September, 1891, and had ever since been acting as such

without having his salary fixed, and declaring that his salary "be, and the same is hereby, fixed at the monthly sum of \$200 per month from November 1, 1891, to April 1, 1892, and that thereafter he should receive a salary of \$750 per month, which should remain the same until changed by the board of directors." On the 10th day of January, 1893, there was a general meeting of the stockholders. At this meeting there were present stockholders representing 2,510 shares of the capital stock of 3,000 shares; and by a resolution adopted by a majority of the shares, exclusive of those represented by Fairchild, it was resolved "that all the acts of the board of directors and officers of this company for the past year be approved and ratified."

The by-laws provide that "the compensation and terms of office of all officers of the corporation (other than directors) shall be fixed and determined by the board of directors." This language does not on its face mean that the compensation must be expressly and definitely agreed upon and settled before performance of the services; but respondents contend that under the general law, established by judicial decisions, there can be no lawful allowance to an officer of a corporation for services, no matter what their character and value, where the amount of the compensation had not been fixed prior to the rendition of the services. Many authorities on this subject have been cited on both sides, and they are to some extent conflicting. Most of those cited by respondents merely declare the rule that a "director" as such, without some previous understanding, is not entitled to pay for services which are within the ordinary duties to be expected of him as director, although some of them no doubt apply the rule to other officers or agents who are also directors, but as to the last proposition the weight of authority and reason is the other way.

As a general rule, when one person performs valuable services for another, whether the other be a corporation or a natural person, the law raises an implied promise to pay a reasonable compensation for the services, unless they are performed under circumstances which show an understanding that they were to be gratuitous. It frequently happens that one natural person performs valuable services for another natural person for which the former cannot recover, because circumstances show that they were rendered without any expectation of compensation. Now, it has been held that directors of corporations cannot, without previous express contract, receive compensation for such ordinary services as are usually rendered by directors without pay; for the common understanding, as declared by judicial decisions, is that such services are presumed to be rendered gratuitously. But that presumption does not apply to those onerous services performed by officers and agents of

a corporation, though they be also directors, for which compensation is usually demanded, and allowed, and which could not reasonably be expected to be performed for nothing. The correct rule is stated by the United States supreme court in *Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608. In that case, Fitzgerald, who was a director of a corporation and its treasurer, acted as superintendent and general manager, and as such did valuable work, "not at all pertaining to his office as director," and the question was whether he was entitled to compensation for such work done before any compensation was fixed. The opinion of the court states that the trial court "instructed the jury that if Fitzgerald, the plaintiff, acted as superintendent, treasurer, or general manager of said company, and transacted the usual business that devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant (during the time before compensation was fixed), there would be an implied agreement on the part of the defendant to pay what the services are reasonably worth, and afterwards repeated this instruction more in detail, confining it to services as manager." The verdict was for Fitzgerald, and the judgment was affirmed. The court said: "The general rule is well stated by Mr. Justice Morton (since chief justice of Massachusetts) in *Pew v. Bank*, 130 Mass. 391, 395: 'A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of the party does not make him liable upon an implied promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man, in the same situation with the party who receives and is benefited by them, would and ought to understand that compensation was to be paid for them.' Tested by this rule, we think that the court fairly left it to the jury to determine whether Fitzgerald rendered services of such a character and under such circumstances that he was entitled to claim compensation therefor. It could not properly have been held as matter of law that he was not so entitled."

Rogers v. Railway Co., 22 Minn. 25, is a

case directly in point. It is stronger in support of the proposition above stated than the case at bar, because the charter of the corporation in that case provided that the board of directors should appoint the officers, "and fix their compensation for the services to be rendered." Rogers was a director, and was appointed secretary of the corporation, and also acted as its land commissioner and attorney, and sued for the value of services rendered in such capacities. There had been no compensation fixed, nor any contract made, before the services were rendered, and it was contended there, as here, that no compensation could be recovered for past services. But it was held otherwise. The court said, among other things, as follows: "The evidence showed that the plaintiff, while acting as land commissioner, was a member of the board of directors. If his services as land commissioner had been performed by him simply as a director, it might be that he could not recover for the same, since, in the absence of a special agreement for compensation, he would, according to many authorities, be presumed to have acted gratuitously. But the duties and labors of a land commissioner of a land grant railroad company do not necessarily nor presumptively pertain to a director as such. Indeed, it would be unreasonable to suppose that duties so onerous would be undertaken by one acting simply as a director without pay. For such extraordinary services, outside of and beyond his duties as director, a party may certainly recover, notwithstanding his directorship; for the reason that, even if he performs the duties of director gratuitously, these services are not a part of those duties" (citing cases). In *Henry v. Railroad Co.*, 27 Vt. 435, there was a standing resolution of the board that a director should not receive more than two dollars per day for special services, yet a director was allowed to recover for services which were outside his duties as a director in an amount much greater than could have been allowed under the resolution for services as director. The court said: "There are services which may be rendered for the benefit of a corporation, the performance of which may be delegated by the directors to other persons. For that purpose the directors may employ, as their agents, those who are not members of the corporation, or they may employ one of their own number. A director is not incapacitated to discharge those duties, and receive the same compensation which other agents would be entitled to recover. * * * In rendering those services the plaintiff was not acting in his official capacity as director, but as the agent of the corporation, and his compensation is no more limited by that vote than it would be if the services had been rendered by others who were not directors." In *Sawyer v. Bank*, 6 Allen, 209, the court, speaking of the circumstances under which the presumption arises that officers

of a corporation are to be paid for their services, says: "Such a presumption arises in reference to any species of work, labor, or employment which is usually and commonly the subject of hire and reward, and paid for, whether any specific bargain is or is not made concerning it." In *Beach, Priv. Corp.* § 208, the author says: "When the charter of a corporation provides that certain officers may be elected, and their salary fixed, by a board of directors, and a president is thus elected, but without a salary named, the law raises an assumpsit on the part of the corporation to pay a reasonable compensation for his services rendered after election." In *Mor. Priv. Corp.* § 508, the author says: "If a director is properly employed to perform services which do not pertain to his office as director, he is entitled to such compensation as has been agreed upon, or as the services are reasonably worth." There are many other authorities to the same effect as those above cited, but they are too numerous to refer to here. See *Ang. & A. Corp.* § 317; *Pew v. Bank*, 130 Mass. 391; *Chandler v. Bank*, 13 N. J. Law, 255; *Shackelford v. Railroad Co.*, 37 Miss. 209; *Association v. Meredith*, 49 Md. 389; *Cheeney v. Railroad Co.*, 68 Ill. 575; *Bank v. Drake*, 29 Kan. 311; *Severson v. Milling Co.*, 18 Mont. 13, 44 Pac. 79; *Felton v. Mining Co.*, 16 Mont. 81, 40 Pac. 70. There was nothing decided in *McCarthy v. Water Co.*, 111 Cal. 328, 43 Pac. 956, that conflicts with the views hereinbefore stated. There the plaintiff, who was a director of the corporation defendant, sought to recover of the latter the value of services rendered without any previously fixed salary or compensation; and a judgment in his favor was reversed merely because the trial court had erroneously excluded evidence offered by the defendant which "tended to show the relations of the parties, * * * and to throw light on the question whether or not it was intended that he should have compensation." The court referred to *Barstow v. Railroad Co.*, 42 Cal. 465,—which was also an action brought by a director to recover for services rendered before his compensation had been fixed,—and quoted from the opinion in the latter case as follows: "The situation of the parties at the time—the relations, if any, in which they stood of a business character or otherwise—are important to be known and considered in order to arrive at a correct solution of the ultimate question involved." In neither the *McCarthy* Case nor the *Barstow* Case is there anything in the nature of a decision that there cannot be a recovery by an officer of a corporation who is also a director unless his salary had been previously fixed, but the contrary in both cases is assumed and necessarily decided. In the *McCarthy* Case it is assumed that plaintiff could have recovered on "an implied contract arising out of, and inferable from, the situation and relation of the parties"; and

it is further said that "respondent, being a director of appellant, was not entitled to compensation for services rendered the corporation unless the circumstances were such as to raise an implied assumpsit to pay what they were reasonably worth." We conclude, therefore, upon the authorities above noticed, as well as upon reasonable and just principles, that Fairchild was not precluded from having a legal claim for the value of his services merely because that value had not been fixed beforehand.

In the opinion delivered in department it was held that the allowance of Fairchild's claim by the board of directors on November 9th was valid, notwithstanding the fact that the presence of Fairchild was necessary to constitute a quorum, and that, at all events, the allowance was an act that could be ratified by the stockholders, and that it was so ratified on January 10, 1893, as above stated. Since then it has been held in *Curtin v. Ditch Co.* (Cal.) 62 Pac. 552, that there is no legal quorum of directors present when action is attempted to be taken on a matter as to which one of the directors necessary to make the quorum is interested. Assuming this to be the established law on the subject, and that, therefore, the resolutions of November 9th were invalid, and assuming, also, that the invalid action of November 9th could not be ratified by the stockholders, still, under the above views, Fairchild was entitled to receive compensation upon quantum meruit for whatever his said services were reasonably worth, and appellants should be credited in this action with an amount of money equal to the value of said services. *Buck v. City of Eureka*, 109 Cal. 522, 42 Pac. 243, 30 L. R. A. 409. In the latter case it was declared that the plaintiff should be allowed to amend his complaint, if so advised. In the case at bar an amendment would hardly be necessary, as the facts supporting a quantum meruit are fully stated; but, if appellants be advised to amend their pleading in that respect, they should be allowed to do so.

It is contended by appellants that, after the case had been submitted, the court made orders allowing an amendment setting up a claim for about \$300 for an entertainment to the board of supervisors of San Francisco at one of the mines (which appellants claim to have been legitimately expended in furtherance of the interests of the corporation), and an amendment setting up a claim for counsel fees of \$2,000 alleged to be reasonable, and also an order that these amendments "are deemed to have been by defendants denied"; and that these orders were erroneously made. The record, however, does not clearly show that these things occurred in the manner asserted by appellants, and, as a new trial is to be ordered, it is not necessary to consider them. Of course, appellants should be allowed to contest these new items of the entertainment

and the counsel fees. The reasonableness of the counsel fees which were allowed need not be passed upon; the finding as to that may be different on another trial. The judgment and order appealed from are reversed, and the cause is remanded for a new trial, with directions to the superior court to find the reasonable value of Fairchild's services as manager of the corporation, and to credit the amount thereof to appellants.

We concur: VAN DYKE, J.; HENSHAW, J.; GAROUTTE, J.

HARRISON, J. (dissenting). The plaintiffs bring this action as stockholders in the Bitumen Consolidated Mining Company, a corporation, one of the defendants, to recover from the other defendants, for the benefit of the said corporation, certain moneys alleged to have been illegally misapplied and withdrawn by them from the corporate funds of said corporation while acting as its directors. Judgment was rendered against the defendants, and they have appealed.

The defendant corporation was organized, under the laws of this state, in 1891, with a board of six directors, and a capital stock of \$300,000, divided into 3,000 shares. The defendants Fairchild, Walrath, and Perine were directors of the corporation from its organization until the time of the commencement of this action (July 21, 1893). The defendant Miles was elected a director November 1, 1892, and thereafter acted as such director. The other two directors were the plaintiffs Bassett and Swift. The by-laws of the corporation were adopted at the time of its organization, in 1891, and provide as follows:

"The officers shall be a president, vice president, secretary, and treasurer, which officers shall be elected by, and hold office during the pleasure of, the board of directors. The vice president shall be the manager of the corporation. The compensation and tenure of office of all officers of the corporation (other than directors) shall be fixed and determined by the board of directors."

"The board of directors shall at their first regular meeting elect one of their number to act as president; and, if at any time the president shall be unable to act, the vice president shall take his place and perform his duties; and, if the vice president from any cause shall be unable to act, they shall appoint some other member of the board to do so, in whom shall be vested for the time being all the duties and functions of his office."

"The vice president, in addition to the duties imposed upon him in article 7 (that is, when acting in place of the president), shall be the manager of the corporation, and shall perform such duties as may be prescribed from time to time by the board of directors."

At the organization of the corporation, Walrath was elected president, Fairchild vice

president and manager, and Perine treasurer, of the corporation, and they continued to hold those offices until the commencement of the action.

The court rendered its judgment against the appellants upon its findings, as facts in the case, that they had mismanaged and illegally applied the funds of the corporation in the following particulars: In paying to the defendant Fairchild the sum of \$6,475 for services rendered by him as manager of the corporation prior to November 9, 1892; in paying \$1,888.05 for the expenses of certain litigation for the benefit of the defendants Fairchild and Walrath, and in which the said corporation had no interest; in paying \$332.25 for the entertainment of certain San Francisco supervisors at a clam bake in San Luis Obispo county. The court finds that during all the time covered by these transactions the corporation was under the control and management of the four defendant directors, and that the aforesaid payments were made under their direction, and that the plaintiffs Bassett and Swift protested and objected to the said payments, and at no time ratified or sanctioned the same. The payment of these sums of money out of the corporate funds, under the direction of the defendants, is not controverted, but they contend that they had authority to make them.

The facts connected with the payment of the money to Fairchild are as follows: As before stated, Fairchild was elected vice president at the organization of the corporation, and by virtue thereof acted as its manager under the provision of the aforesaid by-law, and rendered various services to the corporation. It was provided in the by-laws that the funds of the corporation should be deposited in bank, and should be paid out only by the check or order of the president, countersigned by the secretary. October 11, 1892, Walrath, with the consent of the defendant Perine, withdrew from the funds of the corporation \$3,600, in disregard of this provision of the by-law, and without having the check therefor countersigned by the secretary, and paid the same to Fairchild for services rendered by him as vice president and manager. November 9, 1892, the defendants Walrath, Fairchild, Perine, and Miles held a meeting of the directors,—the other directors, Bassett and Swift, plaintiffs herein, not being present,—and caused the following resolution to be entered upon their records: "Whereas, J. A. Fairchild has been in the employ of the Bitumen Consolidated Mining Company since its organization as its managing agent and manager; and whereas, he has been paid by authority of the president thirty-six hundred dollars on account of the services rendered for the company; Therefore be it resolved, that the acts of said president in advancing and paying the said J. A. Fairchild said sum of thirty-six hundred dollars on account of his services be, and the same is hereby, approved, ratified,

and confirmed." At the same meeting they also caused the following resolution to be spread upon their minutes: "Whereas, J. A. Fairchild was, on September 1, 1891, duly elected by this board of directors vice president and general manager of this company, and has continued to act as such general manager, and no salary for the services has been fixed: Now, be it resolved, that the salary of J. A. Fairchild, as general manager of this company, be, and the same is hereby, fixed at the monthly salary of two hundred dollars per month from November 1, 1891, to April 1, 1892, and that thereafter, to wit, from the 1st day of April, 1892, he shall receive as general manager of this company a salary of seven hundred and fifty dollars per month, and remain the same until changed by the board of directors."

These resolutions were adopted by the votes of Walrath, Perine, and Miles. Fairchild, although present, did not vote upon the adoption of either of them. Under this resolution there was paid to Fairchild, as and for his salary for services rendered prior to November 9th, the sum of \$2,875, aside from the sum of \$3,600 which had already been paid to him by Walrath. At a general meeting of the stockholders held January 9, 1893, at which there were present the holders of 2,510 shares of stock, a resolution was adopted "that all the acts of the board of directors of this company for the past year be approved and ratified." 1,510 votes were cast in favor of the resolution, and 1,000 votes against it. The plaintiff Swift voted 1,000 shares against its adoption, and, of those voting in its favor, the defendant Fairchild represented 500 shares, Perine represented 485 shares, Walrath 500 shares, and Miles 10 shares.

1. That the action of Walrath, in withdrawing \$3,600 and paying it to Fairchild without any authority from the board of directors, and in disregard of the by-laws of the corporation, was a violation of his duty as director, as was also the act of Perine in consenting thereto, and of Fairchild in receiving the money, is not open to question, and has not been contended for by the appellants. No validity was imparted to this act by the resolution adopted at the meeting of November 9th. At that meeting there were present only four directors, and Fairchild was one of this number. Although he abstained from voting, there was not a competent majority of the board at that meeting to bind the corporation. The resolution then adopted ratifying the act of Walrath in making the payment was not, therefore, valid as a corporate act, and the resolution purporting to fix the salary of Fairchild was equally invalid for the purpose of creating any obligation against the corporation. *Curtin v. Ditch Co.* (Cal.) 62 Pac. 552. Neither is the position of the defendants fortified, nor did they receive any immunity from their acts, by reason of the vote of the stockholders in January, 1893,

purporting to ratify the acts of the directors during the previous year. The resolution of November 9th, as we have seen, did not constitute an act of the "board" of directors, and, consequently, could not be affected by this resolution of the stockholders. Moreover, it was not in the power of a majority of the stockholders to vote to themselves or to one of their number the funds of the corporation against the protest and objection of the minority. A majority of the body of stockholders has no power to vote away the funds of the corporation for an illegal purpose, or to make a gift of its funds, against the will of the minority. If the claim of Fairchild for his services was not a legal charge against the corporation, a majority of the stockholders could not authorize its payment, and their ratification of an unauthorized payment by the directors would add no strength to the act of the directors in making such payment. The stockholders had no authority to determine what should have been the salary of the manager. Both by the statute (Civ. Code, § 305) and by the by-law above quoted this authority was conferred upon the board of directors, and could not be exercised by the stockholders. See *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

2. It is contended, however, by the appellants that the services rendered by Fairchild constituted a valid claim against the corporation, which could have been enforced by him, and that they were therefore justified in paying this claim. This proposition is rested upon their contention that his services as manager were of great value to the corporation, and were of an extraordinary character, and not within the scope of his duties as a director or officer. The by-laws herein provide that the compensation of all of the officers of the corporation shall be fixed and determined by the board of directors, and the court finds that the board of directors did not, prior to November 9, 1892, adopt any resolution fixing or determining the compensation for any services that might be rendered by Fairchild, and that there was no contract or agreement between them, at any time prior to November 9th, with reference to his salary, or to the compensation to be paid for his services, and "that he acted as such manager and vice president without any contract respecting such salary."

The rule is well settled that in the absence of any provision, agreement, or resolution on the part of the corporation fixing a salary or compensation for its directors, who are also officers, they are not entitled to any compensation for services rendered by them as such officers or directors. *Smith v. Putnam*, 61 N. H. 632; *Sawyer v. Bank*, 6 Allen, 207; *Road Co. v. Branagan*, 40 Ind. 361; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Kilpatrick v. Bridge Co.*, 49 Pa. 118; *Kelsey v. Sargent*, 40 Hun, 150; *Railroad Co. v. Kneeland*, 120 N. Y. 134, 24 N. E. 381, 8 L. R. A. 253; *Pew v. Bank*, 130 Mass. 391; *Pierce, R. R.* 31;

Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788. In *McCarthy v. Water Co.*, 111 Cal. 337, 43 Pac. 956, this court said: "As the respondent was a stockholder and director of the corporation, he was not entitled to compensation for services rendered by him for it, no matter under what claim or official position, unless there was some kind of a contract for such compensation." The interest of the directors in the subject-matter of the trust, and the advantages to be derived from their individual supervision of a corporation, are deemed to be a sufficient consideration for assuming the position, and authorize the presumption that they undertook to perform its duties without the acceptance of compensation. Such presumption can be overcome only by an agreement or resolution on the part of the corporation to the contrary before the services are rendered. This is but the application of the general rule as to the compensation of trustees. A trustee cannot, by his own act, while executing the duties of his trust, or by the performance of the duties assumed by him therefor, create an obligation against his beneficiary. By accepting the trust he assumes to act for the benefit of his beneficiary, and to perform gratuitously all the services necessary therefor. If the particular duties of his office are not defined, whatever services he may voluntarily render will be presumed to have been within his contemplation when he entered upon the trust, and he has no right of recovery for any services required of him in the exercise of the trust which may be referable thereto, and for which no compensation has been fixed. This rule has been applied where one of a board of directors was appointed treasurer, and performed the duties of that office. (*Holder v. Railway Co.*, 71 Ill. 106); where the president of a bank was appointed superintendent of the repairs of the bank building (*Pew v. Bank*, 130 Mass. 391); where the vice president of a corporation was also appointed its general superintendent (*Besch v. Manufacturing Co.*, 36 Mo. App. 333); where the president of a corporation was appointed its manager (*Rose v. Carbonating Co.*, 60 Mo. App. 28).

In the cases cited in the opinion of Mr. Justice McFARLAND, where the right to compensation for services was upheld, this right was based upon the ground that the services were outside of the functions of a director, and had been rendered either in some ministerial or executive capacity,—such as secretary or treasurer of the corporation, or as superintendent or manager of its works,—to which he had been appointed by the other members of the board, or had been rendered under a similar appointment or authority in matters entirely distinct from the management of the corporate affairs, as in the case of an attorney at law or agent, whose functions were such as could be delegated by the board of directors to a person not a member of the corporation. In the *Fitz-*

gerald Case the court bases its ruling upon the fact that "the character of all the services rendered by him placed them outside of official duties proper." A portion of the claim for these services, as stated by the court, was for the expense and trouble in procuring money for the company while acting as its treasurer. In its instructions to the jury, the circuit court had said that "if Fitzgerald acted as superintendent, treasurer, or general manager of said company, and transacted the usual business that devolves upon such officer," etc., he would be entitled to recover. In commenting upon this instruction the supreme court concedes that the reference therein to the "treasurer" was erroneous, but that the error was unimportant, saying in its opinion immediately following that portion which is quoted by Mr. Justice McFARLAND: "The reference to the treasurer, as made in one clause of the charge, even though inaccurate, was not of sufficient moment to require a reversal of the judgment. In none of these cases does it appear that the services for which the director was held entitled to compensation were rendered by him by virtue of his office, or that they were rendered in exercise of the official duties which he had assumed by virtue of his position as director."

In the present case Fairchild did not hold the position of manager by reason of any special appointment to that office by the board of directors. He was manager only by virtue of his position as vice president, and whatever service he performed as manager was by virtue of this position. The by-laws declare: "The vice president shall be the manager of the corporation, and shall perform such duties as may be prescribed from time to time by the board of directors." His election as vice president made him ipso facto manager, and his acceptance of the office carried with it an obligation on his part to perform all the duties required of the manager. It does not appear that any duties were imposed upon him or prescribed for him by the board of directors, after he was elected a director, other than those which existed by virtue of the by-laws, and the court finds that all of the services rendered by him prior to November 9, 1892, "were rendered within the functions of vice president and manager of said corporation and director thereof." These findings of fact are fully sustained by the evidence, and upon these facts the court has no alternative than to hold that he was not entitled to any compensation or salary for any of the services rendered by him as vice president or as manager during this period, and that the appellants should restore to the corporation the money that had been withdrawn for the payment of the services.

This liability does not depend upon any proof or finding of negligence or fraud on the part of the defendants, or upon the extent or value of Fairchild's services. The

defendants may have acted in the utmost good faith in making the payment, and the corporation may have derived great benefit from his services, but, as the law forbids him from receiving any compensation therefor, they were not authorized to make the payment, and the legal obligation exists upon them to restore the money so withdrawn.

The rule invoked by the appellants that the law implies an agreement for compensation when one receives valuable services from another has no application in the case of services rendered to a corporation by one of its officers or directors. The mere fact that a director has rendered valuable services to the corporation does not create an implied promise on the part of the corporation to pay him therefor. The presumption in such case that the services were rendered gratuitously can be overcome only by showing an agreement for such compensation before the services were rendered, or that the services were distinct from those which pertain to the office, and the burden of making this showing is upon the claimant. The absence of an agreement that he should not be compensated therefor is not enough. It must be affirmatively shown that an agreement for compensation was made before the services were rendered.

The finding of the court that "no contract" respecting his salary was made before the 9th of November includes an implied, as well as an express, contract, and its findings that the services rendered were within his functions as vice president and manager preclude any implied promise to pay therefor. There could be no implied assumpsit for services which the law presumes he had agreed to render gratuitously. There were no duties imposed upon him after he was elected director of the corporation other than existed by virtue of the by-laws. Whatever services he rendered to the corporation were performed at his own suggestion, and without any direction from the board of directors, and it must be held that they were performed gratuitously, and without any expectation of compensation.

The appellants have not presented in their brief any argument against the correctness of the judgment to the extent that it declares them liable for the moneys paid for the expenses of the litigation which affected only Fairchild and Walrath, and the findings of the court in that respect are fully sustained by the evidence. The payment out of the corporate funds for the entertainment of the supervisors at a clam bake was unauthorized, even if it could be shown that the corporation had derived a benefit thereby. Whether such benefit was derived must, however, rest very materially in conjecture.

The objection that after the case had been tried and submitted to the court for its decision, and it had given directions for a judgment in favor of the plaintiffs in the sum of \$1,888.05, the court improperly allowed cer-

tain amendments to the complaint, and ordered that they be considered as denied, and thereafter proceeded to render the judgment herein without again submitting the cause, cannot be considered. There is no bill of exceptions in the record, and, in the absence of any showing of the circumstances under which these acts and directions of the court were made, it cannot be assumed that any error was committed therein. The judgment and order should be affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.

132 Cal. 700

DE JARNATT v. MARQUEZ. (L. A. 752.)

(Supreme Court of California. May 21, 1901.)

JURISDICTION—APPELLATE—ORIGINAL—JUS-
TICE OF THE PEACE—SUPERIOR COURT.

Where an action to recover on a note for \$250, and for \$100 attorney's fees, was appealed from a justice to the superior court on questions of both law and fact, such court had original jurisdiction of the controversy, so that, while it could not obtain jurisdiction by the appeal, it could try the case anew after the parties had voluntarily submitted themselves to the jurisdiction, and the judgment rendered in such trial was valid.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by J. L. De Jarnatt against Pascual Marquez. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

R. Dunnigan and H. L. Dunnigan, for appellant. Hugh J. and Wm. Crawford, for respondent.

GAROUTTE, J. Plaintiff brought an action in the justice's court for the sum of \$250, being the principal of a promissory note, and he also asked judgment for the sum of \$100 as an attorney's fee in the litigation, the note providing for a reasonable attorney's fee in case suit was brought. Defendant filed a demurrer, one of the grounds of demurrer being that the court had no jurisdiction of the subject-matter of the action. The demurrer being overruled, issue was joined, and judgment went for plaintiff. Defendant appealed to the superior court upon questions of both law and fact. The case was tried upon its merits, and judgment again went against him. He now appeals to this court, and attacks the jurisdiction of the superior court to try the case, and render judgment therein. He claims that the justice court had no jurisdiction of the subject-matter of the action, and that, therefore, the judgment rendered by the court was void. He then claims that, the justice's court having no jurisdiction to try the case, the superior court, by appeal, gained no jurisdiction to try it, and for that reason its judgment is also void.

Defendant made no complaint at any time of lack of jurisdiction in the superior court

to hear and decide this case upon its merits. It will therefore be seen from the foregoing statement of facts that he has placed himself in a somewhat novel position. Section 976, Code Civ. Proc., says: "When a party appeals to the superior court on questions of fact, or on questions of law and fact, no statement need be made, but the action must be tried anew in the superior court." Defendant appealed to the superior court upon both questions of law and fact. He made no protest or objection going to the jurisdiction of that court to try the case upon its merits, and, without raising any question of law whatever in that court, he goes to trial, and then, having lost his case, for the first time he here denies the jurisdiction of the superior court to hear and determine the cause. It may at least be said that, in the orderly course of civil procedure, he should have raised this jurisdictional question in the court where the case was upon trial. Of course, if the judgment there rendered is absolutely void,—a mere nullity,—the question may be raised anywhere and at any time, yet certainly the better practice and more orderly procedure would have been to pursue some other course than that which has been here followed.

In this case the superior court had original jurisdiction of the subject-matter of the action. While not securing jurisdiction of the cause by virtue of the appeal, it had jurisdiction over it by virtue of the constitution. The defendant brought the pleadings before that court by reason of his appeal upon questions of both law and fact. The court then having jurisdiction of the subject-matter of the action, and jurisdiction of the person and the parties going to trial upon the merits by consent, we are at a loss to see how a judgment rendered under these circumstances is void. The authorities fully support the conclusion to which we have arrived. *Randolph County v. Ralls*, 18 Ill. 29; *Birks v. Houston*, 63 Ill. 77; *Allen v. Belcher*, 3 Gilman, 594; *Harrington v. Heath*, 15 Ohio, 483; *Van Dyke v. Rule*, 49 Ohio St. 535, 31 N. E. 882; *City of Santa Barbara v. Eldred*, 95 Cal. 378, 30 Pac. 562; *Hart v. Carnell-Hopkins Co.*, 103 Cal. 132, 37 Pac. 196. It further may be said that the question here involved was not considered in the case of *Ballerino v. Bigelow*, 90 Cal. 500, 27 Pac. 372. The appeal in that case was decided alone upon the proposition that the superior court could not obtain appellate jurisdiction upon an appeal from a judgment of a justice's court in a case of which that court had no jurisdiction over the subject-matter. But, however that may be, this case in its facts is similar to *Hart v. Carnell-Hopkins Co.*, supra, and the decision in *Ballerino v. Bigelow* must give way, if the law there declared is opposed to the later case. As to the relative effect resulting from an appeal to a superior court upon questions of law alone, and from an appeal

upon questions of both law and fact, see *Maxson v. Superior Court of Madera County*, 124 Cal. 468, 57 Pac. 379. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

133 Cal. 1

PEOPLE v. KELLY. (Cr. 685.)

(Supreme Court of California. May 21, 1901.)

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—HARMLESS ERROR—FORGERY—FILING FORGED INSTRUMENT.

1. Where there is no evidence that defendant entered into a conspiracy with others relative to the crime with which he is charged, conversations of such other persons, in the absence of defendant, are inadmissible.

2. Error in reading a city ordinance in the instructions in a criminal case is not rendered harmless, on the ground that the evidence, aside from the ordinance, is conclusive on defendant's guilt, since the weight of the evidence is for the jury.

3. Reading a city ordinance prohibiting the police court clerks from accepting bail bonds outside the city hall is error in a prosecution of such a clerk for filing a false bail bond, under Pen. Code, § 115, making it criminal to prosecute or offer any false or forged instrument for registration.

Department 1. Appeal from superior court, city and county of San Francisco; William P. Lawlor, Judge.

Thomas A. Kelly was convicted of filing a false bail bond, and he appeals. Reversed.

Dibble & Dibble, for appellant. Tirey L. Ford, Atty. Gen., for the People.

GAROUTTE, J. The defendant has been convicted of a felony under an indictment charging him with a violation of section 115 of the Penal Code, wherein it is provided that every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed or registered or recorded under any law of this state, or of the United States, is guilty of a felony. By the indictment defendant is charged with filing in a public office a false and forged bail bond.

The court will notice but two assignments of error relied upon for a reversal of this judgment. The first assignment is based upon the admission of a great mass of evidence as to occurrences taking place between one Wilson, a prisoner, and Wilson, his attorney, not in the presence of the defendant, and subsequent to the release of the prisoner from jail, upon an order based upon the aforesaid false and forged bond. There appears to be no evidence in the record of any conspiracy existing between the defendant and the two Wilsons bearing upon the subject-matter of the crime here alleged; and for that reason all matters occurring without the presence of the defendant between the Wilsons were inadmissible in evidence

as in any way affecting his rights. There is an attempt made by the prosecution to show that the defendant was present in company with them, a short time after the release of the prisoner, but the attempt to show this fact is most feeble, and we deem the evidence wholly insufficient to establish it.

The trial court in its instructions to the jury read to them an ordinance of the city and county of San Francisco, wherein it is prohibited to the police court clerks (of which the defendant was one) to accept bail bonds outside of the limits of the city hall. It is conceded by the trial court, in an opinion attached to the record, that the reading of this ordinance to the jury was error upon its part; but it is asserted that in view of the fact that the evidence, aside from this ordinance, pointed conclusively to defendant's guilt, that, therefore, the reading of it did no harm, and for that reason it was in no wise prejudicial to him. Questions of fact are essentially matters for the jury to pass upon, and it is not for this court, nor for the trial court, to say that any particular quantum of evidence absolutely points to defendant's guilt. That is a question resting alone with the jury, and neither this court nor the trial court has the right to deprive the jury of its constitutional function in this regard. The court is at a loss to see the competency of this ordinance, even if it had been offered in evidence; and upon its face, when it came before the jury, it was clearly prejudicial to defendant's right, for the bail bond accepted in this case was accepted without the limits of the city hall, and for that reason the act of the defendant was violative of this ordinance of the city. And, the act being violative of the ordinance, it is impossible for this court to say that a showing of such violation of a city ordinance did not prejudice the defendant with the jury before whom he was being tried. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VAN DYKE, J.

132 Cal. 691

ANGUS et al. v. CRAVEN (FAIR, Intervener. S. F. 1,458).

(Supreme Court of California. May 20, 1901.)

JURY TRIAL—ACTION TO QUIET TITLE—FORGED DEEDS—CROSS BILL.

1. Under Code Civ. Proc. § 738, providing that an action may be brought by any person against another who claims an estate or interest in real estate adverse to him, to determine such adverse claim, where the complaint shows that plaintiff is the owner and in the actual possession, and that defendant claims some title which is unfounded, and the answer admits plaintiff's possession, and does not allege prior possession in defendant, the defendant is not entitled as of right to a jury trial.

2. Plaintiffs alleged that their testator died seised and possessed of certain land, and that defendant claimed an interest therein based on

certain forged deeds, and prayed to quiet their title. Defendant's answer admitted deceased's possession, denied that the deeds were forged, and claimed ownership thereunder. *Held*, that a cause of action was stated under Civ. Code, § 3412, providing that a written instrument in respect to which there is a reasonable apprehension that, if left outstanding, it may cause serious injury to a person against whom it is void or voidable, may be so adjudged on his application, and ordered to be delivered up or canceled.

3. The action being equitable, it was not error to refuse a jury trial.

4. Where plaintiffs alleged ownership and possession of land, and that defendant claimed title thereto under forged deeds, and prayed cancellation of such deeds, and that defendant be restrained from claiming thereunder, such equitable action cannot be changed into a legal action by defendant filing a cross bill in the nature of ejectment, so as to entitle defendant to a jury trial.

Temple, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by James S. Angus and others, executors of the will of James G. Fair, deceased, against Nettie R. Craven, defendant; Virginia Fair, intervener. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

D. M. Delmas and Denson, Oatman & Denson (W. W. Foote, J. H. Dickinson, and A. Ruef, of counsel), for appellant. Pierson & Mitchell, Garret W. McEnerney, Bishop & Wheeler, Lloyd & Wood, Wilson & Wilson, Knight & Heggerty, and Garber, Boalt & Bishop, for respondents.

McFARLAND, J. This is an appeal by the defendant, Nettie R. Craven, from a judgment in favor of plaintiffs and the intervener. Appellant made a demand for a jury for the trial of "said cause," which was refused, and the only question presented on this appeal is whether she was entitled to have said cause tried before a jury. Persons other than appellant were originally made defendants, but by defaults, disclaimers, etc., they disappeared from the case, and need not be further noticed; and in hereafter stating the pleadings we will treat them, for convenience, as if Mrs. Craven were the only defendant. In considering the question above stated, it will be necessary to notice as briefly as possible the condition of the pleadings.

The action was commenced on June 23, 1896, by a complaint which contained, substantially, these averments: James G. Fair died testate on December 28, 1894, and at the time of his death was the owner in fee and in actual possession of certain described lands. On the next day his will, together with a petition for the probate thereof, was filed in the proper court; and on January 2, 1895, the plaintiffs and one Bresse, since deceased, were appointed special administrators of his estate, with very full enumerated powers. Plaintiffs and said Bresse

immediately assumed their rights and duties as such administrators, and took possession of all the property of the estate, including the premises described in the complaint, and continued to act as administrators until the death of Bresse, on April 22, 1896, and thereafter respondents continued to so act. It is averred that defendant claims and pretends to have some right or interest in said described lands adverse to the estate of Fair and to plaintiffs as such administrators, but that said claim is false and fraudulent, and is based in part upon certain false and forged deeds purporting to have been executed by the said James G. Fair, deceased, in his lifetime, on the 8th day of September, 1894, which deeds purport to convey the said lands hereinbefore described to the defendant, Craven, and were recorded in the recorder's office of the city and county of San Francisco, state of California, where said lands are situated, on the 19th day of June, 1896. It is further averred that the defendant sets up claims and pretensions to said lands under said forged deeds, and that such claims and pretensions tend to cloud the title of the estate of said Fair, deceased, to the said premises; to impair the market value thereof; to obstruct plaintiffs' management of said premises as special administrators; to harass and annoy them in their possession thereof and in the collection of rents therefrom; to depreciate the market value of said premises; and to thereby inflict irreparable injury upon the said estate and upon plaintiffs as administrators thereof,—and that, unless restrained by the judgment or decree of the court, the said false claims and assertions will continue to injure plaintiffs as above stated. It is further averred that, by a special order of the court, plaintiffs are authorized to commence the action. The prayer is that plaintiffs be decreed to be the lawful owners in fee of the premises and entitled to the possession thereof; that defendant has no right, title, or interest therein; and that she and those claiming under her be forever restrained from asserting any title or interest therein and from interfering with the possession thereof, "and for such other and further relief as may be just and agreeable to equity." To this complaint the appellant on July 17, 1896, filed her answer. By her answer she admitted that James G. Fair at the time of his death was in the actual possession of the premises, and that plaintiffs were at the time of the commencement of the action, and had been since their appointment as administrators, in the possession thereof. She denies that Fair was the owner of the premises. She admits that she claims under the deeds set up in the complaint, but denies that they, or either of them, was forged or simulated, and avers that each of them is true and genuine. She avers that she is the owner in fee of the premises. She admits that she will continue to harass and annoy plaintiffs in the posses-

sion of said premises until they shall have recognized and yielded to her rights as owner thereof. She also filed a cross complaint, which is, in form, what we generally call a "complaint in ejectment," in which she prays for possession of the property, with damages for withholding the same. To this cross complaint defendants filed an answer in which they denied all the material averments in said cross complaint.

Afterwards the will of said Fair, deceased, by which plaintiffs were appointed executors of his estate, was admitted to probate, and letters testamentary were issued to them as such executors. Thereafter, on February 24, 1897, plaintiffs filed their supplemental complaint, in which they set up the fact that they had become executors, and restated the material averments in the original complaint; but, in addition to said averments, they averred that the claim of the defendant was based solely upon the alleged forged deeds before mentioned. The prayer was substantially the same as in the original complaint. To this supplemental complaint the appellant, Craven, filed an answer substantially the same as her former answer to the original complaint, and in addition filed a cross complaint which was substantially the same as her former cross complaint. To this cross complaint the plaintiffs filed an answer denying its averments, and also a further and separate and distinct answer for the purpose of obtaining affirmative equitable relief. In this further answer all the facts as to the claim of defendant, Craven, under the two alleged forged deeds are again set up; and it is further alleged that the certificates of acknowledgment attached to said spurious deeds which entitled them to record were also false and spurious, and were not made or attached to said deeds until long after the death of said Fair, deceased, and also that in said forged instruments the dates, names of parties therein, and the description of the premises alleged to have been conveyed thereby, and the signature of said James G. Fair, were all written in lead-pencil writing, so that it would be within the power of any person having possession of the same to erase portions of said pencil writing and to write therein descriptions of other property of the deceased, and thus the outstanding of said deeds constitutes a constant menace to the interest of said estate, not only as to the property therein alleged to have been conveyed, but as to all other property of the estate; and it is prayed that the defendant, Craven, "do immediately surrender the same to this honorable court for cancellation."

Afterwards the respondent Virginia Fair was allowed to file a complaint in intervention, in which she alleged that she was the owner of one undivided third of the lands, and alleged in detail the possession by Craven of said two deeds, and her assertion of title under them; that said deeds were forged, as averred in the former pleading,

and that the certificates of acknowledgment thereto which entitled them to record were spurious, and made long after the purported date of the same and after the death of said Fair; and she attached to her complaint copies of said alleged forged deeds, and copies, also, of the alleged spurious certificates of acknowledgment. She further alleged that the assertion of right under said false deeds and certificates was a cloud upon her title and caused her irreparable injury: and her prayer was that the defendant, Craven, be restrained from asserting or pretending that said deeds were valid or genuine, or from claiming any right or interest in or to said premises under said deeds, and that the court proceed to hear and determine without a jury the matters of equitable cognizance set forth in her complaint, and for such other and further relief as is meet in the premises and in conformity with equity. Defendant, Craven, moved to strike out this complaint in intervention, and the motion was denied. Afterwards the court granted the motion of plaintiffs "to proceed first with the trial of the equitable issues," to which ruling defendant excepted. The court then proceeded to the trial without a jury, and, having found all the material facts alleged in the pleadings of the respondents, found and decreed that the defendant, Craven, and all persons claiming through or under her, be forever enjoined "from asserting or pretending that said alleged deeds, or either of them, are or is valid or genuine, or from claiming or asserting any right or title to the said premises, or any part thereof, under the said deeds, or either of them." It was also decreed that the defendant, Craven, has no right or interest in or to any of the premises described in the complaint.

The case has been presented very fully by counsel on both sides, and with much labor and ability, and it is not at all free from difficulty. It is argued from various standpoints, one of which is that the action must be treated solely as an action to quiet title under section 738 of the Code of Civil Procedure. Taking this view of the case, it may be said that a complaint under section 738, having no averments inconsistent with the scope of that section as heretofore construed, presents on its face a case for equitable remedy. It seeks to have something done which a court of law cannot do. It invokes a decree in equity, not a mere judgment at law, which in its nature is only for the recovery of the possession of specific real or personal property or for damages. The purpose of the section is evidently to afford a remedy similar in character to that of the old bill of peace, but extending it to cases which the latter remedy did not reach. See *Curtis v. Sutter*, 15 Cal. 259. Courts, however, in guarding the constitutional rights to a jury trial, have repeatedly held that where the suit should have been, and in substance is, an action for the recovery of the

possession of land, the right of a defendant to a jury cannot be defeated by the mere device of bringing the action in an equitable form. And so it has been held that the right to a jury is not defeated where at the commencement of the action the defendant, and not the plaintiff, was in the actual possession of the premises involved; and it has also been held that where the defendant had been for a long time in the actual possession, and the plaintiff had ousted him, the plaintiff, by first bringing his action to quiet title, could not by such inversion of parties avoid the defendant's right to a jury, but that the action should be treated as substantially an action to recover possession. But this is as far as this court has gone in *Donahue v. Meister*, 88 Cal. 121, 25 Pac. 1096; *Newman v. Duane*, 89 Cal. 597, 27 Pac. 66; *Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816; *Moore v. Copp*, 119 Cal. 434, 51 Pac. 630; and kindred cases. As was substantially said in *Donahue v. Meister*, supra, the decision of the question whether, in an action brought under section 738, either party is entitled to a jury, must depend greatly upon the facts in that particular case. It has never been held by this court that an action to quiet title under the Code cannot be maintained as an equitable action where the plaintiff was, and for a considerable period of time had been, in actual possession, and defendant had never been in possession, or that in such case a defendant can overthrow the equitable character of the action by simply answering that he has title, and praying that he, for the first time, be let into possession. A complaint showing that plaintiff is the owner of the land and in actual possession of it, and that defendant asserts some right or title thereto which is unfounded, followed by an answer admitting plaintiff's possession, and not showing prior possession in defendant, seems to present the very action contemplated by the Code provision; and, under these conditions, its continued equitable character is not affected by the particular kind of right which the defendant sets up. Therefore, if we are to consider the case at bar solely in the light of an action to quiet title under section 738, we do not think that, under the conditions above stated, the court below erred in denying appellant's demand for a jury.

But really the action is something more than an action under section 738, if that section be construed as limiting the judgment to be entered to a mere general decree quieting title. Section 3412 of the Civil Code provides that "a written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged and ordered to be delivered up or cancelled." Relief under this section is clearly equitable, and it could not be successfully contended that in an action brought under it

the defendant would be entitled to a jury trial. Now in the case at bar the facts averred in respondents' pleadings entitled them to relief under section 3412, and to have the alleged forged deeds declared to be such and to be canceled. The only apparent obstruction to this view is the fact that in their complaint the plaintiffs did not expressly pray that it be decreed that the deeds are forged, and that appellant be enjoined from asserting any right under them, etc.; contenting themselves merely with the general prayer for "such other and further relief as may be just and agreeable to equity." If respondents had put into their complaint the specific prayer above alluded to, we apprehend that there would have been great difficulty in making any plausible objection to the refusal of the demand for a jury trial. But section 580, Code Civ. Proc., expressly provides that when there is an answer to the complaint the court may grant plaintiff "any relief consistent with the case made by the complaint and embraced within the issue." See *Walsh v. McKeen*, 75 Cal. 519, 521, 522, 17 Pac. 673, and cases there cited; *Grain v. Aldrich*, 38 Cal. 520; *Rollins v. Forbes*, 10 Cal. 299; *Pom. Rem.* §§ 71, 580. It is said by *Pomeroy* (section 580, supra), quoting from the New York court of appeals, that "the relief demanded by no means characterizes the action, or limits the plaintiff in respect to the remedy which he may have." In *Walsh v. McKeen*, supra, the original prayer of the complaint was merely for a money judgment, and "during the progress of the trial" the plaintiff was allowed, against defendant's objection, to amend the prayer "so as to ask for an accounting, and for such other and further relief as might be deemed equitable and proper"; and it was held here that this was not error, although it actually changed the remedy from legal to equitable,—the court saying that, "when an answer has been filed, any relief may be granted to the plaintiff which is consistent with the facts stated in the complaint." In the case at bar no such amendment was necessary, for the prayer for general equitable relief was sufficient. However, in the answer to the cross complaint the prayer was made specific, so that appellant cannot claim that she was not fully informed on the subject long before the trial.

It is said that a court of law can try questions of fraud and forgery as well as a court of equity. Of course, this is true, and it is true of any question of fact, considered independently of the circumstances under which it arises. Either a court of equity or a court of law can hear and determine any issue of fact which is presented for adjudication in a proceeding properly before the court; otherwise, there could scarcely be any equitable remedies. But the circumstance that either kind of court may try a question of fact has no weight in determining whether upon a particular state of facts the remedy is legal or equitable.

In appellant's original points and authorities it is said by counsel that her cross complaint "was not necessary and did not really affect the proceeding"; but in parts of their subsequent arguments they seem to claim that the action should be treated as if it had been commenced by the cross complaint in ejectment, and that the cross complaint and the answer thereto are the only pleadings to be considered, and that the verdict of a jury in favor of plaintiffs would have afforded them ample remedy at law. But, for the reasons hereinbefore given, the equitable character of the remedy sought by plaintiffs was not overthrown by the filing of the cross complaint; and, moreover, if there had been merely a general verdict for plaintiffs, the record would not have shown the ground on which it was rendered, and, under any view, the judgment which could have been rendered on such verdict would not have been the equivalent of an equitable decree forever restraining appellant from asserting any right or interest under the forged deeds. When a party claiming under an invalid instrument would be compelled in establishing his rights to make direct proof of its genuineness or validity, equitable interposition might not be necessary; but a forged deed fraudulently acknowledged and placed on record is admissible in evidence without further proof of execution, and, as was said in *Paper Co. v. O'Dougherty*, 81 N. Y. 483, "when the law raises a presumption without direct proof of the validity of a conveyance, and its invalidity can only be made to appear by extrinsic evidence, a case is presented for the exercise of the jurisdiction of a court of equity, to compel the surrender and cancellation of the instrument as a cloud upon title."

We do not deem it necessary to consider counsel's discussion of the question whether or not the intervention of Virginia Fair was properly allowed; for the pleadings of plaintiffs fully presented the matters at issue, and her absence from the case would not have affected the disposition of the issues involved, or the substance of the decree. The judgment appealed from is affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.

I dissent: TEMPLE, J.

HIENSHAW, J. I concur. Defendant in the first instance was called upon to defend her deeds to the property against allegations that they were spurious and forged, and should be delivered up and canceled. Upon these allegations she joined issue. These issues, and the relief under them, were of equitable cognizance. That defendant at the same time filed a cross complaint in the nature of an action in ejectment could not operate to oust the court in equity of the jurisdiction it had acquired. Under our system, equitable and legal rights are determined in

the same forum. It is within the discretion of the court to control the order of proof upon the issues joined. In the natural order, before defendant was entitled to a hearing upon the legal issues tendered she must defeat plaintiffs upon the equitable issues presented by them. This was the view of the trial court, and, in pursuance of it, it took to itself, as was proper, the determination of these equitable matters. The result was that it found defendant's deeds to have been forgeries. Had it reached the opposite conclusion, then defendant might with right have insisted that the remaining issues of law be tried before a jury. But that time never arrived, and I do not concede the right of a litigant to oust a court of equitable jurisdiction, in an action of purely equitable cognizance, merely by tendering additional issues which are triable at law before a jury. It is sufficient if a jury be had when those issues come to trial.

132 Cal. 631

PEOPLE v. SUESSER. (Cr. 570.)

(Supreme Court of California. May 9, 1901.)

HOMICIDE—CHANGE OF VENUE—SUFFICIENCY OF EVIDENCE.

Pen. Code, § 1033, directs a grant of a change of venue in a criminal case on a showing that a fair trial cannot be had or a jury cannot be obtained. Defendant, who was a man of bad repute, made an assault on a person who had filed an information against him, and fired several shots into his house. The sheriff went to the house of defendant, and was shot by him. A mob was formed, composed of persons of standing in the community, and mob violence was only prevented by prompt removal of defendant to another county. The defendant was denounced in the pulpit and by the press, and public opinion was unanimous that the death penalty should be inflicted. Sixty-eight jurymen were examined on their voir dire, and all but eight had formed an opinion as to defendant's guilt, and three of these were excused. *Held*, that it was error to refuse a change of venue.

In bank. Appeal from superior court, Monterey county.

George Suesser was convicted of murder in the first degree, and he appeals. Reversed.

Dougherty & Lacey, for appellant. Tirey L. Ford, Atty. Gen., and H. A. Melvin, for the People.

TEMPLE, J. The defendant was tried and convicted of murder in the first degree, and sentenced to be hanged, and has appealed from the judgment and from an order refusing a new trial.

The principal point relied upon for a reversal is the refusal of the court to grant a change of venue upon the showing made by the defendant. Section 1033, Pen. Code, directs the trial court to grant the change when it is made to appear that a fair and impartial trial cannot be had in the county, and when from any cause no jury can be obtained in the county where the action is

pending. So far as this case is concerned, both provisions mean the same thing. A fair trial cannot be had where an unbiased jury cannot be had, and a juror who has an unqualified opinion that defendant is guilty, founded upon a knowledge of material facts of the case, does not possess the common-law qualifications for a juror, and it does not matter how that knowledge was obtained, provided the juror believed it. Indeed, the rule went beyond this. A juror was disqualified if he had made positive and unqualified statements in regard to the guilt of the defendant; and to suppose that the majority of mankind would or could act as freely, in the face of such statements made to neighbors and friends, as he could have done if such statements had not been made, is to ignore human nature. It was said in *People v. Wong Ark*, 96 Cal. 136, 30 Pac. 1115: "And when the constitution of this state guaranties to all the right of trial by jury, it means an impartial jury." It guaranties a common-law jury. *Cooley*, Const. Lim. 390; *People v. Powell*, 87 Cal., 348, 25 Pac. 481, 11 L. R. A. 75. It is true that this test as to whether a proposed juror is impartial, and can try a cause uninfluenced by rumors and newspaper accounts, has been modified, and much is now left to the discretion of the trial court, but it is not intended by this to deprive any one of the right to be tried by a jury which is in fact unprejudiced. No more now than formerly is a defendant compelled to submit his case to a juror who has such an opinion of his guilt as will require evidence to remove it, and thus unjustly add to the burden of his defense. The force of this suggestion will be appreciated, if we suppose the prejudice to have been the other way. Suppose the deceased, instead of being killed, had slain the defendant, and without just excuse, and this same demonstration had been made in his favor; all the newspapers, we may suppose, filled with denunciations of the deceased and commendations of his slayer; and suppose the jurors, when called one by one, all, or nearly all, as in this case, had testified that they had formed strong opinions from what they had read and heard in favor of the prisoner, and if taken as jurors would commence the trial with opinions in favor of the defendant, which it would take evidence to remove, and yet each juror should testify that he could fairly try the defendant and determine the case uninfluenced by his opinion. Could any one believe that a verdict of guilty could be obtained from such a jury? The very atmosphere pervading the community would forbid it. And yet the coercion of public opinion is a thousand times stronger in this than it would have been in the case supposed.

The defendant, to say the least, was a person of no consideration in the community. He had been arrested before for trifling offenses. He is said to have been an idler, addicted to drink. He made his living prin-

cipally by hunting. He had been arrested on a charge of petit larceny, made by one Delaney. In the evening of September 18, 1899, he went to the dwelling house of Delaney at Salinas, and, calling him to the door, assaulted him. He afterwards fired several shots at the house, and set fire to a haystack on the premises. A fire alarm was turned in, and naturally the people were much excited. The deceased was sheriff of the county, a young man much esteemed. It is said he was the most popular man in the county. Upon hearing the alarm of fire, and upon learning something in regard to the conduct of Suesser, the sheriff went, with others, to prevent further trouble. Whether he at first designed to arrest Suesser does not appear. Going to the house of Suesser's parents, they found Suesser with a gun, and his parents and sisters trying to persuade him to remain at home. They heard Suesser, with an oath, declare that he would go and kill some person, probably Delaney, or Allen, who had served a warrant upon him. The sheriff addressed him, saying, "No, you won't," and advised him to remain at home. He asked him, "Do you know me, George?" Defendant replied, with a vulgar oath: "Yes; and I will shoot you, too." The sheriff then said: "George, behave yourself. I will shoot. I will shoot." Suesser immediately fired, killing Farley.

The affidavits upon which the motion for a change of venue was based state that the homicide was in the presence of several persons, who have detailed the occurrence for the public press, and such reports have been circulated throughout the country. Upon the arrest of defendant, which was shortly after the homicide, a large concourse of people gathered on the streets, which was composed of citizens of standing and repute. These openly threatened to lynch the defendant, and he was saved from mob violence by hurrying him in a carriage at breakneck speed through the streets of the city, and before reaching the jail the officers were met by another crowd bent upon violence, who were defeated only by dashing into a side street, and going out of the city. In the morning early the prisoner was secretly lodged in jail, around which a crowd gathered, who threatened to break into the jail and hang the defendant. Fearing this, the officers clandestinely removed defendant from the county. He was brought back for a preliminary examination on October 11th, and the examination was held at the sheriff's office, rather than at the office of the justice of the peace, for fear of further violence. And "that the defendant has been denounced in the church pulpits and in the public press, and the opinion is practically unanimous in Monterey county that no punishment but death is deserved by the defendant." The accounts published in the papers are appended as exhibits. Their nature is not overstated in the affidavits. It was natural that

the greatest indignation and sorrow should be expressed. Their sheriff was killed in the performance of his duty,—in fact, in protecting the people of the city from the acts of an incendiary, who, while the fire set by him was still raging, was heard to declare his intention to take the life of a citizen. First vainly attempting to persuade the defendant, as was reported, to remain at home, and to abandon his homicidal intent, he endeavors to make the arrest. He was then shot down in the presence of several citizens by this, as represented, most desperate criminal. Many affidavits and considerable testimony was submitted by the defense, and there was a counter showing. This amounted to little more than a showing that after the lapse of a few days the excitement abated, and there was no real intent to lynch the defendant; also that there was not so much excitement in the remote parts of the county. That but one opinion in regard to the guilt of the defendant existed throughout the county is admitted. There was no pretense that such opinion had changed, but only that the feeling against the defendant was less intense. The motion was renewed after the examination of the panel on voir dire as to their qualifications, and was again denied. So far as the record shows, if I make a correct estimate, 68 jurors were examined, and all except 8 had formed an opinion as to the guilt of the defendant. So far as appears, all were against the defendant. Of the 8 who had not formed opinions, 2 were excused because opposed to capital punishment, and 1 had not been assessed. This left 5. Perhaps 5 to 60 would not unfairly divide the county between those who had not formed opinions and those who had. In fact, it is hard to understand how any one who had heard the reputed acts, as coming from several eyewitnesses, could fail to form an opinion against the defendant.

Most of the 20 peremptory challenges allowed the defendant were exercised upon proposed jurors who stated upon voir dire that, if sworn as jurors, they would take their seats in the box with a strong opinion against the defendant, which it would require evidence—some said strong evidence—to remove. Where such a state of things exists, the defendant cannot have a fair and impartial trial. If the change of venue should not be granted in this case, I think the statute should be repealed. Why courts should hesitate to grant change of venue in a proper case I cannot understand. It seems that many, perhaps most, of the merchants and business men of Salinas, made affidavits of the nature I have stated above to prevent such change. Why? Was it feared the defendant would escape if he were allowed a fair trial? It is suggested that there is undue delay in reaching final judgment. Those who complain of delay have prejudged the case, but delays are too often caused by plain disregard of obvious rights of friend-

less and unpopular defendants. The attorney general says the opinions formed by jurors were based upon rumor or newspaper reports; but there never was any real conflict about the occurrences at the time of the homicide. They were not denied. The opinions were therefore based on the facts as developed at the trial. The defendant testified that he was unconscious, and had no memory of what occurred.

Reference is made to the case of *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75. One reason for affirming the order in these cases was that leave was given to renew the motion when, on an attempt to impanel a jury, the state of mind would be shown. Here the motion was so renewed. These cases arose, too, in a populous city, where there were over 300,000 inhabitants. But it will be observed that in each case the writer of the opinion would have been better satisfied if the motion had been granted. I admit that much discretion is left in this matter to the trial court.

There are other questions in the case, but, if it is to be sent back with directions to grant the change of venue, a new trial will necessarily result, and such matters will be unimportant. The judgment is reversed, and the trial court is directed to grant the motion for a change of venue for the purposes of a new trial, which is ordered.

We concur: BEATTY, C. J.; VAN DYKE, J.; HENSHAW, J.; HARRISON, J.

McFARLAND, J. (concurring). I concur in the judgment and in the opinion of Mr. Justice TEMPLE. It is not improper, however, to say that, while appellant's counsel do not claim that he was not guilty of some crime, they do contend, with at least some plausibility, that he committed the homicide under a state of wild excitement and frenzy produced by causes entirely disconnected with the deceased, and not necessary to be here detailed, which show the absence of that deliberation and premeditation necessary to constitute murder in the first degree.

(132 Cal. 582)

SAN JOSE RANCH CO. et al. v. SAN JOSE LAND & WATER CO. et al. (L. A. 671.)¹

(Supreme Court of California. May 1, 1901.)

NONNEGOTIABLE NOTES—DEFENSES—ASSIGNMENT AFTER MATURITY—MORTGAGES—MISTAKE—IRRIGATION—WATER RIGHTS—PURCHASE—FALSE REPRESENTATIONS—EVIDENCE.

1. Where notes given with a mortgage were nonnegotiable, but were assigned, the assignee took them subject to all equities; and the mortgages could set up the defense that by mistake the mortgage included more property than the parties intended, though the assignee had no notice of the mistake.

2. The notes having been assigned after maturity, they were subject to all defenses under

¹ Rehearing denied May 31, 1901.

Code Civ. Proc. § 368, declaring that an assignment of a chose in action, except negotiable paper before maturity, shall be without prejudice to any defense or set-off existing at the time or before notice of the assignment.

3. Under Civ. Code, §§ 3399-3402, providing that, when by mistake a contract does not express the intention of the parties, it may be revised to conform to their intentions, on a finding that a mortgage given by the purchaser of land was intended by the parties to include only the lands purchased, but by mistake it included more, and that the notes given therefor, though nonnegotiable, were assigned with the mortgage after maturity, in good faith, the court should have reformed the mortgage to conform to the intention of the parties before decreeing foreclosure.

4. The president of a corporation which purchased a water right stated that he had thoroughly explored the cañon in which it was located; that the stream dried up, possibly 5 years in 12, and was sometimes so dry that people within four miles had trouble to get drinking water; and that the claims other than that purchased were inconsiderable. The agent who did the purchasing testified that he had been acquainted with the waters of the cañon since 1874, and that for several years he had occasionally traveled over the property on which the right was purchased, and that some years there was not much water, and he had seen the cañon dry. One of the organizers of the corporation testified that the owner of the claim said that he had a right to 70 inches of water under a 4-inch pressure and that the time of year when he could get water varied; that the corporation was claiming the water rights in the cañon, and purchased the claim to extinguish the owner's rights. *Held*, that the evidence supported a finding that the corporation had not relied on and been deceived by the representations of the owner.

In bank. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by the San Jose Ranch Company and another against the San Jose Land & Water Company and another. From a judgment in plaintiffs' favor, and from an order denying a new trial, defendants appeal. Reversed.

Dunnigan & Dunnigan and Anderson & Anderson, for appellants. J. S. Chapman, for respondents.

VAN DYKE, J. The action was brought to foreclose a mortgage executed by the defendant company to one Peter H. Taylor to secure the payment of two promissory notes of even date, for \$10,000 each. The notes were made by the defendant company to said Taylor in part payment of the purchase price of certain lands and water rights in the San Dimas Cañon, Los Angeles county. The notes were nonnegotiable, and passed, by sale and assignment after maturity, into the ownership of the plaintiffs. Both by answer and cross complaint the defendant corporation sets up and alleges—First, mistake in the contract of mortgage, and asks for a reformation thereof; second, alleges a failure of consideration, through fraud and misrepresentation on the part of Taylor as to the value of his water right. The appeal is taken from the judgment in favor of the plaintiffs, and from an order denying defendants a new trial.

1. The questions presented on the appeal may be grouped under the two heads contained in the defendants' answer and cross complaint. In reference to the alleged mistake in the execution of the mortgage, the finding of the court is as follows: "That it was the intent, purpose, and understanding of the said defendant the San Jose Land & Water Company and the said Peter H. Taylor that said mortgage should create and constitute a lien only upon the land and water right conveyed by said Peter H. Taylor to said defendant the San Jose Land & Water Company by the deed described in the seventh paragraph of these findings, but through mistake and inadvertence, and through the mistake of the scrivener who drafted said mortgage, in copying literally the description contained in said deed into said mortgage, said mortgage was so framed as to constitute a lien upon the flumes, aqueducts, and water rights owned by said defendant the San Jose Land & Water Company other and different and in addition to the water rights, flumes and ditches conveyed by said Taylor to said defendant by said described deed." And further: "That said notes are nonnegotiable notes, and, at the time of said assignments by said Taylor to said Wicks and by the said Wicks to the plaintiffs, the said A. S. Kimball and the San Jose Ranch Company, said notes were past due, but said several assignments, and each of them, was made in good faith and for a valuable consideration, and neither the said Wicks nor the said Kimball nor the San Jose Ranch Company had at the time of the assignment by said Taylor to said Wicks, or at the time of the assignments by the said Wicks to Kimball and to the San Jose Ranch Company, notice or knowledge of any mistake contained in said mortgage, or that it was the intent or purpose of the parties to said mortgage to create a lien upon any water right or other property other than described in said instrument of mortgage." It seems that the court, as a conclusion, found that the defendant was not entitled to relief on the ground of mistake in the execution of the mortgage, from the fact that the plaintiffs and their assignors had no notice or knowledge of the mistake. This fact is quite immaterial, as the notes in question were nonnegotiable. Besides, they were transferred by assignment after maturity, and the plaintiffs, as assignees, took subject to all the equities and defenses which could have been urged against the original payee. Civ. Code, § 1459; Code Civ. Proc. § 368; Bank v. Gay, 101 Cal. 286, 35 Pac. 876; 2 Pom. Eq. Jur. § 704; 1 Jones, Mortg. § 841 et seq.; Wilts. Mortg. Forec. § 354. On the facts found the court below should have revised and reformed the mortgage, before decreeing its foreclosure, so as to express the intention of the parties when it was executed. Civ. Code, §§ 3399-3402.

2. On the defense of failure of consideration through the fraud and misrepresenta-

tion of Taylor, the vendor of the property, the court finds as follows: "That at and prior to the time of the execution of said agreement the said Peter H. Taylor represented to the defendant the San Jose Land & Water Company that said water right so claimed by him was a right to seventy inches of water measured under a four-inch pressure, and acquired by prescription and adverse user; but such representations so made by the said Peter H. Taylor were not made fraudulently or with intent to deceive the said defendant the San Jose Land & Water Company, or for the purpose of inducing the said defendant to enter into said contract of purchase, and said defendant was not deceived by said representations, and was not induced by reason thereof to enter into said agreement of purchase; but said defendant, in entering into said agreement, acted upon its own investigation and judgment, and the investigation and judgment of its officers and agents, and not upon such representations, or any representations, made by the said Peter H. Taylor; and said defendant was at the time of entering into said agreement as fully informed and advised as to the character and extent of the water right so claimed and owned by the said Peter H. Taylor as was the said Peter H. Taylor himself."

The evidence fully supports the finding of the court to the effect that the defendant corporation, in entering into the agreement of purchase, acted upon its own investigation and judgment by its officers and agents. T. W. Brooks, called on behalf of the defendant, was one of the organizers of the defendant corporation, and was president thereof at the date of the purchase and execution of the mortgage. He testified that he was acquainted with the San Dimas Cañon, and had thoroughly explored it, and details an account of his operations in that section of the country, giving the names of the different parties who claimed water rights in the same. He was in fact one of the main promoters of the scheme to develop and control the waters of that cañon, and conduct the same to lands lying below its mouth. He says: "I thought that watershed, properly handled, was one of the valuable properties of Los Angeles county; that it was worth a million of dollars, with an expenditure of a hundred thousand to place a reservoir in it, which was my plan from the first." Again: "Seeing this, and knowing it to be a fact, and furthermore knowing that the summer water is a matter of no consideration,—it is so small that no intelligent man would fight another for it,—I saw that this property could be made a valuable property by building several reservoirs in the cañon, as was the plan, and I went to work to avail myself of this great watershed. It is the winter water that is worth money, and not the summer water that so much talk is about. The stream dries up

there, possibly, five years in twelve; and it has been so dry that people were troubled, within a distance of four miles, to get water to drink. These are notorious facts, that all the settlers know. So far as appropriations were concerned, and who was using the water, I found that there was none except Mr. Bixby, Mr. Young, and those people on the mesa, Mr. Chappel. Their amount of water was so small that it was not a consideration, but expected to be respected, and the amount more than respected, in all my plans and operations." Mr. M. G. Rogers, another member of the defendant corporation, and agent of the company to purchase the land from Taylor, and a witness for the defendant, states that Taylor at the time claimed seventy inches of water, and that he had posted notice accordingly, and used the water for five or six years, and that they relied upon Taylor's statement. On cross-examination, however, he says that that conversation with Taylor was at the time he made the contract. He lived only about half a mile from Taylor, and had been acquainted with the waters of the cañon since 1874, and had known Taylor for about twelve years. He had looked at the ditch before he bought it, and was acquainted with the San Dimas creek. The road from Rogers' house to the mountain went over Taylor's place, and he had been traveling over it occasionally for several years. He is asked this question: "Q. Did you at that time know about how much water ran in the stream as far down as Mr. Taylor's ditch, in the irrigating season, as a general rule? A. Well, some years there was considerable, and some years there wasn't very much. Q. Didn't the stream dry up many years, above Mr. Taylor's place, in the summer time? A. The latter part of the season I think it almost always dried up. I have seen the cañon dried clean up; that is, occasionally. Q. But every year, along at the time they begin irrigation, haven't the waters of that stream subsided to such an extent that there is not more than from fifteen to twenty and twenty-five and thirty inches flowing down the — A. That might be, sir. I have never seen it, sir, since I have been in the country. Q. My question was whether you meant that you never saw so much as twenty or thirty inches flowing down as far as the head of Taylor's ditch in the irrigating season. A. Well, that would depend on when you would call the irrigating season. I have seen water running over his ditch when he would be irrigating. He would have all the water in his ditch when he would be irrigating, and still quite a number of inches of water beyond his ditch flowing down the creek. Other seasons he would have it all taken, without none passing his ditch; and then, again, he would have none coming to his ditch. The creek would be dry. And I have seen and known the creek to be that way during the seasons that I have known it." Again he

says: "Our company, or some of its members, were at that time claiming rights to the water in the creek; and there were other parties claiming a right to the use of it, to my knowledge, or to some portion of it. I live a little ways above Mr. Taylor, in the cañon,—about a half a mile." And asked by the court, "In other words, you knew that the water rights in the cañon were in an unsettled condition?" he answered: "Yes, sir; yes, sir, we did." Mr. C. M. Wells, another of the original parties who organized the defendant corporation, testified that he went up the cañon with Brooks, and was introduced to Taylor. Negotiations had been in progress before that time for the purchase of the Taylor property. They had a general conversation in relation to his property and his water rights, and the character of them. Taylor told him that he had appropriated 70 inches of water, and Wells asked him during what portion of the year he would get water, and Taylor said it would vary; some years he would not get any water after June; other years it would run up to August. The negotiations for the purchase began before they had incorporated the defendant company, and continued after that. The witness says further: "Our company was then claiming water rights in the cañon. We had the Chappel place at that time, and there was a water right in connection with it. We were claiming the waters of the San Dimas Cañon that time, and the whole of it, and we recognized that Taylor had a right there. We purchased Taylor's claim to extinguish his water right,—to acquire his water right. The stream flows through the Taylor place in its natural course, when there is water enough in it to run down that far. Our company was obtaining water for the purpose of taking it out beyond the cañon upon other lands for use. The Taylor lands lay right directly along the route which we proposed to carry our pipe or ditch line. That would be the only possible route for it." In view of the testimony, therefore, it is quite clear that the organizers and officers of the defendant corporation were quite as well acquainted with the San Dimas Cañon and the water flowing therein as the defendant Taylor himself, if not better. The finding of the court to that effect is therefore fully supported.

The facts having all been found on which to enter a proper judgment, a new trial is altogether unnecessary. The order will therefore be: Judgment reversed and cause remanded, with directions to the court below to revise the mortgage so that it will embrace only the property sold by Taylor, the mortgagee, to the defendant corporation, the mortgagor, and, as thus reformed, to enter judgment and decree of foreclosure thereon.

We concur: GAROUTTE, J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.

MEMORANDUM DECISIONS.

BAUER v. QUINN et al. (S. F. 2,438.) (Supreme Court of California. April 6, 1901.) In bank. Appeal from superior court, city and county of San Francisco; Carroll Cook, Judge. Action by A. C. Bauer against John E. Quinn and others. Judgment for defendants. Plaintiff appeals. Affirmed. P. F. Dunne, for appellant. Franklin K. Lane, City Atty., and G. W. McEnerney, for respondents.

PER CURIAM. Upon the authority of *Cahen v. Wells* (S. F. No. 2,439, this day decided) 64 Pac. 699, the judgment appealed from is affirmed.

132 Cal. 580

FAIR v. ANGUS et al. (S. F. 1,155, 1,156.) (Supreme Court of California. April 30, 1901.) In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge. Action by Charles L. Fair against James S. Angus and others. From a judgment in favor of plaintiff, certain defendants appeal. Affirmed. See 60 Pac. 442. Wm. M. Pierson, Geo. E. Crothers, and Garret W. McEnerney, for appellant executors. Van R. Paterson, for infant appellants. Knight & Heggerty, for respondent Fair. Lloyd & Wood (Wilson & Wilson and Garber, Boalt & Bishop, of counsel), for respondents Oelrichs and Vanderbilt.

GAROUTTE, J. The appeals in this case are taken in an action brought by Charles L. Fair, prior to the admission of the will of James G. Fair to probate, against Angus, Crothers, and Goodfellow, individually and as trustees named in the will, to determine an adverse claim made by them to the Lick House property in San Francisco. Plaintiff made his sisters defendants under an allegation that he could not obtain their consent to join him as plaintiff. An amended complaint was filed, making as additional defendants the then living infant beneficiaries referred to in the will of James G. Fair. The cause was not brought on for trial until after the admission of the will for probate, and at the trial it was shown that the testator died seized of the property, that the plaintiff and his two sisters are his heirs at law, that his will was admitted to probate on the 16th of November, 1896, and letters testamentary issued to the defendants Angus, Crothers, and Goodfellow. The court found that the plaintiff and his sisters are the owners in fee simple absolute of the property described in the complaint; that the defendants Angus, Crothers, and Goodfellow have no right or interest therein, either as trustees under said will or otherwise; and that said minor defendants, or either of them, have no interest therein. Judgment was rendered accordingly. The two appeals in this case are taken by certain of defendants. In view of the decision this day rendered in *Re Fair's Estate* (S. F. 1,491) 64 Pac. 1000, wherein it is held that the estate passed to the heirs by succession by reason of the invalidity of Fair's will, we find no practical reason presenting itself why the appeals in this case should be considered in extenso upon the various matters presented by counsel in their briefs. The decision in *Re Fair's Estate* is to the effect that neither the trustees nor the beneficiaries take any estate by Fair's will. This being so, the judgment rendered in this cause should be affirmed, and it is so ordered.

We concur: **McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.**

We dissent: **BEATTY, C. J.; HARRISON, J.; TEMPLE, J.**

MEYER v. CITY OF SAN DIEGO et al. (CAPRON et al., Interveners; L. A. 909.) (Supreme Court of California. Feb. 26, 1901.) In bank. Appeal from superior court, Orange county; J. W. Ballard, Judge. Action by Albert Meyer against the city of San Diego and others. H. I. Capron and another intervene. From an order denying a motion to strike a certain sum from interveners' memorandum of costs, defendants appeal. Affirmed. H. E. Doolittle, for appellants. Works & Works, for respondents.

PER CURIAM. The appellants moved to strike from the cost bill filed herein the sum of \$558, which it is claimed is for reporter's fees in transcribing the testimony taken at the trial for the use of the plaintiff and the interveners. The facts are substantially the same as in the case of *Meyer v. City of San Diego* (No. 904, this day filed), 64 Pac. 124. Upon the authority of that case the order is affirmed.

132 Cal. 615

PEOPLE v. PELLER. (Cr. 707.) (Supreme Court of California. May 7, 1901.) Department 2. Appeal from superior court, Sierra county; Stanley A. Smith, Judge. Alfred Peller was convicted of assault, and he appeals. Affirmed. F. D. Soward, for appellant. Tirey L. Ford, Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of an assault with a deadly weapon, and was sentenced to two years' imprisonment in the state prison; and an appeal appears to have been regularly taken on his behalf from the judgment and from an order denying a motion for a new trial. We have examined the record, and see no prejudicial error; and, as we have recently received a written communication from the defendant, in which he states that he had just learned that the appeal had been taken, that it was taken without his knowledge and against his express direction, and that, while he asserts his innocence, he does not desire a new trial, but prefers to finish his short term of imprisonment, we do not deem it necessary to enter upon a detailed discussion of the case. The judgment and order appealed from are affirmed.

PEOPLE ex rel. ROBERTS v. RUSS et al. (S. F. 1,841.) (Supreme Court of California. March 2, 1901.) Appeal from superior court, Humboldt county; E. W. Wilson, Judge. Action by the people, on the relation of Robert W. Roberts, against W. N. Russ and Z. Russ & Sons for the abatement of a public nuisance. From a judgment in favor of defendants, plaintiff appeals. Reversed. Atty. Gen. Fitzgerald, L. F. Puter, and C. M. Wheeler, for appellant. J. H. G. Weaver and W. F. Clybourne, for respondents.

PER CURIAM. This appeal is taken from the judgment. A separate appeal has been taken from the order denying a motion for a new trial. The briefs upon the two appeals are the same, and we find all the questions discussed come under the consideration of the appeal from the order. That order has this day been reversed. *People v. Russ* (S. F. 1,840) 64 Pac. 111. Upon the authority of that case the judgment is reversed.

THOMPSON, BEARD & SONS v. WELLS, FARGO & CO. (S. F. 2,142.) (Su-

preme Court of California. April 6, 1901.) In bank. Appeal from superior court, Napa county; E. D. Ham, Judge. Action by Thompson Beard & Sons against Wells, Fargo & Co. From a judgment for plaintiff, defendant appeals. Affirmed. E. S. Pillsbury, Alfred Sutro, and Percy S. King, for appellant. Webber & Rutherford, for respondent.

PER CURIAM. The foregoing case was submitted under stipulation that the judgment herein should follow the determination and judgment in *People v. Wells, Fargo & Co.* (S. F. 2,136, this day decided) 64 Pac. 702. For the reasons given in *People v. Wells, Fargo & Co.* (S. F. No. 2,136), the judgment in the above-entitled case is hereby affirmed.

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PEOPLE v. HARLAN. (Cr. 625.)

(Supreme Court of California. May 23, 1901.)

RAPE—EVIDENCE—LEADING QUESTIONS—INFANT PROSECUTRIX—IMMORALITY—ACTS—CREDIBILITY—ADMISSIONS BY DEFENDANT—EXAMINATION—AGE OF PROSECUTRIX—EVIDENCE—HEARSAY—RESISTANCE—INSTRUCTIONS—AGE OF CONSENT—STATUTE—INCREASE OF AGE.

1. Prosecutrix testified that defendant had sexual intercourse with her. He had boastfully admitted the fact to two witnesses. A physician testified as to her condition. Prosecutrix, her mother, and one aunt testified positively that she was under the age of 16, which was the age of consent. Another aunt's evidence tended to corroborate this. Prosecutrix, four years previous, had given her age to a school teacher as 13, which, if true, would bring her above the age of 16. *Held*, that the verdict of the jury convicting defendant of rape would not be disturbed.

2. Where the vocabulary of prosecutrix, a minor, was limited, and her answers consequently uncertain, leading questions were proper.

3. Where prosecutrix was asked why she did not say something to M., and, in the next succeeding question, why she did not make complaint to anybody at "the saloon where M. was," which latter question was answered, the exclusion of the first question was not error.

4. Under Code Civ. Proc. §§ 2051, 2052, prescribing the method of impeaching witnesses, questions tending to show the immorality of prosecutrix, or specific acts of immorality, cannot be introduced in evidence merely to affect her credibility, or impeach her, especially where the prosecutrix is below the age of consent.

5. On the day of and prior to commission of the alleged rape defendant had said to a stable keeper that he was procuring a conveyance to have carnal knowledge of a "little girl," without giving any idea as to who the girl was. Other evidence showed that he enticed prosecutrix into the conveyance, and drove to the place where the crime was committed. *Held* no error in admitting defendant's declaration to the stable keeper.

6. Declarations of defendant, on trial for rape, which clearly referred to the crime in question, and which were properly described as to time, place, and circumstances, were admissible in evidence against him.

7. In a prosecution for rape, evidence as to defendant's sobriety on the day previous to the day of the crime was immaterial to offset the declarations made by defendant in a conversation occurring in the evening of the day of the crime.

8. Where a witness testified as to the date of a transaction, the question, "How is it you can recollect a date as long ago as that and you cannot remember the day of the week?" was properly excluded, as not calling for a fact, but for an argument.

9. Testimony was given as follows: "Prosecutrix is my niece. I think I know her age. Q. What is it? A. I think it is fifteen." *Held*, that the answer could not be stricken out as not responsive to the question.

10. Objections to the evidence as to the age of prosecutrix in a rape case on the ground that it was based on hearsay, and not the best evidence, must be made in the trial court, or they will not be passed on by the appellate court.

11. Where prosecutrix in a rape case on cross-examination fully described the position into which she had been forced by defendant, and the jury was allowed to inspect the buggy wherein the crime was committed, there was no error in refusing to compel prosecutrix on cross-examination to again assume the position in view of the jury.

12. Evidence that prosecutrix failed to resist the assault of defendant, charged with rape, is immaterial where she was under the age of consent at the time.

13. That a female under the age of consent consented could not be proved, in a prosecution for rape, to affect her credibility; this being immaterial.

14. Where defendant, charged with the crime of rape, testified that he had kept up a course of drinking all during that day, but that he knew what he was doing, there was no prejudicial error in sustaining the objection to a question of defendant's counsel relating to whether or not he had been drinking just before getting into the buggy wherein the crime was committed.

15. An instruction substantially covering instructions requested by defendant in a rape case that, "if the jury believe that any witness has willfully sworn falsely to any material matter, then it is your duty to scan closely and distrust the entire evidence of such witness," is not objectionable on account of the words "to scan closely."

16. Where, in answer to defendant's affidavit for a continuance, counsel for the prosecution admitted that an absent witness, if present, would testify to facts set out in the affidavit of another witness, there was no error in rejecting an instruction based on the theory that the testimony of said absent witness "was conceded and admitted to be true by the prosecution."

17. There was no error in giving as an instruction to the jury Pen. Code, § 263, stating that the essential guilt of rape consists in the outrage to the person and feelings of the female, and that any sexual penetration, however slight, is sufficient to complete the crime.

18. Pen. Code, § 261, which raises the age of consent from 14 years to 16 years, having been duly certified, approved, enrolled, and deposited with the secretary of state, the presumption that it was legally adopted as a law cannot be set aside by showing the history of the bill's adoption.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Charles Harlan was convicted of the crime of rape, and from a judgment of conviction, an order denying a new trial, and an order refusing to arrest judgment, he appeals. *Affirmed*.

William Henley, for appellant. Tiley L. Ford, Atty. Gen., for the People.

GRAY, C. The defendant was convicted of rape, charged to have been committed on a girl under the age of consent, and sentenced to a term of 40 years in the state prison at San Quentin. He appeals from the judgment of conviction, from an order denying his motion for a new trial, and from an order denying his motion in arrest of judgment.

1. The verdict of conviction finds ample support in the evidence. That the defendant had sexual intercourse with the prosecutrix in the most brutal manner conceivable is established by the testimony of the prosecutrix and by the boastful admissions of the defendant made to two different witnesses. This is corroborated by the testimony of a physician as to the condition of the prosecutrix. That the prosecutrix was, at the date of the crime, under the age of 16, was testified by herself, her mother, and one aunt positively. The mother testifies to her daughter's age as being 15 years on the 3d day of January, 1899. The testimony of another aunt tends to corroborate the evidence of the prosecutrix as to her age. This evidence was without contradiction, except that it was shown that the prosecutrix had, on the 14th day of October, 1895, given her age to a school teacher as 13 years. The crime of defendant is charged to have been committed in April, 1899. The jury seems to have given credence to the testimony of the witnesses as against the declaration of the prosecutrix on the question of her age, and, as the jurors are the judges of the evidence, we cannot see our way clear to interfere with the verdict.

2. The first objection to evidence urged on this appeal is to a leading question asked of the prosecutrix by the prosecution, on the ground of its being leading. Leading questions may be allowed on direct examination, in a proper case, in the discretion of the trial court. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161. There was no abuse of discretion or error in allowing the leading question under the circumstances disclosed by the record. In the field of inquiry pertinent to the main fact sought to be established by the prosecution, the vocabulary of the witness seems to have been limited, and it was uncertain as to what she meant by some of her answers. A leading question removed this uncertainty, and was, therefore, perfectly proper.

The question as to why she did not say something to Jake Martin at the saloon was answered by the prosecutrix in response to the next succeeding question,—as to why she did not make some complaint to anybody she saw at “the saloon where Jake Martin was.” This latter question embraced “Jake Martin,” and was fully answered. The defendant could not have suffered any injury by the exclusion of the previous question.

The court sustained objections to several questions asked by defendant's counsel on the cross-examination of the prosecutrix, in-

tended to show that one of the houses that the prosecutrix visited with defendant was of ill repute, and that she knew of its character. It is claimed that the answers to these questions would have tended to test the credibility of the prosecutrix. It was not necessary to show in this case that sexual intercourse was had forcibly, and against the will of the prosecutrix. The questions were not proper on the ground stated, or on any other ground. The same rule applies to the evidence of other witnesses as to the character of the house. Questions on cross-examination tending to show the general immorality of the witness, or specific acts of immorality, should never be allowed in any case for the mere purpose of discrediting or impeaching the witness. *Same v. Benc*, 130 Cal. 159, 62 Pac. 404; *Sharon v. Sharon*, 79 Cal. 673, 22 Pac. 26, 131; *People v. Hamblin*, 68 Cal. 101, 8 Pac. 687. Nor can the immoral character of a witness, or specific acts of immorality, be shown by independent evidence for the purpose of impeaching a witness. Code Civ. Proc. §§ 2051, 2052, prescribe the method of impeaching witnesses, and they can be impeached in no way other than therein provided. *People v. Johnson*, 106 Cal. 289, 39 Pac. 622.

The court did not err in permitting the stable keeper, Lafferty, to state a declaration made by the defendant on the day of and prior to the commission of the alleged crime. The declaration was to the effect that he was procuring a conveyance from Lafferty to go to a place named to have carnal knowledge of a “little girl,” without giving any idea as to who the girl was. This declaration illustrated the intention and purpose of the defendant, and its relation to the case in hand is apparent when we consider that the other evidence in the case tends to show that in the afternoon of the same day of the declaration the defendant, with false promises, enticed the prosecutrix into a conveyance procured from this same stable keeper, and drove with her to the place where the crime was committed. The fact that the defendant procured the horse and buggy for the purpose of enabling him to have sexual connection with a “little girl” would, in some measure, corroborate the other evidence tending to show that he subsequently accomplished that purpose.

The declarations of defendant to the witnesses Bennett and Stanfield clearly identify the transaction about which he was talking as the crime with which he is here charged. The declarations were, therefore, properly admitted in evidence against him. The time, place, and circumstances of these declarations were sufficiently shown.

The conversation between Bennett and the defendant was had, according to statements made by defendant in that conversation, on the evening of the day of the crime. The defendant's condition as to sobriety on the

day previous to that was immaterial, and evidence as to it was properly excluded.

The objection to the question on cross-examination of an aunt of the prosecutrix as follows: "How is it you can recollect a date as long ago as that and you cannot remember the day of the week?" was properly sustained. The question did not call for a fact, but for an argument in answer to the argument contained in the question. The witness had already stated on cross-examination that she went to get her father on the 5th day of April, 1884, and that she did not know on what day of the week that occurred. The counsel should have directed his argument as to the witness' memory to the jury in the regular way, and not through the examination of the witness.

Etonia Diaz testified as follows: "Reta Martin is my niece. Her mother is my sister. I think I know Reta's age. Q. What is it? A. I think it is fifteen." Defendant's counsel here moved "to strike out the answer, as not responsive to the question." No objection was made to the question, and the answer was responsive to the question. The motion was properly denied. Immediately after the disposition of this motion the witness stated: "She was fifteen in last January. I know that from letters that her mother sent me. * * * After Reta was born, I received letters from her mother every three months. I did not keep them, and I am most sure that Reta Martin's age is fifteen years. I remember Reta is fifteen years from those letters and other things." No objection was interposed during the giving of the above evidence, but at its conclusion counsel for defendant said: "I move to strike out all the testimony of this witness in regard to the age of Reta Martin, on the ground that there is no positive evidence in regard to it." But there was positive testimony that the witness had received letters from Reta's mother, and that she knew Reta's age from those letters. An objection that evidence is not positive goes to its weight, rather than to its admissibility. It may be that the evidence should have been excluded on the ground that it was based upon hearsay, or was not the best evidence; but neither this court nor the court below is required to pass upon objections that are not made.

It is proper for the trial court to place reasonable limits upon the cross-examination of a witness, and we see no error and no abuse of discretion in the action of the trial court in refusing to direct the prosecutrix to repair with the jury to a stable "across the street from the court house," and place herself in the position in the buggy described by her in her direct examination. On cross-examination the witness fully described the position, stated where her head rested on the horse, and the jury, at the request of defendant, were permitted to inspect

the horse and buggy. This was sufficient, and it was not necessary that the witness should assume any position, or point out the spot on the horse where her head rested.

Whether the prosecutrix objected to anything the defendant did was immaterial, for the charge against the defendant proceeds on the theory that she was under the age of consent; therefore her failure to object could not avail the defendant. *People v. Vann*, 129 Cal. 118, 61 Pac. 776. Her consent could not be proved as affecting her credibility, for it was not proper to contradict her upon an immaterial matter. And, as already seen, it was not proper to show her want of chastity as affecting her credibility. Besides, the defendant testified without objection that "everything that was done was done with her full consent." This substantially covered the ground of and answered the question to which objection was made and sustained. There was no error, then, in not permitting defendant to testify that the prosecutrix made no "objection to anything that was done there."

The defendant testified, "I kept up a course of drinking all during that day, but I knew what I was doing." There was, therefore, no prejudicial error (if any error at all) in sustaining the objection to the question asked of the defendant by his counsel: "Now I will take you back for a moment. State whether or not you had been drinking before you got into the buggy."

This disposes of all the material objections and exceptions to the action of the court in the admission and exclusion of evidence.

3. Nothing worthy of attention herein occurred in the argument of the attorney for the prosecution, so far as the record before us discloses.

4. The court instructed the jury as follows: "The jury is instructed that, if they believe that Reta Martin, or any other witness examined during the progress of this trial, has willfully sworn falsely as to any material matter, then it is your duty to scan closely and distrust the entire evidence of such witness." This instruction contains the substance of two instructions requested by the defendant and rejected by the court, with the words "to scan closely" added by the court. These added words did no harm to the instruction. We think it is the duty of the jury "to scan closely" all the evidence placed before them. The defendant cannot complain of an instruction which is in substance the same as those requested by him.

An instruction drawn on the theory "that the testimony of Ernest Barada was conceded and admitted to be true by the prosecution" was properly rejected by the court because no such concession was made by the prosecution. In fact, Ernest Barada gave no testimony in the case. An affidavit made by defendant for a continuance was filed at the commencement of the trial, in which

what the defendant expected to prove by said Barada was set out, and the prosecution admitted "that Ernest Barada would, if present, testify to the facts set out in the affidavits of Charles Harlan"; to which counsel for defendant replied, "Under such admission I am willing to proceed," and the trial went on. The above is all the admission in respect to the matter that we have been able to find in the transcript. There was no error in giving section 263, Pen. Code, as an instruction to the jury.

5. Defendant has reserved for his last point an attack upon the statute under which he is prosecuted. His position is that the amendment of 1897, raising the age of consent from 14 to 16 years, was not legally adopted as a law. The history of the bill by which the said amendment was made, as we glean it from appellant's brief, is as follows: The legislature, at its session of 1897, attempted to amend section 261, Pen. Code, by raising or increasing the age of consent from 14 years to 16 years. The bill purporting to amend the section was known as "Assembly Bill No. 76." The history of the bill shows that it passed the assembly on February 8, 1897, and was transmitted to the senate, by which body it was amended on February 16, 1897, and, as amended, it was passed February 19, 1897; and on the same day it was returned to the assembly, which body, without taking action upon the senate amendment, transmitted the bill, on February 24, 1897, to the governor. On February 25th the governor sent a communication to the assembly and senate, directing their attention to the failure to act on the senate amendment. On February 27, 1897, senate concurring resolution No. 9, recalling the bill from the governor, was passed. On March 1, 1897, the assembly received the bill from the governor, and on March 10, 1897, the assembly concurred in the senate amendment, and it was again transmitted to the governor on March 12, 1897, and was approved by the governor on March 27, 1897. If it were permissible to thus go into the history of the bill, we should have no hesitancy in saying that the same was properly passed and approved, and became a law; but it appears to be settled in this state that the presumption that the amendment was properly passed, arising from the fact that it was properly enrolled, authenticated, and deposited with the secretary of state, cannot be thus rebutted or set aside. *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *Yolo Co. v. Colgan* (Cal.) 64 Pac. 403.

For the foregoing reasons, the judgment and orders appealed from should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

(132 Cal. 539)

SONOMA COUNTY v. HALL et al.
(S. F. 1,529, 1,688.)¹

(Supreme Court of California. May 1, 1901.)

LIMITATIONS—ACTION ON COUNTY RECORDER'S BOND.

Code Civ. Proc. § 338, subd. 1, prescribing a three-years limitation to action "on liability created by statute," and not section 337, prescribing a four-years limitation to action on a written undertaking, applies to an action on a county recorder's official bond because of his failure to collect and turn over legal fees.

In bank. Reversed.

For opinions in department, see 62 Pac. 257, 312.

PER CURIAM. In the decisions of these causes in department the case of *Placer Co. v. Dickerson*, 45 Cal. 14, had not been considered. It contains a declaration contrary to the views expressed in department, and for that reason a rehearing of the question was ordered. After such rehearings, and full consideration of the cases relied on by the petitioner, the court adheres to the reasoning and decisions contained in the department opinions. In *Placer Co. v. Dickerson* the decision upon this question is found in a single sentence. No discussion accompanies the determination, no authorities are cited, no reasoning indulged in. The court said merely: "The action is founded upon the official bond of Dickerson as treasurer of Placer county, signed by defendant, and running to the people of the state of California as the obligee therein, and the county of Placer had a right to maintain an action for a breach of its condition, by which an injury has been suffered by the county." But, as pointed out in the department opinions, while the bond of a public official is in a sense a contract in writing, it is at the same time merely security for the faithful performance by the officer of his duties. A written guaranty to answer for the debt of another is likewise a contract in writing, but no one would have the temerity to say, if the statute of limitations had barred the primary obligation, or in any other legal way it had become extinguished, that, because the guaranty was a contract in writing, the four-years statute of limitation would apply. The declaration in *Placer Co. v. Dickerson* that the action was not upon a liability created by statute is in direct conflict with the language of the later cases of *People v. Van Ness*, 76 Cal. 122, 18 Pac. 139, and *Paige v. Carroll*, 61 Cal. 211. Of the other cases cited by petitioner,—which cases he contends follow and support *Placer Co. v. Dickerson*,—*People v. Gardner*, 55 Cal. 304, was an action upon the official bond of the surveyor general, and it is held that neither he nor his sureties were liable for his misfeasance in the office of register. The statute of limitations upon an official bond is not discussed or referred to. *People v. Van Ness*, 76 Cal. 122, 18 Pac.

¹ For opinion on rehearing, see 65 Pac. 463.

139, was an action in debt against the commissioner of immigration for fees collected by him. It is said in the opinion: "A cause of action, therefore, existed in favor of the people against appellant at the time of the expiration of his term of office. This action, having been commenced more than three years thereafter, is barred under subdivision 1 of section 338 of the Code of Civil Procedure." The opinion therefore holds that the action was upon a liability created by a statute, and was barred in three years, and to this extent supports the views expressed in the commissioners' opinion. *People v. Huson*, 78 Cal. 154, 20 Pac. 369, makes no reference to the statute of limitations, or to any statutory liability. *San Luis Obispo Co. v. Farnum*, 108 Cal. 568, 41 Pac. 447, is reversed upon the authority of *San Luis Obispo v. Farnum*, 108 Cal. 562, 41 Pac. 445, in which latter case it was held that it was no part of the official duties of a county auditor to receive from the license collector money collected by him for license taxes due the county, and that the sureties on his official bond are not responsible for moneys so received. It has not the slightest applicability to the question under consideration. We find nothing, therefore, in the cases cited to warrant a change in our views. The judgments and orders are, therefore, reversed, and the causes remanded, with directions to the court below to sustain the demurrers to the amended complaints.

133 Cal. 3

PEOPLE v. PARKS. (Cr. 739.)

(Supreme Court of California. May 21, 1901.)

RAPE—INFORMATION—SUFFICIENCY.

An information against defendant for the crime of rape alleged that "said P., on August 10, 1900, at the county of S., and before the filing of this information, with one C., a female child under the age of 16 years, to wit, of the age of 14 years, and not the wife of the said defendant, P., unlawfully and feloniously did," etc. *Held*, that the information was not void, as against objection first made on appeal, as failing to charge that the prosecutrix was not the wife of defendant on August 10, 1900.

Department 1. Appeal from superior court, Solano county; William S. Wells, Judge.

Charles Parks was convicted of the crime of rape, and he appeals. Affirmed.

Frank W. Sawyer, for appellant. Tirey L. Ford, Atty. Gen., for the People.

PER CURIAM. Defendant has been tried and convicted of the crime of rape, and prosecutes an appeal to this court, contending that the information does not state a public offense, in this: that it is not alleged by the information that at the time of the commission of the alleged crime the prosecutrix was not the wife of the defendant. We do not find it necessary to enter into a consideration of the question as to whether or not, under the Penal Code of this state, such an allegation is necessary to the validity of an

information. We do not find it necessary, for the reason that, in our opinion, this information in substance does charge that the prosecutrix was not the wife of the defendant. Possibly, the information is defective in this regard, and subject to a special demurrer; but we are entirely satisfied that it is not so defective as to render it wholly void. The information alleges "that the said Charles Parks, on the 10th day of August, A. D. 1900, at the said county of Solano, and before the filing of this information, with one Lela Condon, a female child under the age of 16 years, to wit, of the age of 14 years, and not the wife of the said defendant Charles Parks, unlawfully and feloniously did," etc. Appellant's contention is that the information charges the prosecutrix not to have been the wife of defendant upon the 17th day of August, 1900, the day the pleading was filed; but, as already suggested, as against a general objection to the pleading upon this ground, made for the first time before the appellate court, we are prepared to hold that the information charges the prosecutrix with not having been the wife of the defendant upon the 10th day of August. For the foregoing reasons, the judgment is affirmed.

133 Cal. 11

PEOPLE v. CASTRO. (Cr. 704.)

(Supreme Court of California. May 22, 1901.)

RAPE—INFORMATION—SEVERAL ACTS—ELECTION.

An information charging defendant with the crime of rape alleged that the offense was committed on June 30, 1899, and that prosecutrix was then under the age of consent. On the trial, over defendant's objection, four separate acts of sexual intercourse by defendant, extending over a period of several months, were sworn to by prosecutrix. No one of the acts was proven to have been committed on June 30th. *Held*, that the state should have been required to select the particular act relied on to make good the allegation of the information.

Department 1. Appeal from superior court, San Bernardino county; Frank F. Oster, Judge.

Eulogio Castro was convicted of the crime of rape, and from an order granting a new trial the people appeal. Affirmed.

Tirey L. Ford, Atty. Gen., for the People. John Brown, Jr., F. B. Daley, C. N. Damron, Dist. Atty., and J. W. Curtis, for respondent.

GAROUTTE, J. Defendant has been convicted of the crime of rape. The superior court granted a motion for a new trial, and the state appeals. The offense is alleged by the information to have been committed upon June 30, 1899, and the prosecutrix was alleged to have been under the age of consent. At the trial four separate acts of sexual intercourse committed by defendant were sworn to by the prosecutrix. These acts were proven under objection of defendant,

and covered a period of time extending over several months. No one of the acts was proven to have been committed upon the 30th day of June. It is not material upon this appeal as to the particular ground upon which the court based its order granting the new trial; for, if the order should have been made upon any one of the grounds raised by defendant, it will be affirmed. *Kauffman v. Maier*, 94 Cal. 276, 29 Pac. 481, 18 L. R. A. 124; *In re Martin's Estate*, 113 Cal. 481, 45 Pac. 813.

The doctrine appears to be fairly well settled that in actions of adultery, seduction, etc., evidence of sexual intercourse between the parties both before and after the particular act charged may be introduced in evidence, as tending to sustain the main allegation. Chief Justice Bartch, in his dissenting opinion in the case of *State v. Hilberg* (Utah) 61 Pac. 215, thus states the rule: "Where, as in this case, there is a continuation of the relation of intimacy and illicit intercourse between the parties to the offense, evidence of improper familiarity and adulterous acts both before and after the act charged is admissible. Such evidence is received to prove the adulterous disposition in the parties implicated. This appears to be the rule sanctioned by the weight of recent authority." The cases cited by him to support the proposition advanced may well be declared to constitute the great weight of authority. The *Hilberg Case*, in its facts, and upon the record, is very similar to the case at bar, and many of the reasons there advanced by the court for a reversal of the judgment appeal strongly to the court here. Under the instructions given to the jury in the case at bar, the defendant should have been convicted if any one of the various acts of intercourse sworn to by the prosecutrix was established beyond a reasonable doubt; but certainly the defendant was not called upon to defend himself against all of these respective acts of intercourse, extending through a period of several months. The information only charged one act, and upon that allegation the case must stand or fall. Possibly any one of the acts sworn to by the prosecutrix could have been selected by the state as the act charged in the pleading, but the entire four acts could not be so selected. The state at the commencement of the trial should have been required to select the particular act upon which it relied to make good the allegation of the information. This was not done, and, even conceding that the failure to make such election at that time did not constitute error, because of the want of demand upon the part of the defendant to make the election, still, when the case went to the jury, the court, in some form, should have directed their minds to the particular act of intercourse which it was incumbent upon the state to establish by the evidence, before a verdict of guilty could be returned against the defendant. This was not done.

Under the evidence disclosed by the record, a verdict of guilty or not guilty was the only verdict which could be properly rendered in the case. For the foregoing reasons, the order is affirmed.

I concur: VAN DYKE, J.

HARRISON, J. I concur in the affirmance of the order appealed from, for the reason, in addition to that given in the opinion of Mr. Justice GAROUTTE, that the court erred in admitting evidence of acts of sexual intercourse committed subsequent to the particular act selected by the prosecution in support of the information. The defendant could be convicted only upon proof of the act selected, and any evidence of subsequent acts would create no more than a presumption of his guilt, arising from the establishment of a disposition in that direction. A person charged with a crime is not to be convicted upon evidence that he has at another time committed a similar crime. The evidence thus admitted was manifestly prejudicial to the defendant, and should have been excluded.

133 Cal. 38

In re HANSON'S ESTATE. (S. F. 2,641.)
(Supreme Court of California. May 25, 1901.)
GRATUITOUS SERVICES—CLAIM AGAINST ESTATE.

One who renders services gratuitously, with no intention to ask or to receive any compensation therefor, cannot make such services the subject of a claim against the estate of the person for whom the service was rendered.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; J. M. Mannon, Judge.

Proceeding for the settlement of an administrator's account. From an order approving and settling the account, the sole heir at law appeals. Order modified and affirmed.

McNab & Hirsch, for appellant. W. P. Thomas, for respondent.

CHIPMAN, C. Appeal from an order approving and settling the administrator's account. The only part of the account drawn in question is the following item: "Mrs. P. H. McClelland, pies, cakes, soups, etc., \$208.00,"—which the court allowed as a proper charge. Letters were issued to the public administrator, and the sole heir at law of the deceased filed written objections to the above item. There is no brief for the respondent. The only witness sworn at the hearing in explanation of the charge was the claimant, Mrs. McClelland. She testified with entire frankness that she never had any conversation with deceased about paying for the articles and labor mentioned in the account, and that what she did was "out of kindness for Mr. Peter Hanson." She kept no account of the materials or labor at the time, and she stated that she was advised after the death of Mr. Hanson to put in

a claim. She testified that she "never intended to charge Peter Hanson anything."

The single question is presented, namely: May one who renders a kindly and gratuitous service to another, with no intention at the time to ask or to receive therefor any pecuniary compensation, afterwards make such act the subject of a claim? It has been often held, where services were originally rendered gratuitously, they cannot afterwards be converted into a charge. The question is fully discussed in *Lampligh v. Brathwait*, found in 1 Smith, Lead. Cas. 268. It also arose and was similarly decided in *Moulin v. Columbet*, 22 Cal. 509. The books abound in cases holding that, under circumstances such as are disclosed here, there is no liability incurred. The court erred in allowing this item. The order, in so far as it approves and allows the above item, should be modified, with directions to strike it from the account, and otherwise the account should stand approved and allowed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons stated in the foregoing opinion, the order is modified by striking from the account the item of \$208 in favor of Mrs. P. H. McClelland, and, thus modified, is affirmed.

(133 Cal. 25)

EDSON et al. v. SOUTHERN PAC. CO.
(S. F. 2,433.)¹

(Supreme Court of California. May 23, 1901.)
RAILROADS—RAILROAD COMMISSION—JUDICIAL POWERS.

Const. art. 12, § 20, prohibits a railroad corporation which has reduced its transportation rates for the purpose of competition from raising such rates without the consent of the authorities vested with the power to regulate such rates. Section 22 authorizes the railroad commissioners to hear and determine complaints against railroads, but provides that nothing therein contained shall prevent individuals from maintaining actions against railroad companies, and authorizes the recovery of exemplary damages in suits based on excessive charges. Held, that the railroad commission has no jurisdiction of judicial proceedings instituted before it to compel a railway company to reinstate a lower competitive rate which it had formerly made.

In bank. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Proceedings by E. B. Edson and others, as constituting the board of railroad commissioners, against the Southern Pacific Company, to compel the defendant to restore a lower rate. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

J. E. Foulds (John Garber, of counsel), for appellant. C. N. Sterry, amicus curiæ. Tiley L. Ford, Atty. Gen., Geo. A. Sturtevant, Dep. Atty. Gen., and Frank H. Short, for respondents.

BEATTY, C. J. Section 20 of article 12 of the constitution provides that "whenever

a railroad corporation shall for the purpose of competing with any other common carrier lower its rates for transportation of passengers or freight from one point to another such reduced rates shall not be again raised or increased from such standard without the consent of the governmental authority in which shall be vested the power to regulate fares and freights." This is a proceeding under said section to compel the defendant to restore a lower rate which it is charged was adopted by it for the purpose of competition, and which it has raised without the consent of the railroad commission established by section 22 of the same article of the constitution. The complaint consists of two counts, in the first of which it is alleged that the defendant lowered its passenger rate between San Francisco and Fresno for the purpose of competing with the San Joaquin Valley road, and afterwards raised the rate without the consent of the railroad commission. Several of the material allegations of this count are put in issue by the answer. In the second count it is alleged that, in a proceeding before the railroad commission instituted by John C. Moore, the facts alleged in the first count were established and found, and an order duly made requiring defendant to restore the lowered rate. The answer admits these allegations of the second count as to the proceedings actually had before the commission, but does not admit their force or efficacy. There was also a cross complaint by the defendant, to which a demurrer was interposed and sustained; but, on the view we entertain of the case, the order of the court respecting the cross complaint requires no special consideration. Conceding that it was properly overruled, we think the court erred in granting the prayer of the complaint upon the admissions of the answer. The court held that the findings and order of the railroad commission in the proceeding instituted before it as above stated were conclusive as an adjudication against the defendant, and accordingly, without hearing evidence or making any findings except by recital of what the commission had found, made its decree enjoining the observance of the commission's order.

If the commission had no jurisdiction to hear and determine the complaint of Moore, this was clearly an error; and we are of the opinion that the commission, in assuming to adjudicate the matters presented by that complaint, exceeded its jurisdiction. The jurisdiction of the railroad commission to hear and determine complaints against transportation companies is such only as is conferred by section 22 of article 12 of the constitution, which provides that "said commissioners shall have the power and it shall be their duty * * * to hear and determine complaints against railroad and other transportation companies," etc. But what complaints? It is clear from other provisions contained in the same section that they are

¹ Rehearing denied June 22, 1901.

not given jurisdiction of all complaints against transportation companies, for it is provided that nothing in the section shall prevent individuals from maintaining actions against any such companies, and further that in any action for damages "sustained by charging excessive rates" the plaintiff may, in the discretion of the judge or jury, recover exemplary damages. Plainly, therefore, it is a question of construction what complaints the railroad commission is empowered to hear and determine, or, in other words, what controversies are within its jurisdiction as a court of last resort? To this question we can find no answer in the constitution, except in another clause of this same section, which subjects transportation companies to a fine for any transgression of the rules established by the commission regarding the keeping of accounts and the rates of transportation. We think it is the clearly-manifested intention of the framers of the constitution to make the commission a court for the trial of charges preferred against transportation companies under this clause; and such, we think, and such only, are the complaints which they are empowered to hear and determine. Other complaints as to abuses by transportation companies they may hear and investigate with a view to action in their legislative capacity in the making or modifying of rules for keeping accounts and regulating fares and freights, and also, we think, for the purpose of taking proceedings in the courts on behalf of the public for the correction or restraint of abuses, but their jurisdiction as a court of justice does not extend to causes arising under section 20 of article 12. That section has no reference to rates fixed by the commission, and their power to impose fines is strictly limited by section 22 to violations of the rules and rates made and prescribed by themselves. It is a matter of history that section 20 was adopted by the convention before it was agreed to create the commission subsequently established by section 22,—a fact strongly emphasized by the language of the latter part of section 20, where, instead of naming the railroad commission, resort is had to the awkward periphrase above quoted: "The governmental authority in which shall be vested the power to regulate freights and fares." When the section was adopted it was understood that the power to regulate freights and fares might be left, along with the mass of legislative powers, to the senate and assembly; and, of course, it was not then supposed that any infraction of its provisions would be redressed otherwise than through the medium of appropriate proceedings in the courts. The subsequent adoption of section 22 required no change in this respect, and none seems to have been intended.

The superior court therefore erred in treating the findings and order of the railroad

commission as a final and conclusive adjudication against the defendant, and in basing its decree upon the pleadings alone, without proof of the facts alleged in the first count of the complaint. As this error of the superior court necessitates a reversal of the judgment, it is unnecessary, and, as we think, undesirable, that we should at this time undertake to decide the constitutional questions which have been so elaborately argued in the briefs. The judgment is reversed, and cause remanded.

We concur: HENSHAW, J.; McFARLAND, J.; TEMPLE, J.; VAN DYKE, J.; GAROUTTE, J.

133 Cal. 14

PACIFIC COAST SAV. SOC. v. CITY AND COUNTY OF SAN FRANCISCO.

(S. F. 1,503.)

(Supreme Court of California. May 23, 1901.)

TAXATION—FOREIGN BANK BALANCE.

Where there was a balance to the credit of a California corporation in a New York bank, such balance due was properly taxed to the corporation in California.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Pacific Coast Savings Society against the city and county of San Francisco. From judgment for defendant, plaintiff appeals. Affirmed.

Vincent Neale, for appellant. H. T. Creswell, W. B. Brobeck, City Atty., and Franklin K. Lane, for respondent.

HARRISON, J. The plaintiff is incorporated under the laws of this state for the purpose of carrying on the business of a building and loan society, and banking incidental to said business, and has been so engaged since its organization. In connection with its business, the firm of J. and W. Selgman, bankers, doing business in the city of New York, have been its correspondents, and it has been accustomed from time to time, in the course of its banking business, to place money with them to its credit, and to sell, exchange, and draw drafts against the same in the usual and ordinary way customary among banks and bankers. Prior to the first Monday in March, 1896, it had sold in London certain of its bonds of the face value of \$100,000, and the proceeds thereof were placed to its account and credit with its said correspondents in New York. After taking into account the drafts that had been drawn by it against its account with the Seligmans, there remained to the credit of the plaintiff with them, on the first Monday of March, 1896, the sum of \$65,000. March 30, 1896, upon the demand of the assessor of

the city and county of San Francisco, the plaintiff made and returned to him a statement purporting to contain a list of all its personal property, but which did not include the aforesaid sum of \$65,000. After receiving this statement, the assessor notified the plaintiff that the same was not correct or satisfactory, and in response to a notice therefor the president of the plaintiff appeared before him, and stated to him that at noon, on the first Monday of March, 1896, there was a debt of \$65,000 due from said Seligmans to the plaintiff, which did not appear on said statement, but insisted that the same was not taxable. The assessor thereupon assessed to the plaintiff, in addition to the property that had been returned to him in the aforesaid statement, the said sum of \$65,000 as a "solvent credit." Subsequently the plaintiff applied to the board of equalization to reduce the assessment made by the assessor by striking the said sum of \$65,000 therefrom, upon the ground that it was not on the first Monday of March within the state of California, or liable to taxation. The application was denied, and thereafter the plaintiff paid to the tax collector the amount of the tax upon all of the property so assessed to it, delivering to him at the same time its written protest against the amount paid upon the said sum of \$65,000. The present action is to recover the amount of the taxes paid upon the said sum of \$65,000. Judgment was rendered in favor of the defendant, and the plaintiff has appealed.

Upon the aforesaid facts, the judgment of the superior court was correct. The relation between a general depositor of money with a bank and the bank is that of debtor and creditor. *Mackay v. City and County of San Francisco*, 113 Cal. 392, 45 Pac. 696. The court finds in the present case that the plaintiff did not have any money on special deposit with its New York correspondents, and that the said sum of \$65,000 was merely the balance due to it from them, and was a debt owing from its correspondents to the plaintiff on the first Monday of March, 1896. It was therefore properly assessed against the plaintiff as a solvent credit, and as property in San Francisco belonging to it on that day. The fact that the creditor is not a resident of this state is immaterial. "The general rule is that debts attend the person of the creditor, and are taxable at his domicile." *In re Fair's Estate*, 128 Cal. 607, 61 Pac. 184, and cases cited at page 612, 128 Cal., and page 186, 61 Pac. Other propositions presented by the appellant are discussed in this case, and also in the case of *Savings & Loan Soc. v. City and County of San Francisco* (Cal.) 63 Pac. 665, and decided adversely to the contention of the appellant. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

133 Cal. 99

HODGE v. NORTON et al. (S. F. 1,617.)
(Supreme Court of California. May 29, 1901.)
HOMESTEAD—MORTGAGE BY WIDOW—FORECLOSURE—MINOR CHILDREN—RIGHTS OF PURCHASER.

Mortgages executed by a widow on homestead property are valid as to her interest therein, and a purchaser of such property at a foreclosure sale thereof is entitled to enter into possession on the youngest child's attaining majority.

Department 2. Appeal from superior court, Santa Cruz county; Lucas F. Smith, Judge.

Action by Thomas Hodge against Marian G. Norton and others. From a judgment for plaintiff, and an order refusing to set aside an execution and order of sale, certain defendants appeal. Affirmed.

Nicholas Bowden, for appellants. S. A. Baker, S. G. Tompkins, and Wm. M. Beggs, for respondent.

HENSHAW, J. Marian G. Norton and H. C. Morril, defendants, appeal from the judgment of the superior court for the foreclosure of a mortgage executed by Marian G. Norton to the plaintiff, and for the foreclosure, on the cross complaint of defendant Yocco, of a mortgage executed by Marian G. Norton to him. During the progress of the administration upon the estate of Henry B. Norton, deceased, formerly husband of defendant Marian G. Norton, the court in probate set aside about 36 acres of land, as a homestead for the widow, Marian G. Norton, and her two minor children. The property thus set aside was community property; and, subject to the homestead, the title to an undivided one-half vested in Marian G. Norton, and the title to an undivided one-fourth each in the two minor children. One of the children was a minor at the commencement of the action, and would arrive at majority upon January 1, 1900. In 1894 Marian G. Norton executed the mortgage in suit to plaintiff upon her interest in the homestead land. Subsequently, in 1895, she executed another mortgage upon the same land to her co-defendant Yocco. The decree of the court ordered a foreclosure of the liens of these mortgages, and decreed a sale of Marian G. Norton's interest in the land; providing further, however, that the purchaser at foreclosure sale should be entitled to enter into possession only when the youngest child obtained majority.

Upon this appeal there is no pretense but that the money was paid upon the security of the mortgages, and has not been repaid. The contention merely is that the mortgages so made by Marian G. Norton were nullities, and ineffectual to impose any liens upon the

homestead property. This contention is conclusively answered by the case of Hoppe v. Fountain, 104 Cal. 101, 37 Pac. 894. In that case, as in this, the widow executed a mortgage upon the probate homestead set apart to her and to the minor children, and in discussing the validity of this mortgage it was there said: "As the owner of an undivided interest in the land, it was competent for the mother to mortgage or convey such interest. She could not, however, confer upon her grantee or mortgagee any greater rights in the premises than she herself held. As she could not destroy the homestead quality of the premises, or deprive the minor children of their right to occupy the homestead, any grantee of her interest must take it subject to the same limitations. A purchaser at the foreclosure sale can obtain no greater rights than would her immediate grantee, and the court in the foreclosure proceedings would have no right, by reason of any covenant in the mortgage or allegation in the complaint, to make any order or direct any act which would affect the rights of any of her co-tenants. For the purpose of informing the court of the extent of her interest and the nature of the estate which she had mortgaged, it was proper for her to allege in her answer the manner in which her title had been derived, and to show that the premises had been set apart as a homestead, and that their homestead quality had not yet ceased. Upon these facts being brought to the attention of the court, the decree it might make would be adapted to the rights of the respective parties to the action. As the purchaser under the decree would not have a right of entry upon the premises as a co-tenant until the termination of the homestead, that limitation should be included in the decree under which the sale should be made. The demurrer to the separate answer of Mrs. Hoppe should therefore have been overruled." As overruling this case, the appellants rely upon the case of Moore v. Hoffman, 125 Cal. 90, 57 Pac. 769. But the Hoffman Case neither overrules the Fountain Case, nor is it in conflict with it. In the Hoffman Case a probate homestead had been set apart to the widow and the minor children. Upon obtaining majority one of the children deeded his interest, and the grantee under the deed sought to take possession as tenant in common with the widow. It was there decided that when the children arrive at majority their interest in the homestead, as such, ceases, and the homestead as to them is terminated, but as to the widow it continues to be a homestead so long as she desires to preserve its character as such, and does no act towards its destruction. Therefore, in the Hoffman Case, as the widow insisted upon preserving the homestead character, it was held that, as to her, it could not be destroyed by the act of an adult child. In the case at bar, however, it is the widow herself, by her own act, who has destroyed this character.

The court refused to recall and set aside the execution and order of sale which it had issued. The grounds of the motion were that the judgment itself as rendered by the court was void. The court's denial of the motion was therefore proper. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

133 Cal. 107

PEOPLE ex rel., etc., v. BANK OF MENDOCINO et al. (S. F. 2,354.)

(Supreme Court of California, May 29, 1901.)

BANKS—INSOLVENCY—DISSOLUTION—FINAL JUDGMENT—INJUNCTION—APPEAL.

1. A judgment in favor of the people, under the bank commissioners' act (St. 1895, p. 175, § 11), to the effect that defendant bank is insolvent, and it is unsafe for it to continue business; that the property of the bank previously sequestered and in the hands of commissioners be delivered to the corporation for liquidation purposes, to be administered by the directors under direction of the bank commissioners; and that the injunction applied for issue,—is a final judgment, from which an appeal may be taken under Code Civ. Proc. § 1908, subd. 2.

2. The fact that defendants were enjoined under the judgment from doing business "until the further order of this court" did not affect the finality of the judgment, so as to render it nonappealable.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; Albert G. Burnett, Judge.

Suit by the people, on the relation, etc., against the Bank of Mendocino and others. From an order refusing to modify an injunction, defendants appeal. Affirmed.

T. L. Carothers, for appellants. Tirey L. Ford, Atty. Gen., and Geo. A. Sturtevant, Dep. Atty. Gen., for respondent.

SMITH, C. Appeal from an order refusing motion of defendants to modify an injunction. The injunction affected by the motion was part of the judgment rendered March 10, 1896, in a suit of the people against the defendant corporation, under section 11 of the bank commissioners' act, as amended March 26, 1895 (St. 1895, p. 175). The motion was made on two grounds, namely, the one, "that the judgment, * * * by its terms, provides that it be operative only until the further order of the court"; the other, "that the said judgment, in so far as it restrains and enjoins * * * the * * * defendant bank," etc., "is not warranted by the law and facts of the said case." It is claimed by the appellants that the judgment in which the injunction was ordered is "an interlocutory order, and not a final judgment," and the motion, with regard to both the grounds specified, proceeds on this assumption; otherwise, the appeal would not lie, or at least could not be sus-

tained, for the time for appealing from the judgment has long since expired, and, assuming it to be final, it was not in the power of the court to modify it. Code Civ. Proc. § 939, subds. 1, 3. On the other hand, even were the judgment interlocutory, and hence unappealable, as not falling within the class of interlocutory judgments mentioned in subdivision 3 of the section, it would not follow that it would be within the power of the court to modify it. Id. §§ 577, 936, 1908. Possibly a judgment may be final in the sense of the term as used in the sections cited, and yet not final as the term is used in section 939. But, under the view we take of the case, it will be unnecessary to consider this aspect of the subject. We are satisfied that the judgment entered in a case of this character is final in the sense of the term as used in subdivision 1, § 939, Id., and therefore appealable. Such a judgment is, in effect, an adjudication that the defendant corporation is insolvent; that it is unsafe for it to continue business; that the property of the corporation previously sequestered and in the hands of the commissioners be delivered to the corporation for purposes of liquidation, to be administered by the directors under the direction of the bank commissioners; and that the injunction applied for be issued. Id. § 1908, subd. 2. This is the only judgment provided for in the act, and is, therefore, final in the strictest sense of the term. *Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.*, 98 Cal. 577, 33 Pac. 633; *Bouv. Law Dict.* "Decree" and "Judgment." Nor is the case affected by the peculiar language of the judgment, which is that the defendants be enjoined, etc., "until the further order of this court." Indeed, we are not satisfied that this addition to the usual form of the order is improper. It is expressly provided in the act that "the affairs of [the] corporation * * * shall be closed and the business thereof settled within" the time specified in the act; and upon such settlement, and the fact being made to appear, it would doubtless be in the power of the court—or, to speak more cautiously, it would perhaps be in the power of the court—to dissolve the injunction. If such be the case, the clause in question would add nothing to the order that was not implied by the law. But, however this may be, the character of the judgment was not affected by the language used. It was undoubtedly final, and there was no limitation as to its effect with reference to its principal provisions, to which the provision for injunction was merely subsidiary. While these remained in force, the injunction—which was essential to their due execution—could not be dissolved. Nor, even if the court had had power or jurisdiction to dissolve it, would it have been justified in doing so. The authorities cited by the respondent fully sustain this proposition.

Woffenden v. Woffenden (Ariz.) 25 Pac. 666; People v. Gold Run Ditch & Min. Co., 66 Cal. 155, 4 Pac. 1150. Still less can the second ground of the appellant be sustained. The judgment was duly entered on sufficient pleadings and findings, and it is now too late to inquire whether it was "warranted by the law and the facts of the case." The order appealed from should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(123 Cal. 110)

AIGELTINGER v. WHELAN et al. (S. F. 1,900.)¹

(Supreme Court of California, May 29, 1901.)

SHERIFF—ATTACHED PROPERTY—STORAGE CHARGES—SALE—LIABILITY—ATTACHMENT SURETIES—RELEASE—EFFECT—EVIDENCE—ADMISSIBILITY.

1. Code Civ. Proc. § 540, provides that a sheriff must safely keep attached property; and section 553 declares that, if the defendant in attachment recover judgment, all the property attached remaining in the sheriff's hands must be delivered to the defendant. *Held*, that where a sheriff, without an order of court, allowed attached property in his possession to be sold by a warehouseman for storage charges, he was liable for conversion.

2. Property was seized in attachment, and the sheriff, without an order of court, allowed it to be sold by a warehouseman for storage charges, and defendants in the attachment obtained judgment, which they assigned to A. *Held*, that the fact that A. discharged the sureties on the attachment bond from liability constituted no defense to an action by him against the sheriff for conversion.

3. Where a sheriff allowed goods which he held under attachment to be sold by a warehouseman for storage charges, and the defendant in attachment obtained judgment, such judgment was admissible in an action against the sheriff for conversion to show a dissolution of the attachment.

4. Where there was evidence that the converted property was worth \$315, a judgment fixing its value at that amount was, as a matter of law, supported by the evidence.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by E. H. Aigeltinger against R. I. Whelan and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Reddy, Campbell & Metson, for appellants. Wal. J. Tuska, for respondent.

GRAY, C. This action is brought by the assignee of the defendants in an attachment suit against the sheriff of the city and county of San Francisco and the sureties on his official bond for damages arising out of a failure on the part of said sheriff to safely keep the attached property of the said defendants in said attachment suit, and to restore the same to said defendants on de-

mand, after judgment rendered in their favor. The plaintiff had judgment, and defendants appealed from the same, and from an order denying them a new trial, and also from an order modifying said judgment.

The undisputed facts of the case are as follows: In the suit of Slosson against Glosser et al., a writ of attachment was issued, and the defendant in this case, as sheriff, under said writ, took into his possession some 22 bicycles and some other articles of small value belonging to said defendant Glosser. Nearly two years later judgment was duly given, made, and entered in said suit in favor of defendants and against the plaintiff therein. Thereupon the said defendant Glosser demanded of said sheriff that he return the property taken by him under said writ of attachment. In response to this demand, the sheriff made no claim of lien on the property for any costs, charges, keeper's fees, or anything of that kind, but stated, in substance, that he did not have the property, that he had stored it, and the warehouseman had sold it for storage, all of which was proven at the trial to be true. Thereafter, and before the commencement of this action, said Glosser assigned his claim against said Whelan, arising out of said facts, to the plaintiff herein. No order was made in the attachment suit allowing or fixing keeper's fees or other compensation to the sheriff for attaching or keeping the property.

It was also proven at the trial, and found by the court, that prior to the commencement of this action the plaintiff herein, in consideration of \$60, the amount of the judgment for costs in favor of defendants in the attachment suit, released the sureties from all obligation on the undertaking on attachment given in said suit.

1. In permitting the property to be sold for storage, the sheriff violated the duty to safely keep the same, and to restore it to the defendant on his recovering judgment. Code Civ. Proc. §§ 540, 553. It is unnecessary to determine whether the sheriff ever had a lien on the property; but as to that matter it is sufficient to say that he had no right to sell the property, or to permit it to be sold, pending the suit, in the absence of an order of the court directing its sale. The act of the warehouseman in making the sale is to be treated as the act of his principal, the sheriff, and in so selling, or permitting the property to be sold, without authority of law, the sheriff became liable as for a conversion of the property, whether he ever had a lien on it for his charges or not. It he had a lien on the property, that alone would not warrant such a sale of it as the circumstances here disclose.

2. Nor does the fact that the plaintiff discharged the sureties on the undertaking on attachment from further liability operate as a defense to this action. They were not joint tort feorsors with the sheriff, and it

¹ Rehearing denied June 27, 1901.

is immaterial whether or not they were liable at all for the act of the sheriff. It is only by virtue of their contract that they can be held so liable. They were guilty of no tortious act. The sheriff's liability arose from his tortious act in not safely keeping the property, but permitting it to be disposed of contrary to law. In *Obetwood v. Bank*, 113 Cal. 414, 45 Pac. 704, *Urton v. Price*, 57 Cal. 270, and *Tompkins v. Railroad Co.*, 66 Cal. 163, 4 Pac. 1165, the party discharged by plaintiff in each instance was a joint tortfeasor with the defendant in the suit; and it was upon the joint tort, from which one party to it had been discharged, that action was based in each of those cases. Of course, those cases are entirely inapplicable here. Civ. Code, § 1543; *Wristen v. Curtiss*, 76 Cal. 6, 18 Pac. 81; *Insurance Co. v. Potter*, 63 Cal. 157; *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154.

3. The judgment in defendants' favor in *Slosson* against *Glosser et al.* ipso facto dissolved the attachment. Section 553, Code Civ. Proc.; *O'Connor v. Blake*, 29 Cal. 316; *Loveland v. Mining Co.*, 76 Cal. 564, 18 Pac. 682; *Hamilton v. Bell*, 123 Cal. 93, 55 Pac. 758. It was proper, therefore, to admit said judgment in evidence to establish the dissolution of the attachment, and show defendants' right to a return of the property; and the fact that the time for appeal had not expired, and the judgment was not final, did not limit its effect on the attachment. On the record before us, no question arises as to whether an attachment may be continued in force by a compliance with section 946, Code Civ. Proc.

4. There was substantial evidence in the testimony of Van Der Vort tending to show that the property at the time of its sale by the warehouseman, as well as when seized by the sheriff, was of the value fixed in the modified judgment. It cannot be said, therefore, as a matter of law, that the decision that the property was worth \$315 is without support in the evidence. The judgment and orders appealed from should be affirmed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

(133 Cal. 72)

PEOPLE v. WYNN. (Cr. 729).¹

(Supreme Court of California. May 29, 1901.)
CRIMINAL LAW—PLEADING—MINOR DEFECTS—
ARREST OF JUDGMENT—INSTRUCTIONS.

1. Minor defects and imperfections in pleadings, not affecting any substantial right of defendant as provided by Pen. Code, §§ 960-1258, are insufficient to sustain a motion to arrest judgment.

2. An instruction that, "in case of a reasonable doubt whether defendant's guilt is satisfactorily shown, he is entitled to an acquittal," shows no error.

Department 2. Appeal from superior court, city and county of San Francisco; William P. Lawlor, Judge.

P. J. Wynn was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

John J. Barrett, for appellant. Tiley L. Ford, Atty. Gen., for the People.

HENSHAW, J. Defendant was indicted, tried, and convicted of the crime of obtaining money by false pretenses. He appeals from the judgment, and from the order denying his motion for a new trial. In a long and studious brief his counsel assails the sufficiency of the indictment under which conviction was had, urging that the demurrer to the indictment should have been sustained, and his motion in arrest of judgment granted. But, after careful consideration of the points that he makes, we are satisfied that the ruling of the trial court was correct. The indictment charges an offense in language sufficient and sufficiently clear to put the defendant upon trial before a jury. While there are, as pointed out by the learned judge of the trial court, some minor imperfections and defects in the pleadings, none of them does, nor do they altogether, affect any substantial right of the defendant, and for these reasons the trial court properly refused to arrest the judgment. Pen. Code, §§ 960-1258.

Many objections are also presented to the court's rulings in the admission and rejection of evidence. These, too, have been examined. The rulings were without error, or, if it can be said that in any case error was committed, it was harmless to the defendant. To illustrate: Exception is taken to the court's overruling defendant's objection to a question asked by the district attorney of the complaining witness, upon the ground that it called for a conversation, without specifying the time and place and circumstances thereof, but the answer which the witness gave to the question began as follows: "He came in there in the evening afterwards,—into this place where I was doing business. I mean, 643 Mission street. And he went into a little room that was there, where was my wife and myself." Thus the answer itself relieved from the force of appellant's objection. Again, error is asserted in the ruling of the court in sustaining the people's objection to questions propounded by defendant to the complaining witness, concerning statements contained in two complaints sworn to by him in the police court, touching the ownership of the money of which the complaining witness was defrauded; but, notwithstanding, the ruling of the court allowed the defendant's counsel the fullest latitude in this inquiry. These are given as examples. It would serve no useful purpose to discuss one by one the many like objections pressed upon our attention. The only instruction given by the

¹ Rehearing denied June 28, 1901.

court to which exception is taken is found in its declaration to the jury as follows: "In case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, he is entitled to an acquittal." We fail to see any just ground for complaint in this instruction. Whether or not during the trial of this cause the court took up other legal matters to the injury of defendant, as asserted in the affidavit of counsel for defendant upon his motion for a new trial, was a question disputed by counter affidavits, and one with the determination which was made of it by the trial court we see no valid ground of complaint. The judgment and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

133 Cal. 39

PEOPLE v. ROWELL. (Cr. 702.)

(Supreme Court of California. May 25, 1901.)

BURGLARY—EVIDENCE—ADMISSIBILITY—
MISCONDUCT OF JUROR.

1. Where one witness in a prosecution for burglary testifies to having seen a man running from the burglarized house, evidence of another witness that defendant's shoes corresponded with tracks found at the place of the burglary is admissible, though it is not shown that the tracks were made by the man running from the house.

2. Evidence of the appearance of defendant, accused of burglary, when his shoes were compared and found to correspond with certain tracks, and when brought before the prosecuting witness for identification, is admissible against him.

3. Where the defendant attempts to show an alibi by proving his presence in a certain saloon at the time of the commission of the crime, the fact that a juror visits the saloon during the trial is not sufficient misconduct to invalidate a conviction.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

George Rowell was convicted of burglary, and he appeals. Affirmed.

W. H. Shinn, Zue G. Peck, M. E. C. Munday, and E. E. Rowell, for appellant. Tirey L. Ford, Atty. Gen., and A. A. Moore, Dep. Atty. Gen., for the People.

GAROUTTE, J. Defendant has been convicted of the crime of burglary, and appeals to this court. Some intimations are made to the effect that the evidence is insufficient to support the verdict; but, after a careful reading of it, the court is entirely satisfied with the verdict rendered. A witness testified that she saw a man, soon after the burglary, running from the house burglarized. A second witness testified that, in the presence of the defendant, he placed defendant's shoes in certain tracks which he found near the scene of the burglary, and that the shoes fitted those tracks. The objection was made that the tracks to which the shoes were fitted were not those made by the per-

son to whom the first witness referred. This objection goes to the weight of the evidence, and in no way to its competency. If tracks near the scene of the crime compared with defendant's shoes, it was some evidence tending to show that defendant was there when the crime was committed. The weight of the evidence would be dependent upon a hundred different circumstances, and the particular weight to be given to it was for the jury alone to determine. The court sees no reason why the evidence of similarity in the tracks when compared with defendant's shoes would not have been admissible, regardless of the evidence of the first witness to the effect that she saw a man hastening away from the scene of the crime. We see no error in the admission of evidence as to the appearance of defendant when the tracks and his shoes were compared, or when he was brought before the prosecuting witness for identification. This character of evidence has always been held admissible. The identification of the cane found in the house as being the cane seen in the possession of the defendant shortly prior to the commission of the crime was amply sufficient to justify its admission in evidence.

Misconduct of the juror Stein in visiting a certain saloon during the progress of the trial is claimed to have amounted to error. Defendant's evidence tended to show an alibi to the effect that he was in this saloon building at the time the crime was committed in another portion of the city. Stein made affidavit that he went to this saloon for lawful purposes; but, aside from that fact, it would seem that the mere circumstance of a juror visiting a public place of business, only material to the case by reason of defendant's claim that he was there when the crime was committed in another portion of the city, could not possibly affect defendant prejudicially.

There are a few other objections made to the admission of evidence, but we find the rulings of the court thereon to be sound. Also, the action of the court in giving and refusing certain instructions of which complaint is here made is without error. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

133 Cal. 5

CITY OF ALAMEDA v. COHEN.

(S. F. 1,794.)¹

(Supreme Court of California. May 22, 1901.)

MUNICIPAL CORPORATIONS—PUBLIC STREETS—CONDEMNATION PROCEEDINGS—ASSESSMENTS—IRREGULARITIES—DAMAGES—APPEALABLE ORDER—PLEADING AND PROOF.

1. A final order for the condemnation of land, made after an alleged payment of damages awarded therefor, is a special order after a

¹ Rehearing denied June 21, 1901.

final judgment, from which an appeal may be taken under Code Civ. Proc. § 939, subd. 3.

2. Under Code Civ. Proc. § 1251, requiring plaintiff in condemnation proceedings to pay the sum of money assessed within 30 days after final judgment, the costs of court need not be deposited.

3. In proceedings for the condemnation of land for a public street, the owner must allege and prove damages for improvements, if such damages are claimed.

4. Under St. 1889, p. 70, providing that streets may be laid out in municipalities, and property condemned therefor, a property owner, refusing to accept from the commissioners the amount awarded her, is bound by the judgment in subsequent condemnation proceedings, though the amount awarded therein is less than the amount of assessment on the land.

5. Where appellant does not point out in what part of the transcript alleged erroneous rulings as to the evidence may be found, and in what the error consists, the appellate court will not consider the objections raised thereto.

6. St. 1889, p. 70, § 18, provides that if any owner of land to be taken for a public street does not accept the warrant drawn in his favor for damages, or objects to the report of the necessity of taking his lands, proceedings for the condemnation thereof shall be taken, as provided by law, under the right of eminent domain. The complaint need not set forth the proceedings therein provided for, and the resolution and ordinance ordering said work to be done shall be conclusive evidence of the necessity of taking the land. *Held* that, if the resolution and ordinance are passed as in the law provided, authority exists to bring an action condemning property for a public street under the right of eminent domain, without proof of the regularity of the proceedings for levying assessments thereon.

7. Where a municipality proceeds to enforce its right to condemn land for a public street, the fact that a property owner's land is irregularly assessed does not affect the right of the municipality to condemn the land.

Department 1. Appeal from superior court, Alameda county; W. E. Green, Judge.

Condemnation proceedings by the city of Alameda against Emilie G. Cohen. From a judgment for plaintiff and an order denying a new trial, defendant appeals. *Affirmed*.

Alfred H. Cohen, for appellant. Geo. T. Wright and J. W. Goodwin, for respondent.

PER CURIAM. Appeal from judgment in favor of plaintiff condemning certain lands in the city of Alameda for a public street, and from an order denying defendant's motion for a new trial. The main contention of appellant is that the act of March 6, 1889 (St. 1889, p. 70), is unconstitutional. The act has heretofore been before this court, and held to be valid (*Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771); and again in a case, in which this appellant was plaintiff, involving the validity of the assessment for the purpose of paying for the right of way and improvement involved in this suit (*Cohen v. City of Alameda*, 124 Cal. 504, 57 Pac. 377). It is not necessary to further discuss this point, as it is settled upon reasons fully stated in said cases. It is also settled in the latter case that the resolution of intention passed by the board of trustees of the city of Alameda sufficiently described the work, and the land

necessary to be taken, and that the assessment was made upon all the lands of the district. In fact, the latter case may be here regarded as conclusive of the constitutionality of the act, and as settling the principal contentions of defendant as to irregularities in the assessment upon which the proceedings are based. We will notice such other objections as appear of importance.

It is claimed that the judgment is void because the record shows that the amount of money deposited in court does not include the costs of defendant. This would not show that the judgment is void. The judgment of condemnation is the final judgment. It became the duty of plaintiff to pay the money assessed as damages within 30 days after such judgment, or to deposit the same in court. Code Civ. Proc. §§ 1251, 1252. After payment has been made, the court must make a final order of condemnation. A copy of this order must be filed in the recorder's office of the county where the land is situated, and thereupon the title vests in the plaintiff for the purposes specified. *Id.* § 1253. This order of final condemnation was made, and it recited that the amount of damages awarded had been deposited in court for defendant. The order was not appealed from, and was an order made after final judgment. *City of Los Angeles v. Pomeroy* (Cal.) 64 Pac. 477. The Code does not require the costs to be paid or deposited in court, but "the sum of money assessed." Code Civ. Proc. § 1251. And costs may be allowed or not, in the discretion of the court. *Id.* § 1255. It was the duty of defendant to allege and prove damages for improvements if she claimed such damages. *Monterey County v. Cushing*, 83 Cal. 510, 23 Pac. 700; *Town Co. v. Neale*, 88 Cal. 55, 25 Pac. 977, 11 L. R. A. 604.

It is argued, with apparent earnestness, that the finding of the court that the value of the land was the sum of \$3,120, and of the improvements \$50, is not supported by the evidence. The witness Hanly testified, upon his direct examination, that the value of the land was \$3,500, but upon his cross-examination he withdrew this estimate, and placed it at \$3,120. This was the only evidence upon the subject, and is sufficient to support the finding. It is admitted that he so testified, but it is claimed that he is not an expert. Several pages of the transcript are taken up with questions and answers tending to show the knowledge of the witness as to land values in the neighborhood. We think the witness showed himself sufficiently qualified to give an opinion, and, even if he was not an expert, his evidence is in the record, and there is nothing to contradict it. It is said that there is absolutely no evidence in the record as to damages to improvements. Conceding this to be true, the defendant certainly cannot complain because given \$50 more than she was entitled to from the evidence. The finding does her no injury. The court found "that no damages will accrue to

the portion of the lands of defendant, Emilie G. Cohen, not sought to be condemned by virtue of the severance therefrom of the portion to be condemned, and the construction of the improvements in the manner proposed by plaintiff."

It is said in appellant's brief, "There is positively no testimony as to whether said land will be damaged or not." The witness Hanly was asked: "Does the circumstance of the extension of the street through the Cohen tract, as indicated on that Exhibit A, cause any damage to be suffered by the lands on either side of the extension? Does it damage the land on either side?" The witness answered: "I should not consider that it did." This evidence supports the finding.

It is contended by appellant that the amount awarded her by the judgment of condemnation is less than the amount of the assessment that she was compelled to pay for her part of the expense of opening the street, and that the act is invalid because under its provisions the total expense of opening a street might be assessed against one person. This position cannot be maintained. The defendant had the right and the option of accepting from the commissioners the amount awarded her. She refused to do this, and took her chances upon the judgment in condemnation proceedings. If the judgment had been for more than the award of the commissioners, she would have been entitled to it; as it was for less, she must accept it. The statute provides a means by which the value of the property may be ascertained, and if the amount thus fixed is satisfactory to the owner, and he voluntarily conveys the right of way for such sum, the city would get title without the expense and delay of a suit for condemnation. If the owner, however, is not satisfied, and refuses to accept the amount or make the conveyance, the property may be condemned as in other cases. *Davies v. City of Los Angeles*, 86 Cal. 48, 24 Pac. 771.

Certain errors are claimed in the overruling of objections to questions asked by plaintiff of certain witnesses, and in sustaining plaintiff's objections to certain other questions asked by defendant of her witnesses. We have examined the argument of counsel in his brief, and see no reasons given therein to convince us of any erroneous ruling. It is not shown whether, after an objection was overruled, the witness answered the question, or, after an objection was sustained, the witness did not elsewhere testify to the fact sought to be elicited. The brief does not refer us to the folios or pages of the record where the alleged erroneous ruling may be found, and, as the printed transcript contains 310 pages (930 folios), we have not the time, nor the inclination, to read it all for the purpose of discovering error. A party relying upon an erroneous ruling should point it out, and show that it is erroneous, referring to

the folio and page where it can be examined. Much of appellant's brief is devoted to argument as to alleged irregularities in the proceedings taken for the purpose of levying the assessment and proceedings subsequent to the assessment.

As before stated, the principal irregularities complained of were passed upon in *Cohen v. City of Alameda*, supra. But, aside from this, the action is not for the purpose of setting aside an assessment, nor is it an action to collect an assessment. It is a proceeding under the law of eminent domain, as laid down in the Code of Civil Procedure. All the alleged irregularities are collateral to the main issue. The act provides (section 18): "If any owner of land to be taken neglects or refuses to accept the warrant drawn in his favor as aforesaid or objects to the report as to the necessity of taking his land, the commissioners, with the approval of the city council, may cause proceedings to be taken for the condemnation thereof, as provided by law under the right of eminent domain. The complaint may aver that it is necessary for the city to take or damage and condemn the said lands, or an easement therein, as the case may be, without setting forth the proceedings herein provided for, and the resolution and ordinance ordering said work to be done shall be conclusive evidence of such necessity." It will thus be seen that the act dispenses with proof of the regularity of the proceedings. If the resolution and ordinance are passed, as in the act provided, the authority to bring the action exists. The answer of appellant sets forth the resolution and ordinance in full, and the court found that they were correctly set forth. They were regular in form, and, under the statute, are conclusive evidence of the public necessity for which the land is sought. In fact, the action may be brought under the general provisions of the Code of Civil Procedure relating to eminent domain. *City of Los Angeles v. Leavis*, 119 Cal. 165, 51 Pac. 34; *City of Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197.

If the proceedings in regard to levying the assessment in the district in which the street is to be opened should be conceded to be irregular, it does not follow that appellant would be injured. She alleges in her answer that she has certain property within the assessment district which was assessed. The district comprises only a portion of the city of Alameda, and, if the assessment is void, then the damages awarded appellant might be paid from the general funds of the city. *City of Los Angeles v. Leavis*, supra. Appellant would in such case be benefited, and not injured, by the alleged irregular assessment. It was said in *City and County of San Francisco v. Kiernan*, 98 Cal. 623, 33 Pac. 724: "Whether the money thus tendered and paid into court for their use had been obtained by plaintiff through regular or irregular assessments on the property of oth-

ers did not concern the appellants, nor affect the right of the plaintiff to condemn their lands which had not been assessed. The proceedings to assess and to enforce the payment of assessments are entirely distinct from actions to condemn land. There is no pretense that the money tendered was not the property of plaintiff, nor that it did not amount to just compensation. Therefore the rights of the appellants in this action could not have been prejudiced by defects in proceedings to assess the property of others." The same principle applies here. If the appellant's land is irregularly assessed, it could not for this reason be held that the portion sought for a public street should not be condemned. The plaintiff has the right to condemn property for public streets. Appellant has been brought into court, and evidence introduced. The court found the amount of damages to which she is entitled, and the evidence sustains the finding. The amount has been deposited in court as found by the court in its final order of condemnation. This order has not been appealed from.

It is not the business of appellant to try the title of plaintiff to the \$3,170. It is there for appellant, whether obtained by legal or illegal assessment. The judgment and order are affirmed.

(133 Cal. 51)

AMADOR COUNTY v. GILBERT.
(Sac. 886.)¹

(Supreme Court of California. May 28, 1901.)
PUBLIC LANDS — TOWN SITES — STREETS — PLAZAS — COUNTY AND SUPERIOR JUDGES — DEEDS — VALIDITY.

1. St. 1867-68, p. 692, § 15, gives the right of pre-emption of public lands in unincorporated town sites patented to the county judge as trustee under Rev. St. U. S. § 2387 et seq., to "possessors of adjoining lands or other citizens of said town," but provides further that, "if any such lands remain unsold at the end of six months after filing the town plat, the county judge shall proceed to sell such lands to the highest bidder for cash." *Held*, that a superior judge, who was substituted for the county judge by St. 1867-68, p. 692, had no power to convey such lands otherwise than to the highest bidders for cash, at public auction, in compliance with the act.

2. St. 1867-68, p. 692, § 5, provides that "all streets, roads, alleys," etc., "marked and platted on the map of the town site," dedicated under Rev. St. U. S. § 2387 et seq., "shall be deemed and considered and are hereby declared to be dedicated to public use by the filing of such town plat," etc. Land which constituted part of a plaza was defined on the map by the boundaries of a street, of which it formed a part. The other boundaries were marked by clearly-defined lines. The map showed the entrance of intersecting streets into the plaza. *Held*, that the plaza was designated as a part of the street, whose boundaries were coincident with it, and hence that a deed thereto by a judge of the superior court was void.

Commissioners' decision. Department 1. Appeal from superior court, Amador county; G. W. Nicol, Judge.

Suit by Amador county against William S. Gilbert. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Neil A. Macguarrie, for appellant. C. P. Vicini, Dist. Atty., and William J. McGee, for respondent.

SMITH, C. The suit was brought to annul a deed made by the judge of the superior court of Amador county purporting to convey to the defendant a lot or piece of land in the unincorporated town of Jackson in said county, and to eject the defendant from the premises, and remove the buildings therefrom. The town site of Jackson was granted by the government of the United States, August 6, 1870, to the county judge of Amador county and his successors, in trust for the inhabitants of the town; the patent being issued under the provisions of the act of congress of March 2, 1867, "for the relief of the inhabitants of cities and towns upon the public lands" (14 Stat. 541; Rev. St. U. S. § 2387 et seq.). Under this act provision had been made for the entry of such lands by the county judge of the county in which they were situate, "in trust for the several use and benefit of the occupants thereof according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state," etc. In pursuance of the authority thus granted, an act was passed by the legislature of the state March 30, 1868, prescribing the duties of the county judge in executing the trust in such cases (St. 1867-68, p. 692); and afterwards, by the amendatory and supplementary act of March 12, 1885, the judge of the superior court of the county was substituted as trustee in place of the county judge, whose office had been abolished (St. 1885, p. 115). At the date of the deed to the defendant, therefore, the legal title of the town site—with the exception of lands previously conveyed to occupants or others—was vested in the judge of the superior court, in trust for the inhabitants of the town, and subject to the provisions of the acts of the legislature prescribing the mode of executing the trust. The first question to be considered, therefore, is whether the deed in question was authorized by the terms of the trust; otherwise it was void. Civ. Code, § 871. In this case, before the passage of the last act, the trust, so far as it could be, had been executed by the county judge; who, on the issue of the patent in 1870, proceeded at once to perform, and, so far as appears, did perform, all the duties imposed on him by the original act. The trust was thus fully performed, except with reference to the "unoccupied or vacant unclaimed land within the limits of the town site," if any, referred to in section 15 of the act; and there remained no functions to be performed by the superior judge other

¹ Rehearing denied June 27, 1901.

than those prescribed—with reference to the land referred to—by the section cited. Ordinarily indeed the power of the trustee to convey might exist in favor of two classes of persons, namely, original occupants, to whom the original trustee had failed to convey, as required by section 10 of the act, and purchasers under the provisions of section 15. But there is no pretense here that the defendant was one of the former class, and the validity of the deed is therefore to be determined by the provisions of the latter section. Under these provisions the right of pre-emption "at a price not less than one dollar per acre or fraction of an acre" is given to "possessors of adjoining lands, or other citizens of said town"; but it is further provided that, "if any such lands remain unsold at the end of six months after filing the town plat, the said judge shall proceed, in the same manner and at the same time that any delinquent land shall be sold [i. e. at public auction,—section 12], to sell said lands to the highest bidder for cash"; and from this provision it appears that the privilege of pre-emption given in the preceding part of the section is limited to six months after the filing of the plat. We thus arrive at the conclusion that the superior judge had no power to convey lands otherwise than to the highest bidders for cash, at public auction, after survey and subdivision of the land, and compliance with the other provisions of this section of the act. It is not pretended that in the execution of the deed to the defendant any of these conditions were complied with.

Another objection made to the authority of the judge to make the deed is that the land conveyed did not come within the description of the land he was authorized to sell; or, at least, that it was of the kind of land referred to in section 5, namely, "all streets, roads, lanes and alleys, public squares, cemeteries and commons, surveyed, marked and platted on the map of [the] townsite," which it is provided "shall be deemed and considered, and * * * are hereby declared to be dedicated to public use by the filing of such town plat," etc., "and shall be inalienable unless by special order of the board of supervisors of the county," etc. In this case it is not claimed that the sale was authorized by the board of supervisors, and it will, therefore, be unnecessary to inquire whether the kind of lands referred to in this section, and declared dedicated to public use, come within the description of "unoccupied or vacant unclaimed land," referred to in section 15. It will be sufficient to inquire only whether the land described in the deed was in fact dedicated. On this point the record leaves no room for doubt. The land in question forms part of an open plaza or space about the center of the town, on which the three blocks shown on the map (8, 9, and 10) all front. The main street of the town, marked on the map "Main Street," and running from south to north, has its eastern line coincident with

the east line of the plaza; and there is no line on the west other than the west line of the plaza. North and south of the plaza the street is marked by clearly-defined lines in ink, showing a width south of the plaza of about a chain or 66 feet, and to the north of it a little less. On the northwest of the plaza there enters a highway, marked "Sutter Road." All this indicates plainly that the plaza is "designated" on the map as part of the highway or highways of the town, as required by section 3 of the act; for otherwise the owners of lots on the west of it would have no frontage, and the communication between Sutter road and Main street would be cut off, and the alley entering it at the southwest corner would have no exit. And, further, it is clear from the boundaries of Main street, as represented on the map, that it constitutes a part of that street. The field notes are not very clear, but they, in effect, confirm this construction. Thus block 10 is described as "all on the west of Main street to crossing of creek, and [of] Sutter road to Trenchell residence," etc.; lots 29 and 30 as bounded "on the east by the road"; lot 31 as bounded "on the east by the creek" (running through the center of the plaza); and lot 24 as bounded "on east by Miner, etc., and Main street." The plaza must therefore be regarded as "designated" on the map as part of Main street, and therefore, under the provisions of section 5, as dedicated to public use. We have no difficulty, therefore, at arriving at the conclusion that the deed was absolutely void. Nor would this conclusion be affected by the provisions of section 24 of the act. That section can have no application to a case of this kind, where it appears affirmatively from the recitals in the deed, and from the verified petition of the grantee on which it was made, that the deed was not made "pursuant to the provisions of [the] act," etc. Nor have the provisions of section 10 any application to a deed of this kind, or to any deed other than those provided for in the section itself. I advise that the judgment and order denying the defendant's motion for new trial be affirmed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying the defendant's motion for new trial are affirmed.

(133 Cal. 42)

NEALE v. HEAD. (S. F. 2,172.)¹

(Supreme Court of California. May 25, 1901.)

INSURANCE—MUTUAL INSURANCE COMPANY—GUARANTY FUND—GUARANTY NOTES—LIABILITY OF MAKER—TRIAL—FINDINGS—EXECUTION—CAVEAT EMPTOR.

1. The maker of a guaranty-fund note given to a mutual life company organized under St. 1865-66, p. 752, requiring a reserve fund of \$250,000, created by the giving of such notes,

¹For opinion on petition for rehearing, see 65 Pac. 576.

and which prohibited the withdrawal of such notes, except on the substitution of similar notes by the consent of the corporation directors and the makers of other notes, is released from liability by the act of the corporation in returning certain of the notes without taking other notes in lieu thereof, and in making no attempt to file other notes as claims against deceased makers, and in transferring such notes to its successors.

2. The maker of such a note is only liable as surety for the corporation to its creditors, and not to its stockholders.

3. A finding of the trial court which is not embraced in the issues raised by the pleadings is of no validity.

4. An execution purchaser of a note takes it subject to all equities existing against it in the hands of the original maker.

Department 1. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action on a note by Vincent Neale, as special administrator of the estate of James Laidley, deceased, against A. E. Head. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Bishop & Wheeler and Garber, Boalt & Bishop (Thos. B. Bishop and William Rix, of counsel), for appellants. Vincent Neale, in pro. per.

VAN DYKE, J. The appeal is taken from the judgment, and also from the order denying defendant's motion for a new trial. The action was brought in the superior court of the city and county of San Francisco by one Joseph E. Shain, for whom the present plaintiff was substituted as plaintiff at the trial. The action is founded upon a promissory note of the defendant, constituting one of the so-called guaranty notes, of which the following is a copy: "Office of the California Mutual Life Insurance Company. \$5,000. San Francisco, Jan. 6, 1868. Five days after actual demand, for value received, I promise to pay to the order of the California Mutual Life Insurance Company the sum of five thousand dollars, in United States gold coin, with interest at the then legal rate from and after such demand. A. E. Head." The case was heard in the court below on the second amended complaint filed by the original plaintiff, and the answer thereto, and the supplemental complaint substituting the present plaintiff.

The California Mutual Life Insurance Company was incorporated in the year 1867, under an act of the legislature of this state entitled "An act to provide for incorporation of Mutual Insurance Companies, for the insurance of life and health and against accident," approved April 2, 1866. St. 1865-66, p. 752. After obtaining the guaranty fund, as provided by said act, the said insurance company engaged in business and carried on the same during the years 1868, 1869, 1870, 1871, and 1872. In the year 1873 it sold out its business to the Republic Life Insurance Com-

pany of Chicago, an Illinois corporation, and ceased to do further business. In 1885 said insurance company being insolvent, proceedings in involuntary insolvency were on the 7th of March of that year commenced against it, and thereafter it was adjudicated insolvent; and the court decreed, among other things, that the assets of the insolvent, including the notes constituting the guaranty fund, should be sold, and in pursuance of said decree said notes were, by the assignee, sold; the note of the defendant being sold to one James H. Dobinson for \$300, who, as alleged in the second amended complaint, transferred and assigned the same to the original plaintiff; and September 22, 1888, on demand being made on defendant, and refusal to pay, the action was commenced, in 1891, and the original plaintiff, before the trial, transferred the claim to the present plaintiff. By the act under which the company was organized and operating, a guaranty fund of not less than \$250,000 is required, which "shall consist of the notes of solvent parties, approved by the board of directors and by each other," which notes so given by any one person should not exceed the sum of \$5,000, exclusive of interest. It is also provided that, when the fixed capital of the company shall have been obtained, a sworn declaration of the amount and nature of the same shall be filed with the original certificate of incorporation, and "until such time no guaranty note shall be withdrawn from the fund, unless another note of equal solvency shall be substituted therefor, and unless with the unanimous approval of the board of directors then in office, and of all of the other parties liable on the rest of the notes comprising the guarantee fund." In this case there were 50 notes, of \$5,000 each. There is no averment in the complaint of compliance with any of these requirements. The contrary, however, is expressly alleged in defendant's answer, and the findings substantially support the allegations of the answer. The findings show that five of the guaranty notes were, during the existence of the company, surrendered to the makers of the same, and withdrawn from the said guaranty fund, without any substitution or attempt at substitution of other securities, and without the knowledge, approval, or consent of the defendant. It is also found that eight of the makers of said guaranty notes had died, and had left solvent estates sufficient to pay their respective notes and other debts, and that the company neglected and failed to present any claim whatever against the estate of said deceased solvent note makers, or to take any steps whatever for the collection of the same, until the same had become barred by limitation; that said company, without the approval, consent, or knowledge of the defendant, transmitted all of said notes constituting said guaranty fund, including the note in suit, to the Republic Life Insurance Company, a corpora-

tion existing under the laws of the state of Illinois, without substituting or procuring to be substituted therefor any note, money, or property whatever; that after the commencement of this action, and without defendant's approval or consent, said company surrendered to the makers thereof 32 of said notes, constituting said guaranty fund, without any substitution of other notes or security, other than the execution of a bond in the sum of \$25,000 in favor of the assignee in insolvency.

The appellant contends (1) that, having made the note in suit on certain conditions, he is not liable, because the conditions have not been complied with, and, being a guarantor, is discharged from liability in consequence of the acts and transactions referred to as having been found by the trial court; (2) that the claim, if any ever accrued, is barred by limitation.

The note in suit, as already shown, was given in pursuance of and in accordance with the provisions of the statute for 1866. Among the other provisions of that act, it is declared that such notes, or the proceeds thereof, should remain with the company, and should not be withdrawn from the guaranty fund without substituting therefor another note of equal solvency, nor without unanimous approval of the board of directors, and all of the other parties liable on the rest of the notes. These provisions of the law must be considered as having been read into the note, and they are in harmony with the general rules of law for the protection of a surety or guarantor. Each note maker had the right to require that there should be, in all, 50 solvent note makers, each of the sum of \$5,000; and it was also his right to have that number of such solvent note makers continue, subject to the same conditions and liabilities as himself. The reason of this provision in the law is very obvious. The corporation and its stockholders are primarily liable for the company's debts. *Morrow v. Superior Ct.*, 64 Cal. 383, 1 Pac. 354. The parties who executed the guaranty notes are the mere sureties of the company and its stockholders, for the payment of the company's debts. In *re California Mut. Life Ins. Co.*, 81 Cal. 364, 22 Pac. 869. And, as sureties, each note maker, if required to pay in discharge of the company's debts, is entitled to contribution from such note makers as may not have paid an equal amount. As a guarantor, the defendant is entitled to stand upon the very letter of his contract. *Brandt*, Sur. (2d Ed.) §§ 93, 254; *Miller v. Stewart*, 9 Wheat. 680, 702, 703, 6 L. Ed. 189; *Tomlinson v. Simpson*, 33 Minn. 443, 446, 23 N. W. 864; *Independent Dist. v. Reichard*, 50 Iowa, 98. It was held in *Re California Mut. Life Ins. Co.*, supra, that this guaranty fund was liable only for the debts of the

company; and as an additional security to the parties dealing with said company, over and above the liability of the company and its stockholders, and as between the makers of these notes and the company and its stockholders, the money paid by stockholders cannot be made a charge upon such guarantors. It is very clear, therefore, that the company could not have maintained an action on this note under the circumstances, and there is nothing to show that the plaintiff is, or that his assignors were, creditors of the company. It is alleged in the second amended complaint, on which the case was tried, "that pursuant to said decree the said note was sold to one James H. Dobinson, who transferred and assigned it to this plaintiff;" and in the supplemental complaint, after averring the appointment of the plaintiff as special administrator of the estate of James Laidley, deceased, it is said "that since the commencement of this action, to wit, in the month of November, 1895, Joseph E. Shain, the original plaintiff in the above-entitled action, transferred to the plaintiff, as special administrator of the estate of James Laidley, deceased, the promissory note sued upon, and all his right, title, and interest in the above-entitled action." The title to the note in question passed from the insurance company, to which it was originally given, to Dobinson, by means of a judicial sale, and from him by mesne assignments to the present plaintiff. The plaintiff therefore stands in no better position than the company itself would have stood, had it brought suit on the note. The finding of the court that Dobinson transferred to the executors of Laidley in extinguishment of a claim against the insolvent company, held by said estate of James Laidley, deceased, is altogether outside of the issues raised in the pleadings, and is therefore without support. One who buys at judicial sale a negotiable promissory note takes it under the rule of caveat emptor, and holds it subject to all equities existing against it in the hands of the original maker or assignor. It is not a transfer in due course. 2 Pars. Notes & B. p. 46 et seq.; *Ror. Jud. Sales*, p. 474; *Civ. Code*, § 312; *Code Civ. Proc.* § 368. The small price paid for the note at such sale would indicate that the purchaser so understood it.

For the foregoing reasons, bearing upon the first point relied upon by appellant, we are of the opinion that upon the findings of the court, within the issues raised by the pleadings, the defendant was entitled to judgment. This view of the case renders it unnecessary to consider the other points made by appellant. Judgment and order reversed.

We concur: HARRISON, J.; GAROUTTE, J.

133 Cal. 33

CAMPBELL v. CAMPBELL. (S. F. 1,782.)
(Supreme Court of California. May 24, 1901.)

NOTES—FORGERY—ESTOPPEL—LIMITATIONS
—AMENDMENT—EFFECT OF FRAUD.

1. Plaintiff's original complaint, filed within four years of the giving of the note in suit, alleged that he loaned money to defendant on a note, and that he commenced suit thereon, and was defeated in the trial court and on appeal, and that defendant's name was forged to the note, but that he received the proceeds, and judgment was asked for damages therefor. The amended petition, filed after the expiration of four years, alleged that the note was a forgery, and was procured by an agent of defendant, and that the latter received the proceeds, and asked for judgment on the note. *Held*, that the amendment substituted a cause of action on the note for a cause of action for damages, and was barred by Code Civ. Proc. § 337, requiring suit on a written instrument to be commenced within four years.

2. Where money is loaned to an agent for defendant on a note, to which the name of defendant is forged, and the latter knows the facts and receives the proceeds, he is estopped from denying his liability on the note.

3. The character of an action on a note, as affecting the bar of limitations, is not affected by the fact that plaintiff asks to be subrogated to a judgment, which was paid by the money secured by the note, since subrogation is a mere incident to the principal relief.

4. An action to enforce a note for borrowed money against one who receives the proceeds, but whose name is forged to the note, and to be subrogated to a judgment paid by the proceeds, is not for relief on the ground of fraud or mistake; and hence Code Civ. Proc. § 338, subd. 4, providing that limitations shall not commence to run against an action for relief on the ground of fraud or mistake, until the fraud or mistake is discovered, has no application thereto.

Department 1. Appeal from superior court, Sonoma county; A. G. Burnett, Judge.

Action by J. D. Campbell against George O. Campbell. From a judgment in favor of the defendant, plaintiff appeals. Affirmed.

C. S. Peery and Wm. Shipsey, for appellant. A. B. Ware, for respondent.

COOPER, C. The court below sustained defendant's demurrer to the amended complaint. Plaintiff declined to further amend, and judgment was entered for defendant. This appeal is from the judgment, for the purpose of determining the question as to the correctness of the order sustaining the demurrer. The amended complaint was filed May 26, 1898, and states, in substance, that on April 1, 1893, a judgment was duly given and made by the superior court of San Luis Obispo county in favor of one Ramage against this defendant for certain personal property, \$271, and costs; that on the 24th day of May, 1893, one Stilts, as the agent of defendant, and with his knowledge, borrowed of plaintiff the sum of \$280 for the purpose of paying the said judgment, and the same was paid and satisfied with said money; that on said last-named date the said Stilts, in consideration of the said \$280, delivered to plaintiff a promissory note of even date for said sum, payable one day after

date, and "purporting to have been made and signed by the said Stilts and the said George Campbell," bearing interest from date at the rate of 10 per cent. per annum until paid; that Stilts was at the time of making said note insolvent, and was known to plaintiff to have been so insolvent, and the said money was advanced wholly upon the credit of defendant's signature to said note; that plaintiff is informed and believes that the purported signature of the defendant to said note was forged, and was not the genuine signature of the defendant, and that plaintiff did not discover the forgery until July, 1896; that defendant received and retained the \$280, and on January 3, 1898, with full knowledge of all the facts, procured and had an order duly given and made by the superior court of said San Luis Obispo county satisfying the said judgment of record; that plaintiff has demanded of defendant that he pay the amount of said note, with legal interest thereon, but no part thereof has been paid. Judgment is asked that the said sum of \$280, with legal interest thereon from May 23, 1893, be repaid to plaintiff, and that plaintiff be subrogated to the rights of said Ramage in said judgment against defendant, and that said judgment be revived in favor of the plaintiff in this action. There is no allegation in the amended complaint that Stilts was insolvent or unable to pay the note at the time of the commencement of the action.

Among other grounds of demurrer to the amended complaint, the defendant demurred upon the ground that the cause of action, as therein stated, is barred by the provisions of section 337, Code Civ. Proc., which provides that an action upon a written instrument is barred unless commenced within four years after the cause of action accrues. A cause of action accrued in favor of plaintiff one day after May 24, 1893. When the amended complaint was filed more than four years had elapsed after the cause of action accrued. The demurrer was therefore properly sustained.

The action was not commenced upon the note until the filing of the amended complaint. The original complaint alleged that on July 30, 1896, the plaintiff commenced an action in the justice court of San Simeon township, in the county of San Luis Obispo, against defendant and said Stilts on said note; that said action was tried in said justice court, and judgment rendered in favor of defendant, and against this plaintiff; that said case was afterwards appealed, and the superior court of San Luis Obispo county, by its judgment, duly given and made, decided and rendered judgment in favor of this defendant and against plaintiff. The original complaint then enumerates certain acts as to the alleged forgery of defendant's name to said note, and that defendant received the \$280 with which he paid the Ramage judgment. Judgment is then asked for \$600

damages and costs. As the original complaint alleged a final judgment upon the note in favor of defendant, and stated facts showing that plaintiff relied upon the alleged forgery and receipt of the money by defendant as a cause of action for damages, it cannot be held that it was the commencement of an action upon the note. Instead of being an action commenced upon the note, it contained express declarations showing a final judgment in defendant's favor thereon. After a demurrer was sustained to the original complaint, plaintiff evidently concluded to proceed upon a different theory, and, instead of alleging a final judgment in defendant's favor upon the note, set forth the amount, date, execution, and delivery of the note, and asked judgment for such amount. If the name of defendant was in fact forged to the said note, and the other allegations of the amended complaint are true, it by no means follows that the defendant was not liable thereon. If Stilts was defendant's agent in the transaction, acted with full knowledge of defendant, procured the money for defendant, and "defendant retained the benefit with full knowledge of all the facts," and received the money to his own use, could he be heard to deny his liability upon the note? The cause of action, therefore, was upon the note. Plaintiff loaned the money upon the note, and the indebtedness was evidenced thereby.

This action is for the purpose of recovering such indebtedness, and the character of the action is not changed by the fact that the plaintiff asks other relief in the way of subrogation to compel the payment of the indebtedness. The right of subrogation would, in any event, be only incidental to the principal relief sought. *Clausen v. Meister*, 93 Cal. 555, 29 Pac. 232.

The allegation that plaintiff did not discover the forgery of defendant's name until July, 1896, cannot relieve him. He knew he had the note at that time. He knew the circumstances, and the defendant's connection therewith. He still had, after such alleged discovery, nearly two years in which to bring his action upon the note, and to ask the relief of a court of equity as to any subrogation incident to the indebtedness due thereon.

This is not an action for relief on the ground of fraud or mistake, and therefore subdivision 4 of section 338 has no application. It is really an action to recover upon the promissory note, and plaintiff is in no better position because fraud has been committed upon him, nor the defendant in any worse position than if defendant had in fact signed the note. It follows that the judgment should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

6 Cal. Unrep. 677

PAINTER'S EX'RS v. PAINTER et al.

(S. F. 1,971.)

(Supreme Court of California. May 25, 1901.)

PARTNERSHIP—ACCOUNTING—DISSOLUTION
—DEATH OF PARTNER—FIRM ASSETS.

1. Where a surviving partner carried on the firm business with the firm assets until it was terminated by the appointment of a receiver, an accounting should be as of the date of the appointment of the receiver, and a personal judgment against the surviving partner, which merely fixed his liabilities as of the date of the deceased partner's death, was erroneous.

2. Where the assets of a partnership dissolved by the death of one of its members were used by a new firm formed by the surviving partner, the old partnership was entitled to a share in the profits of the new firm proportionate to the value of the assets of the old firm used, as compared with the value of the property or services contributed by the new firm; but all the property of the new firm should not be regarded as assets of the old.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Jerome B. Painter's executors against Theodore P. Painter and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Pringle & Pringle, for appellants. M. B. Kellogg, for respondents.

PER CURIAM. Appeal from a judgment for plaintiffs and from an order denying the defendants a new trial. The case was before this court on appeal from a former judgment and similar order in favor of plaintiffs, and reversed, reported in 36 Pac. 866. The case, stated generally, and so far as identical on the two appeals, or noting divergences, is as follows: The defendants and the plaintiffs' testator, Jerome Painter, were brothers, and at the time of the death of the latter he and Theodore were partners, under the firm name of Painter & Co., in the business of printing and of manufacturing type in the city of San Francisco. Jerome died February 6, 1883, and by his will the plaintiffs and the defendant Theodore were named as executors, and qualified as such; but the latter resigned May 3, 1888. On the death of Jerome the business and assets of the firm came to the hands of Theodore as surviving partner. But shortly afterwards he formed a partnership with the defendant Milton under the firm name of Painter & Co., and thereafter the business of the old firm and that of the new was carried on under the same management, under the name of Painter & Co., up to May 17, 1889, when a receiver was appointed, who took possession of all the properties in the possession of the defendants as partners, whether of the old or of the new firm. Thus far the facts are undisputed. But it was found on both trials that after the defendants took possession the business was managed by them as if it were their own, and under claim to that effect; and in the findings on the last trial, now under review, it is found that this claim of

defendants was based on a bequest in the will of Jerome (being the bequest referred to in *Painter v. Painter*, 113 Cal. 371, 45 Pac. 689); and that, under this claim, they continued, to the commencement of the suit, to hold the assets of the old firm, and to use them for their own benefit, or, more specifically, in "the conduct of the business of the old firm of Painter & Co., claimed by them as aforesaid"; and also that the defendant Theodore failed to keep the books of the concern correctly, or to keep a just or true account of its business, for the reason that the books have been kept by the new firm as accounts of their own; and that "such omission and neglect was not with fraudulent intent, but was willfully and wrongfully careless and negligent." It was further found on the last trial—and, in effect, on the former—that the business continued to be the business of the old firm, and that all the properties in the hands of the defendants when taken from them by the receiver were the properties of the old firm. On the former trial it was found that the irregularities in the books were the result of fraudulent design of the defendants to cheat and defraud the estate; on the latter the findings negative the existence of fraud on the part of defendants. Otherwise, with regard to the facts found, the general case presented on the two appeals is substantially the same. But, with regard to the effect to be given to the facts, the conclusions reached by the court, and the judgments rendered in accordance therewith, are widely divergent; and, as one of the questions to be now determined is as to the effect of the former decision as the law of the case, a brief statement of the effect of the findings and judgments on the former trial will be necessary. On that trial the settlement of the accounts of the partnership was carried up to the date of the commencement of the suit, at which time the business of the old firm, as also that of the new, was terminated by the receiver taking possession of the assets of both; and in the findings there is contained a statement of the account of Theodore as of that date. This is based on a statement of the "resources and liabilities" made out by the plaintiffs' expert, and put in evidence by them, which may, therefore, be regarded as part of the finding. From this it appears that the net capital of the firm (the old and new firm being regarded as one) at the date of accounting ("assuming all resources as collectible," etc.) was the sum of \$113,142.31, and the share of each \$56,571.15; but that Theodore was to be charged with various amounts, to be deducted from his share, aggregating \$67,246.19. These items (with the exception of two, amounting to \$15,208.86) were charges against Theodore to correct credits in his favor on the books, found by the court to be unauthorized; and with reference to all of them this court on appeal held the findings not to be justified by the evidence. This (with the exception of the items specified) leaves the

account as shown by the books. Another correction is, however, required with reference to a charge of \$21,201.50, or more, credited on the books to Jerome as the purchase money of certain school lands, which this court on the former appeal held to have been a private transaction of Jerome's, and therefore to be transferred to his personal account. With these corrections, as the result of the last trial and decision on appeal, we may assume the account thus corrected to be a correct, though not complete, exhibit of the state of the account between the partners.

The judgment entered by the court on the above data is, of course, on the present appeal immaterial. But it may be briefly alluded to as part of the history of the case, and as serving to illustrate the character of the judgment now before us on appeal. The result of the court's calculations on the former trial was to bring Theodore in debt to the firm, after deducting credits on the books, in the sum of \$28,675.64. Judgment was accordingly rendered against him personally, and in favor of the plaintiffs, for one-half this amount, \$14,337.82; and it was further adjudged that the balance of the net capital, \$113,142.31, after deducting the amount of \$28,675.64, in which Theodore was found to be indebted to the firm,—being \$84,466.37,—should be divided equally between the parties. But among the resources of the firm going to make up the amount thus to be divided between Theodore and the plaintiffs it appears from the statement of resources and liabilities that there was an indebtedness of Jerome to the firm of \$32,532.14, of which one-half would, under the judgment, belong to Theodore. The judgment for the division of the net capital was, therefore, in effect, a judgment that Jerome, or, rather, his executors, was indebted to Theodore in the sum of \$16,276.57,—an amount exceeding the amount of the judgment against the latter by \$1,938.75. On the last trial, now under review, a different mode of settlement was adopted. No account was taken of transactions subsequent to the death of Jerome, nor was there any attempt to settle the accounts of the partners. All that is found is that at the date of the death of Jerome he was not indebted to the firm, and the net value of the firm's assets, over liabilities and exclusive of real estate, was \$62,708.50, to which is added the sum of \$2,740, in which Theodore is found to be indebted to the firm, thus making "the total net market value of the assets" \$66,448.88; and for one-half of this—\$33,224.44—judgment is rendered against Theodore personally and as surviving partner, to be satisfied by sale of his share of the assets, real and personal, and, if these be insufficient, a deficiency judgment to be docketed against him. This was obviously erroneous. It is expressly found by the court that the business carried on after Jerome's death, with all its original assets and accessions and profits, was the business of the old firm; and Theodore was,

therefore, entitled to an accounting up to the date of its termination by the appointment of the receiver. Until final settlement of the accounts, a personal judgment against a partner or surviving partner is erroneous. 2 Bates, Partn. §§ 919, 971, 974. Argument on this point is unnecessary; but the result of the mode of settlement adopted by the court may be illustrated by comparing it with the settlement made at the former trial. There, though Theodore was improperly charged with items amounting to \$52,037.30, yet the result was a judgment against him of \$14,337.82 only, less than one-half of the judgment rendered at the last trial on data precisely the same, except that the charges disapproved by this court on the former appeal were, presumably, omitted. For the reasons given, the judgment must be reversed, and the cause remanded for new trial. There are, however, other errors, which, with a view to the future proceedings in the case, must be adverted to.

1. In arriving at the conclusion that the value of the assets of the firm at the date of the death of Jerome was \$66,448.88, and that his executors were entitled to one-half thereof, it was necessary for the court to assume that Jerome was not indebted to the firm in any amount when he died; and accordingly it is so found. But this finding is clearly in conflict with the statement of resources and liabilities made by the plaintiff's own experts, put in evidence by them, and accepted by the court on the former trial, wherein, among the resources of the firm, is a debit to Jerome's account of \$32,532.14; and, in addition, it was held by this court on the former appeal that he had been improperly credited with large amounts for purchase money of school lands (amounting, according to the testimony of Folger, plaintiff's expert, to the sum of \$21,201.50), which should have been charged to his personal account. Assuming these amounts to be correct, the indebtedness of Jerome to the firm at the time of his death was largely in excess of Theodore's, and the interest of the latter in the assets of the firm correspondingly greater than that of the former. What was the precise interest of Jerome in the assets of the firm at the time of his death is to be determined by the lower court; but on the new trial the attention of the court should be directed to the claim of appellants that it in fact amounted to nothing, and to what is said by this court on the former appeal with reference to this claim, and as to the law applicable to the case if the claim should be found to be just. With regard to the judgment in the case of *Painter v. Painter*, 113 Cal. 371, 45 Pac. 689,—which the court held to estop the defendants to claim that Jerome was in fact indebted to the firm at the time of his death,—it is obvious that the finding cannot be sustained. Leaving out of view the objection that Theodore suffered default, and that there was no judgment against him, and consequently no

estoppel, it is otherwise clear that neither he nor Milton was estopped. The indebtedness referred to in that suit was an alleged personal debt of Jerome to the firm, as distinguished from an indebtedness for money withdrawn from the firm, which could be determined only upon a final settlement of the partnership concerns. The findings of the court were carefully confined to indebtedness of the kind alleged. The settlement of the partnership accounts was involved only as incidentally necessary to the relief sought, which was a sale of lands. The court refused to entertain jurisdiction of, or to hear evidence on, that subject; and it was in fact formally admitted by the defendant's attorney that Jerome had withdrawn from the firm more than Theodore, or, in other words, was indebted on that account.

2. On the former trial the court found, in effect, that the appointment of a receiver was necessary to preserve the property, etc., and this court held on appeal that the finding was not supported by the evidence; yet on the present appeal we have the same finding. As the case is reversed on other grounds, we have not thought it necessary to examine the record critically, with a view of determining whether there is new evidence on this point materially affecting the case, though on such examination as we have made we have not been able to discover any. But the court on the former appeal also held that "the receiver should have been discharged," and this injunction has been disregarded by the lower court. On another appeal, a continuance of the receivership, unless the case be materially varied from what it was on the former appeal, may be a ground for reversal.

3. The court finds that all the property held by Painter & Co. (the new firm), including the Directory, belongs to the old firm. This finding, we think, is not sustained by the evidence. The firm of the defendants and the dissolved firm, though having the same name, are entirely distinct entities. The use of the assets of the old firm in the new business entitled it to a share in the profits, but not necessarily to an ownership of the assets acquired by the new firm; nor could it give it more than a part ownership of such assets, proportionate to the value of the assets of the old firm used, as compared with the value of the money or services contributed by the new firm. On this point, also, attention should be directed to what was said by this court on the former appeal.

4. There are other imperfections in the findings that may be briefly adverted to. The finding that the assets of the old firm were "appropriated by the defendants to their own use" is inconsistent with the finding of the court that their claim was based on the bequest in Jerome's will, and with the facts also found that an inventory and account were filed in the matter of his estate. Their claim was evidently in subordination to the title of Jerome's executors. The finding that

the amounts collected by Theodore from old accounts and sales of stock of the old firm were expended by the defendants in the attempt to continue the business seems also to be in conflict with the evidence. A part of it—\$10,000, and presumably more—seems to have been paid on the debts of the old firm. The judgment and order appealed from are reversed, and the cause remanded for new trial, to be conducted in accordance with the principles stated in this and in the former decision of this court.

133 Cal. 29

ALLEN v. HOME INS. CO. OF NEW YORK.
(S. F. 1,819.)

(Supreme Court of California. May 24, 1901.)

FIRE INSURANCE—POLICY—DWELLING HOUSE
—COMPLAINT—JURY—CHARGE—OWNERSHIP—WAIVER.

1. Where, in an action on a fire policy on a building "while occupied as a dwelling house," the complaint fails to allege that the building was so occupied at the time the fire occurred, the complaint does not state a cause of action, since there could be no recovery unless such fact was proved, and the facts necessary to be proved must be alleged.

2. In an action on a fire policy insuring a building "while occupied as a dwelling house," defendant's request to charge that, "if the jury believe from the evidence that at the time of the insurance and at the time of the fire the premises were occupied and used as a roadside bawdy house and saloon," the verdict will be for the defendant, was refused until modified by the court by adding after "saloon," "and that plaintiff knew or had notice thereof." *Held* error, since the insurer has a right to select the character of risks which it will assume, and contract which it will enter into, and plaintiff cannot commit her property to the care of another, and avoid responsibility on the ground of want of notice.

3. Where defendant, with knowledge that plaintiff's interest in insured property was that of mortgagee, issued a policy to her providing that, if the interest of the insured was other than the entire ownership of the property, the policy should be void unless otherwise provided by agreement indorsed thereon, and at the expiration of the term issued a new policy in renewal thereof, the issuance of the policy was a waiver of such condition, and such waiver extended to the renewal.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Lalla T. Allen against the Home Insurance Company of New York. From a judgment for plaintiff, defendant appeals. Reversed.

E. W. McGraw, for appellant. Frank J. Sullivan, for respondent.

PER CURIAM. This action was brought to recover on a policy of fire insurance insuring plaintiff in the sum of \$2,200 "on one-story, shingle-roof frame building, and its additions adjoining and communicating, while occupied as a dwelling house." The case was tried before a jury, and a verdict rendered for plaintiff. Defendant appeals from

the judgment, on the judgment roll and a bill of exceptions. *..

The appellant urges certain errors of law as grounds for reversing the judgment. It is first claimed that the court erred in overruling the demurrer to the amended complaint. The principal contention under this head is that the complaint does not allege that the building at the time of the fire was occupied as a dwelling house. It was in the contract between the insurer and the insured that the premises were insured while occupied as a dwelling house. It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling house. If it was essential to prove such fact, it was essential to allege it. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. *Green v. Palmer*, 15 Cal. 413, 76 Am. Dec. 492; *Spring Valley Waterworks v. City and County of San Francisco*, 82 Cal. 323, 22 Pac. 910, 1046. In declaring upon a contract of insurance, so much of it as will show a right to recover must be set out in terms or in substance. 2 May, Ins. (4th Ed.) 589. Accordingly it has been held that, where the policy was upon the stock of a commission merchant while in a certain warehouse, the complaint must allege that the stock was in such warehouse at the time of the fire. *Todd v. Insurance Co.*, 1 Mo. App. 472. Where a policy of insurance confined the insurance to the building while located and occupied by the plaintiff in the town of Newfane, it was held that the case should be reversed because the condition was not alleged in the complaint. *Powers v. Insurance Co. (Vt.)* 35 Atl. 331. The allegation was not merely a condition precedent, as referred to in Code Civ. Proc. § 457. It went to the very essence of plaintiff's right to recover. Certain conditions subsequent to the right of recovery, matters of defense, the nonperformance of conditions subsequent, and certain negative prohibited acts need not be pleaded by plaintiff; but the rule does not extend to the essence of the cause of action. The facts alleged in this complaint may all be true, and yet the plaintiff not be entitled to recover. She could not recover unless she proves more than the complaint alleges. It was therefore error to overrule the demurrer.

The answer alleges as a special defense that at no time after said policy was issued was said building occupied as a dwelling house, but at all times after said policy was issued it was occupied as a disreputable roadside tavern and bawdy house. There was at least sufficient evidence on this point to entitle defendant to have the question submitted to the jury. If the premises were in fact occupied as a bawdy house and saloon at the time of the fire, this was a good defense. May, Ins. (4th Ed.) § 245, and cases cited. The court so instructed the jury, in the following language: "The insured

premises were insured only while occupied as a dwelling house. The burden of proof is on the plaintiff to show that at the time of the fire the premises were occupied as a dwelling house. A bawdy house and saloon is not a dwelling house, within the meaning of that term in this policy of insurance, notwithstanding persons may dwell there." The defendant requested the court to instruct the jury as follows: "If the jury believe from the evidence that at the time of the insurance and at the time of the fire the premises were occupied and used as a roadside bawdy house and saloon, then your verdict will be for the defendant." The court refused to give said instruction as requested, but modified it by adding after the word "saloon," "and that plaintiff knew or had notice thereof." The court also, at the request of plaintiff, instructed the jury as follows: "If you find from the evidence that at the time of the execution of the policy sued on the plaintiff had no notice or knowledge, and no means of knowledge, as to the character of the house and its inmates, and that she made no representations whatever in relation thereto, then I instruct you that her rights cannot be affected thereby." It is thus made plain to the jury that the use of the house for purposes other than a dwelling house would not forfeit the policy unless plaintiff had knowledge of such use. As the plaintiff testified that she had no such knowledge, and her evidence was not contradicted, the instruction, as given, at once destroyed the defense claimed by defendant. The court erred in so instructing the jury. The policy was a contract to pay only in case of loss of the insured premises while occupied as a dwelling house. The liability was limited by the terms of the contract, and such limitations are held valid. It is the business of the insured, and the burden is upon him, to see that the premises are not used in such manner as to make void the policy. The insurer is at liberty to select the character of risk he will assume, and he is not liable except upon proof that the loss occurred within the terms of the policy. The insured cannot commit the control of the insured premises to another, and avoid responsibility on the ground of want of notice. He is presumed to have notice, whether the premises are occupied by himself or tenant. Phil. Ins. § 866; Ostr. Ins. § 331; 1 May, Ins. (4th Ed.) § 227; Insurance Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575; Slinkard v. Assurance Co., 122 Cal. 595, 55 Pac. 417; Mawhinney v. Insurance Co., 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87; Kohlman v. Selvage (Sup.) 54 N. Y. Supp. 230; Kelly v. Insurance Co., 97 Mass. 286.

It is further contended that the only interest of plaintiff in the insured property was that of a mortgagee, while the policy provided that "if the interest of the assured be or become other than the entire, unconditional, and sole ownership of the property, or if

the building insured be on ground not owned by the assured in fee simple, then in every such case this policy shall be void, unless otherwise provided by agreement indorsed hereon." We think the evidence shows that the defendant knew the interest of plaintiff in the premises, and issued the policy with such knowledge. The witness Thompson testified that he attended to plaintiff's insurance business, and in July, 1895, he went to a Mr. Everett, the counter clerk of defendant, and stated all the facts, and that plaintiff was mortgagee and had commenced foreclosure proceedings; that, with full knowledge of such facts, defendant issued a policy for one year; that at the expiration of the year he went again to the defendant, and asked for another policy for a year, when it issued the policy upon which this suit is brought. The present policy is a renewal of the first one-year policy, and, as such renewal, is affected by the knowledge and acts of defendant and its agent in issuing the original policy. Kruger v. Insurance Co., 72 Cal. 94, 13 Pac. 156, and cases cited; May, Ins. (4th Ed.) § 70a. The issue of a policy upon known facts waives all conditions inconsistent therewith. Id. §§ 133a, 294b; Kruger v. Insurance Co., supra. The judgment is reversed, and the cause remanded, with directions to allow the plaintiff a reasonable time to amend her complaint, if so advised.

133 Cal. 55

HERD v. TUOHY. (Sac. 789.)

(Supreme Court of California. May 28, 1901.)

MORTGAGES — FORECLOSURE — DEFICIENCY JUDGMENT—ENFORCEMENT—JURISDICTION—PLEADING — SUFFICIENCY — TRANSFER OF MORTGAGE—PERSONAL LIABILITY—EX PARTE HEARING—FRAUD—HARMLESS ERROR—JUDGMENT—ESTOPPEL.

1. Const. art. 6, § 5, gives the superior court jurisdiction over all cases in equity. Code Civ. Proc. §§ 392-397, require actions for the recovery of possession of, quieting the title to, or for the enforcement of liens on real estate to be brought in the county where the real estate affected is situated, but provide that, if the action is not commenced in the proper county, the only remedy of the defendant is to demand change of venue. Held, that the provisions of the Code do not affect the jurisdiction of the court, and where a transcript of a judgment foreclosing a mortgage and granting a deficiency judgment was filed in a county other than where rendered, and the mortgagor brought action in such latter county to enjoin enforcement of the judgment, and the mortgagee made no objection, a decree in the injunction proceedings was not invalid for want of jurisdiction.

2. Where the transcript of a judgment foreclosing a mortgage and granting a deficiency judgment was filed in a county other than where rendered, and the mortgagor brought suit in such latter county to enjoin enforcement of the judgment without alleging that he had made any motion in the court where the judgment was rendered to have it set aside, the defect, if any, was cured by the answer setting out the motion with the order denying the same.

3. Under Code Civ. Proc. § 726, providing that, if the sheriff's return of a mortgage fore-

closure sale show a balance still due, a judgment can be docketed for such balance against the "defendant or defendants personally liable," a recital preceding the actual judgment foreclosing a mortgage that the interest on said note had been paid to a certain date, that no other part had been paid, and a certain sum was due from defendants, and that "said defendants are personally liable," was not an adjudication of personal liability on which the clerk might docket a judgment for deficiency.

4. Where a mortgagor conveyed the premises to one who assumed the mortgage, which fact was known to the mortgagee, who agreed in writing with such grantee that the time for payment should be extended, it was error to enter deficiency judgment against the mortgagor, since the mortgagor stood in the relation of surety, and was therefore discharged from personal liability.

5. Findings by the court on conflicting evidence will not be disturbed on appeal.

6. Where plaintiff sought to enjoin the enforcement of a deficiency judgment entered by default, alleging that he had been assured by the mortgagee that no deficiency judgment would be taken, a conversation between plaintiff and another was admissible, though the mortgagee was not present, as it explained the plaintiff's failure to appear.

7. Where, on proceedings to enjoin a deficiency judgment entered on mortgage foreclosure, it was found that the provision for deficiency judgment was added by amendment on an ex parte application without the mortgagor's knowledge, it should be set aside as fraudulent.

8. Any error, therefore, in the admission of evidence relating to the mortgagor's failure to appear was harmless.

9. Code Civ. Proc. § 1908, relating to the conclusiveness of judgments and final orders, does not apply to an order denying a motion to set aside a judgment on mortgage foreclosure; and such order was not a bar to a suit to enjoin the enforcement of the deficiency judgment entered therein, it not appearing that the same questions were involved.

Department 1. Appeal from superior court, San Joaquin county; Joseph H. Buck, Judge.

Bill by John Herd against John Tuohy to enjoin enforcement of a judgment. From a judgment in plaintiff's favor, and from an order denying new trial, defendant appeals. Affirmed.

Davis & Allen, Kile & Plummer, and Rigby & Rigby, for appellant. Woods & Levinsky and Dudley & Buck, for respondent.

SMITH, C. A judgment was recovered by the defendant herein against the plaintiff and others in the superior court of Tulare county February 15, 1897, for the foreclosure of a mortgage made by the latter to the former. In the judgment as originally entered there was no adjudication that the plaintiff was personally liable, or provision for a deficiency judgment against him; but afterwards, March 13, 1897, on an ex parte application of the defendant's attorneys, the judgment was amended by adding thereto a paragraph adjudging the plaintiff to be personally liable on the mortgage, and that, on the commissioner's return of the sale, deficiency judgment should be docketed against him; and accordingly such a judgment was docketed against him for the sum of \$11,-

738.47. Of this judgment a transcript was recorded in the recorder's office of the county of San Joaquin, and under it an execution levied on lands of the plaintiff in that county. This suit was brought in the superior court of San Joaquin county for relief against the judgment as amended and the deficiency judgment entered thereon, and resulted in a judgment for the plaintiff, adjudging, in effect, that the record of the transcript of the deficiency judgment in the recorder's office, and the lien sought to be made by said deficiency judgment on the lands of the plaintiff in the county, be canceled and extinguished, and the defendant be perpetually enjoined from executing the judgment. The appeal is from this judgment and from an order denying a new trial. The points urged for reversal are: (1) Lack of jurisdiction in the court over the subject-matter of the action; (2) insufficiency of the facts alleged in the complaint to constitute a cause of action; (3) insufficiency of the evidence to support the findings, and errors of law.

1. As to the jurisdiction of the court, there can be no serious question. The superior court is vested by the constitution (article 6, § 5) with jurisdiction over "all cases in equity"; and cases of this kind—that is, for relief against judgments on the ground of fraud in their procurement—constitute a familiar and well-established head of equity jurisdiction. *Freem. Judgm.* § 484a; *Daniell, Ch. Prac.* 1584, 1585. Nor—with an exception to be noted presently—is this jurisdiction vested in any particular superior court or courts. Every superior court—with the exception alluded to—has jurisdiction of all equity cases that may be brought in it. The exception referred to is that of "actions for the recovery of the possession of, quieting the title to, or for the enforcements of liens upon real estate," which, under the provision of the constitution cited above must be "commenced in the county in which the real estate * * * affected by such action * * * is situated." With reference to other cases there are statutory provisions determining the proper place of trial (*Code Civ. Prac.* §§ 392-395); but these do not affect the jurisdiction of the court, and hence, "if the county in which the action is commenced is not the proper place for the trial thereof," the only remedy of the defendant is a demand for change of venue (*Id.* § 396). Nor, in determining the proper place of trial of a suit of this kind, is the peculiar nature of the case at all material to the question. Such suits, like all others, are governed by the statutory provisions applying to the subject; and, accordingly as they are or are not suits of the kind described in section 392, *Id.*, the proper place of trial for them will be determined by the provisions of that section, or those of section 395. There is no provision or principle of the law requiring such suits to be tried by the court which rendered the judgment complained of; nor,

unless the county of that court is the proper place of trial either under section 392 or 395 of the Code, can a case commenced in another county come before it otherwise than at the discretion of the judge in which it is pending, exercised under section 397; nor, indeed, even were the suit brought in the court where the judgment was rendered, could a demand for its removal under section 396 be resisted otherwise than on some of the grounds mentioned in section 397. In this case there was no demand for change of venue, and it is, therefore, immaterial whether or not the suit was brought in the county proper for trial. If it is one of the kind of cases provided for in section 392,—as under the decision in *Sloss v. De Toro*, 77 Cal. 129, 19 Pac. 233, it seems to be,—it was brought in the proper county. If it does not fall within that class, then the defendant was entitled to demand its transfer to the county of his residence,—if other than San Joaquin; but, having failed to demand the transfer, he has waived the objection.

2. The objections made to the complaint are: (1) That there is no allegation that the plaintiff moved in the Tulare court to set aside the judgment; (2) that the complaint does not purport to set forth all of the original decree, and non constat that it was not sufficient to authorize the entry of a deficiency judgment; and (3) that the facts alleged would not have constituted a defense to the action for foreclosure. With reference to the first objection, it is true that the allegation referred to is lacking in the complaint, and that there is no excuse alleged for failing to move in the Tulare court. But, without holding that the allegation was necessary, it is sufficient to say that the defect, if any, was cured by the answer, which sets out the motion, with the affidavits on which it was made, and the order of the court denying the same, and pleads the last as an estoppel. It is an ancient rule of the law that "a defect in pleading is aided" if "expressly or impliedly supplied" by the pleading of the other party. 1 Chit. Pl. 703; Bliss, Code Pl. § 437, and cases cited; Daggett v. Gray, 110 Cal. 169, 42 Pac. 568. As to the second point, the complaint purports to set out the whole judgment, but in fact, as appears from the findings, does not do so. But the omitted portions contain no provision for a deficiency judgment; nor is there any adjudication that the plaintiff (then defendant) was personally liable, unless, as claimed by the appellant, the following recital may be so construed, viz.: "That the interest on said note to November 30, 1895, has been paid; that no other * * * part of said note, principal or interest, has been paid, and there is now due and owing to the plaintiff from the defendants John Herd, Jr., and R. Linder on said note the sum of \$91,101.85," etc., "and that the said defendants John Herd, Jr., and R. Linder are personally liable * * * for

said sums so found due from them to plaintiff as aforesaid." But this is merely the recital of a fact preceding the actual judgment, and cannot be regarded as an adjudication of personal liability, which alone could authorize the clerk to docket a judgment for deficiency. Code Civ. Proc. § 726; *Scamman v. Bonslett*, 118 Cal. 98, 50 Pac. 272; *Siehler v. Look*, 93 Cal. 610, 29 Pac. 220; *Leviston v. Swan*, 33 Cal. 483, 484. But in fact, so far as the sufficiency of the complaint is concerned, it is immaterial whether the original judgment was or was not sufficient to authorize a deficiency judgment; for, if it was, it would be open to the same objection as the amended judgment. The complaint is therefore equally good on either hypothesis. With regard to the third ground, the facts, in brief, are that Herd had conveyed the mortgaged premises to Linder, who, in writing, assumed and agreed to pay the amount due on the mortgage; and that Tuohy afterwards, knowing the fact, by written agreement with Linder extended the time of payment. The facts are more fully stated in the decision in *Tuohy v. Woods*, 122 Cal. 667, 55 Pac. 683, which refers to the same transaction. On these facts there can, we think, be no doubt of the sufficiency of the defense. "Linder was not a mere stranger to the principal obligation. By becoming the grantee of the mortgaged premises, and assuming the mortgage indebtedness, he became a principal and controlling party to the obligation. * * * He became the principal debtor, and Herd, the grantor, the surety. *Bank v. Madden*, 109 Cal. 312, 41 Pac. 1092; 3 Pom. Eq. Jur. (2d Ed.: 1892) § 1206. And as to the plaintiff, Herd, and Linder, 'the doctrines concerning suretyship must control the dealings between the parties.' Pom. Eq. Jur. supra." *Tuohy v. Woods*, 122 Cal. 667, 55 Pac. 683. See, also, *Jones, Mortg.* § 742; 1 *Ping. Chat. Mortg.* § 1016; *Insurance Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 38 L. Ed. 118. It follows (assuming the facts to be as stated) that the plaintiff was discharged from personal liability.

3. The objections that remain to be considered are: (1) That the evidence was insufficient to justify the finding of the court as to the assurances of Tuohy to Herd that a deficiency judgment would not be taken, etc., and, in connection with this alleged error in allowing the witness Woods to testify as to a conversation on the subject between him and Herd, in the absence of Tuohy; and (2) the claim of appellants that the order of the judge of the Tulare superior court in denying the motion of the plaintiff (then defendant) to set aside the default and judgments operated as a bar by way of estoppel to this suit. With regard to the first point, we think the case must be regarded as falling under the rule that, where the evidence is conflicting, the findings will not be disturbed. Nor do we think there was any error in the admis-

sion of the testimony of Woods. It was admissible in order to explain and justify the failure of Herd to appear. But were it otherwise, we are of the opinion that the findings as to the alleged conduct of Tucky, and its influence on Herd, are not necessary to sustain the judgment. It is found (and no objection is made to the findings) that the amendment to the judgment was made on an ex parte application of the attorneys of the (then) plaintiff, and without the knowledge of Herd. This, if not fraud, was one of those cases that, in the words of a leading authority, "ought to be treated as fraud" (2 Daniell, Ch. Prac. 1584); that is, it is a constructive or quasi fraud, having all the actual consequences and all the legal effects of fraud. Nor are courts, in granting relief against a judgment, confined to cases of fraud, actual or constructive. Black, Judgm. § 380 et seq. A judgment will never be interfered with for mere error of the court; but want of notice to the defendant, and his consequent inability to be heard against the ruling, may be a sufficient ground for equity to interpose, even where "his failure to defend is not chargeable to the plaintiff"; and a fortiori where it is so chargeable. Freem. Judgm. § 495. Here, if the original record disclosed prima facie error, so as to allow of amendment, which is doubtful (Black, Judgm. § 156) yet there was in fact no error to be amended; for the judgment was rendered as agreed, and presumably with intention to observe the good faith required of the plaintiff. Hence there should have been notice to the defendant, who could then have defeated the amendment. *Scamman v. Bonslett*, 118 Cal. 97 et seq., 50 Pac. 272. As to the estoppel claimed, we know of no principle that would give to an order of this kind effect as a technical estoppel. Section 1908 of the Code of Civil Procedure, cited by appellant's counsel, refers only to judgments and final orders of a similar nature,—such as decrees in probate proceedings, etc. Orders of other kinds are governed by the provisions of section 1909 of the Code. 1 Freem. Judgm. § 325 et seq. Nor is there any principle on which an order of this kind, made on affidavits, and largely addressed to the discretion of the court could be held to preclude a court of equity from granting relief. Id. § 511. Nor does it appear here that the decision of the motion involved the same questions as are involved in this action, and the court was, therefore, justified in finding the contrary. Probably the decision of the motion was based on the fact that the judgments in the case necessarily followed the default; for otherwise the court would not have felt authorized to make the amendment, which could be justified only on the hypothesis that there was error apparent on the face of the original judgment. We may infer, therefore, that the motion was denied because not made within six months of entry of default; or, at least, we cannot, in opposition to the finding of the court, infer the con-

trary. The judgment and order appealed from should, we think, be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER OURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(133 Cal. 69)

HANSEN v. WAGNER et al. (Sac. 882.)¹

(Supreme Court of California. May 29, 1901.)
MORTGAGE—FORECLOSURE—VALIDITY—JURISDICTION—JUDGMENT—COLLATERAL ATTACK.

1. The plaintiff in a suit to foreclose, as against several defendants, alleged that defendant A. was in wrongful possession of the note and mortgage. All the defendants except A. filed a written appearance, consenting to judgment against them; and A. afterwards filed an answer alleging his ownership of the mortgage, and asking its foreclosure, but his pleadings were not served on the other defendants. Notice of his pendency was filed by plaintiff, but not by A.; and a decree was afterwards rendered in favor of A., and he purchased the property at foreclosure. Held, that A. acquired good title, since his answer did not affect the issue of the liability of the mortgagees, and the question of the ownership of the mortgage did not affect them.

2. The filing of a cross complaint by A., under the order of court, alleging his ownership of the property, was unnecessary.

3. Where the answer of one defendant in a mortgage foreclosure suit, alleging ownership of the mortgage and asking its foreclosure, is defective, in failing to allege the execution of the mortgage, such defect is cured by allegations of its execution in the complaint.

4. Where the court has jurisdiction of the subject-matter and the parties in foreclosure, the validity of the judgment cannot be impeached in ejectment.

Commissioners' decision. Department 2. Appeal from superior court, Madera county; W. M. Conley, Judge.

Ejectment by Ebbe J. Hansen against J. Wagner and others. From a judgment in favor of defendant John Hansen, the plaintiff and other defendants appeal. Affirmed.

Robert L. Hargrove, for appellants. B. W. Child and W. H. Larew, for respondent.

SMITH, C. Appeal from a judgment for plaintiff in ejectment. The plaintiff and the defendant Joseph Wagner both deraign title from one George Hansen,—the plaintiff, under foreclosure of a mortgage made by him to John Hansen August 6, 1892; the defendant, under a deed subsequently made by the mortgagor to one Eubanks, and a deed of the latter to him of date May 10, 1897. The controversy turns upon the effect of the foreclosure proceedings, which, in brief, were as follows: The complaint for foreclosure was filed by John Hansen, Sr., against George Hansen Eubanks, John Hansen, Jr., and certain fictitious defendants. The complaint contained the usual allegations, except that, in addition, it alleged, in effect, that the plaintiff was the owner of the note and mortgage, which it

¹ Rehearing denied June 27, 1901.

was alleged were taken for him by John Hansen, Jr., as his agent; that the latter unlawfully retained the note and refused to deliver it; and, under the general allegation, that he, as one of the defendants named, claimed to have some interest in the premises, etc., as "mortgagee" or otherwise. The complaint prayed for foreclosure in favor of the plaintiff, and for judgment against John Hansen, Jr., for the delivery up of the note. The defendants George Hansen and Eubanks filed a written appearance April 10, 1896, consenting that plaintiff might take judgment against them for the relief prayed for. The answer of the defendant John Hansen, Jr., filed April 18, 1896, admits the execution of the note and mortgage set out in the complaint, etc., the nonpayment of principal or interest, his refusal to deliver the note to the plaintiff, etc., but denies that he took the note and mortgage as agent of plaintiff, and alleges his own ownership of the same. It concludes with a prayer for the foreclosure of the mortgage in his favor. The case on the issues thus made was called for trial on the 8th day of May, 1897, and the court, after ordering judgment in favor of John Hansen, Jr., also ordered him to file a cross complaint; and accordingly on May 10, 1897, an amended answer and cross complaint were filed by him. The answer, amended answer, and cross complaint were served on the plaintiff, but not on the defendants George Hansen and Eubanks. Notice of lis pendens was filed by the plaintiff, but not by the defendant. Findings were subsequently filed, and judgment entered May 10, 1897, in favor of defendant John Hansen, Jr., who on a subsequent sale became the purchaser, and in due time received his deed.

The sole point made by the appellant is that the court had no jurisdiction to render the judgment of foreclosure. But this point we think is untenable. The ownership of the note and mortgage was involved in the suit as made by the original complaint; and the appearance and default of the defendants authorized the court to proceed, so far as they were concerned, to dispose of them, and to adjudge the foreclosure accordingly. The answer of John Hansen, Jr., praying for foreclosure in his favor, was sufficient to empower the court to render the judgment, and there was not even error in doing so. Code Civ. Proc. § 437 et seq. Neither the action nor the cause of action set up in the answer was different from that set up in the complaint. The cause of action was the note and mortgage, or, rather, the obligation thereby created. The action was the right of the mortgagee to recover. *Frost v. Witter* (Cal.) 64 Pac. 705. The sole issue raised by the answer was the ownership of the obligation or action. Civ. Code, §§ 14, 655,—a question in which the defaulting defendants had no concern. If the answer was defective in not repeating the allegations of the complaint as to the execution of the mortgage, etc., it was

aided, and the defect cured, by the allegations of the complaint. 1 Chit. Pl. 703; Bliss, Code Pl. § 437, and cases cited; *Herd v. Tuohy* (Sac. 789), 65 Pac. 139; *Johnson v. Polhemus*, 99 Cal. 246, 247, 33 Pac. 908, citing *Belknap v. Sealey*, 2 Duer, 570, and *Harden v. Ware*, 5 Pac. Coast Law J. 317 (not officially reported). But we do not think it was defective. The cross complaint ordered and subsequently filed was altogether supererogatory. It neither added to nor detracted from the jurisdiction of the court. Still less can the jurisdiction of the court be successfully attacked. The court had jurisdiction of the subject-matter and all the parties were before it. Its judgment, therefore, even if erroneous, could not be collaterally impeached. *Hawes, Parties*, § 6; *Jones, Mortg.* § 1369; *White v. Patton*, 87 Cal. 152, 25 Pac. 270; Civ. Code Proc. § 416. The judgment should be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(133 Cal. 64)

HERBERT KRAFT CO. BANK v. BANK OF ORLAND et al. (Sac. 905.)

(Supreme Court of California. May 28, 1901.)

BANK STOCK—ILLEGAL ASSESSMENTS—SALE FOR DELINQUENCY—COLLATERAL SECURITY—PLEDGE—RIGHT OF ACTION—REMEDY—EQUITY.

1. Where a bank levied assessments on certain shares, and not on others, the shares being sold at public auction for delinquency, and one-fourth of its capital stock had not been subscribed, which is a condition precedent to the power to levy assessments by Civ. Code, § 331, such assessments were void, and an action by a party holding such stock as security, to compel the bank to recognize it as a stockholder, is not barred by, or included within, section 347, providing that no action must be sustained to recover stock sold for delinquent assessments on the ground of irregularity in the assessment, unless the sum for which the stock is sold be first tendered, or within Code Civ. Proc. § 341, subd. 2, providing that an action must be commenced within six months to recover stock sold for a delinquent assessment, as provided in Civ. Code, § 347.

2. Where a party held stock of defendant bank as security, and the bank illegally levied an assessment thereon, and sold it for delinquency at public auction, the holder of the stock was not compelled to resort to a suit for damages for conversion, but could retain its security, and obtain relief in a suit in equity to compel the bank to recognize it as a stockholder, under a prayer for such relief as to the court may seem proper.

3. Certificates of stock, assigned as security for an indebtedness, give the holder, as pledgee of the stock, a right to maintain an action to compel defendant corporation to recognize it as a stockholder, after an illegal levy of assessment on the stock and sale thereof for delinquency.

Commissioners' decision. Department 1, Appeal from superior court, Glenn county; Oval Pirkey, Judge.

Action by the Herbert Kraft Company Bank against the Bank of Orland and others to obtain recognition as a stockholder. From a judgment for defendants, plaintiff appeals. Reversed.

R. E. Ragland and E. A. Bridgford, for appellant. F. Freeman and Chas. L. Donohoe, for respondents.

COOPER, C. This is an appeal from the judgment for the purpose of reviewing the order sustaining defendants' demurrer to the amended complaint. It is alleged that one W. R. Hall, being indebted to one Kraft in the sum of \$3,000, on or about the 26th day of January, 1896, caused to be issued to said Kraft, to secure the said indebtedness, a certificate of 70 shares of the capital stock of defendant bank, and that thereafter, to further secure the said sum, said Hall assigned to said Kraft 30 additional shares of said capital stock. The said stock was of the face value of \$100 per share. That, subsequent to the transfer by said Hall to said Kraft of the said shares of stock as security, the said Kraft assigned the indebtedness due him by Hall, and the said stock so held as security, to plaintiff, and "said 100 shares of stock were taken as aforesaid by said plaintiff, and have ever since been, and now are, held by it as a pledge as aforesaid, to secure said indebtedness." That there had been issued by defendant bank 1,000 shares of its capital stock. That defendant bank, on the 18th day of May, 1898, "levied, or pretended to levy, an assessment upon said 1,000 shares of subscribed stock, of \$32.637 per share." That notice of said assessment was regularly published, the assessment was not paid, and defendant bank, through its directors, made an order that said 100 shares, and other shares upon which the assessment was delinquent, should be sold at public auction, and accordingly, on the 25th day of July, 1898, the said 100 shares, so held by plaintiff as security, were sold to defendants Nelson and Searce, and a new certificate issued to them. That the capital stock of defendant bank is \$500,000, divided into 5,000 shares, of the par value of \$100 each, of which only \$100,000 has been subscribed, and that one-fourth of the capital stock has not at any time been subscribed. That defendant bank never intended to, and did not, collect the said assessment upon any other stock except that so held by this plaintiff, and that said assessment was not uniform, and was intended as a means of enforcing an indebtedness due by Hall, the original owner of the said 100 shares, to the defendant bank. That the defendants allege and claim that defendants Nelson and Searce are the owners of, and hold the only title to, said 100 shares of stock. That said Nelson and Searce are, and at all times were, directors of defendant bank. That defendant bank refuses to recognize this plaintiff as the holder of said stock, or

to permit it to enjoy any of the privileges or benefits of a stockholder of defendant bank. The demurrer was upon several grounds, but we will discuss those only upon which defendants rely. We must presume that all the facts set forth in the amended complaint are true.

1. It is claimed that the action is barred by the provisions of Civ. Code, § 347, which is as follows: "No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid thereon, and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made;" and by subdivision 2, § 341, Code Civ. Proc., which provides that an action must be commenced within six months "to recover stock sold for a delinquent assessment as provided in section 347 of the Civil Code." It is said that the court below sustained the demurrer upon this ground. We do not think the action was barred under the provisions herein quoted. This is not an action to recover the stock sold. Neither is the action for the purpose of recovering damages for its conversion. Section 347, Civ. Code, applies only where the action is for the recovery upon the ground of irregularity in the assessment, irregularity or defect in the notice of sale, or defect or irregularity in the sale. The assessment in this case was not an irregular assessment merely, but a void one. If one-fourth of the capital stock had not been subscribed, the defendant bank had no power to levy the assessment. Civ. Code, § 331; Investment Co. v. Merrill, 108 Cal. 492, 41 Pac. 487; Railway Co. v. Hartman, 116 Cal. 262, 48 Pac. 65. An assessment upon certain of the shareholders and not others, is invalid. Mor. Priv. Corp. §§ 154, 305; Kohler v. Agassiz, 99 Cal. 15, 33 Pac. 741.

2. It is claimed that the complaint does not state facts sufficient to constitute a cause of action. The main argument under this head is that the complaint states a cause of action in equity in the nature of an action to quiet title to personal property. We are not inclined to view the complaint in so strict a technical sense. It may not be a model of pleading, but it states the facts, so that we know the points relied upon by the pleader. The prayer of the complaint asks for such relief as to the court may seem proper. If the facts are proven as alleged, we think the court would have no trouble in determining the relief that is

usual and proper in such cases. It is said in *Mor. Priv. Corp.* § 208: "Upon the same principle, it has been held repeatedly that, if shares in a corporation are transferred upon the books, without the consent of the holder, under a forged assignment or power of attorney, the real owner is not thereby divested of his rights as shareholder, and is entitled to have his shares replaced upon the books, and to recover any dividends which may have accrued upon them. If the corporation refuses to recognize the real owner as a shareholder, or refuses to deliver him a new certificate of shares when entitled thereto, he may obtain specific relief by bill in equity, or may sue the company for the value of the shares." In speaking of the remedy of a stockholder in such case, it is said by Cook, in his work on *Stocks, Stockholders, and Corporation Laws* (volume 1, § 389): "He may apply to a court of law for a mandamus to the corporation to compel it to open its books and allow the registry, or to pay him damages if registry is impossible; or he may sue the corporation at law for damages, on the ground that by its refusal it has been guilty of a conversion of his stock." In the case of *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654, it appeared that a part of the stock of the Charleston Gaslight Company was illegally sold pursuant to a statute of the Confederate States during the Civil War, in 1862, on the ground that it belonged to "alien enemies." In the opinion it is said: "The complainant prays that the sale may be vacated; that the certificates still outstanding, issued to the purchasers and their assignees, may be declared invalid, and ordered to be delivered up and canceled. * * * The complainant had a clear right, on account of the cloud cast upon his title, and of the injury otherwise special to himself, of which he complained, to be heard upon his bills. The entire subject and the necessary parties being before the court, and the court having jurisdiction for one purpose, might well take and exercise it as to everything involved in the controversy." There is no doubt of the authority of a court of equity to give a stockholder relief in such case as is here alleged. *Telegraph Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047; *Pratt v. Manufacturing Co.*, 123 Mass. 110, 25 Am. Rep. 37; *Pollock v. Bank*, 7 N. Y. 274, 57 Am. Dec. 520; *Moses v. Watson*, 65 Ga. 198; *Baker v. Wasson*, 53 Tex. 155. It would be strange if a court of equity in such case could not grant relief. The plaintiff has a right to the stock held by it, and to dividends upon it, if any such are paid. The defendant bank will not be allowed to levy an assessment without authority, and sell the stock under such void assessment to its own directors, and refuse to allow plaintiff in any way to enjoy the privileges of a stockholder. It is true plaintiff could have brought a suit for damages for conversion, but it was not compelled to do so. It

has the right to retain the security it holds unimpaired by any wrongful acts of the corporation.

3. The plaintiff has the right to maintain the action as pledgee of the stock. The certificates were assigned to plaintiff. Such certificates are recognized as the evidence of right and ownership, and certainly confer the right upon the holder to protect his special interest therein. Suppose the pledgor of plaintiff has fled from the country, and cannot be served with process; can it be that the plaintiff is unable to enforce its rights or to receive the income from the property it holds as a pledge? We do not think the defendant bank and the purchasers at the void sale can be heard to say that plaintiff has not the capacity to maintain the action. The judgment should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer to the complaint, and allow defendants a reasonable time to answer.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer to the complaint, and allow defendants a reasonable time to answer.

133 Cal. 132

BRIGNOLE v. BRIGNOLE et al. (Sac. 721.)
(Supreme Court of California. May 31, 1901.)
EXECUTORS AND ADMINISTRATORS—COMPEN-
SATION—ATTORNEY'S FEES—SERVICES.

1. Where an executor who is paid a commission for certain services employs an attorney to do the work instead of doing it himself, the attorney should be paid by the executor, and not out of the estate, since otherwise the estate would be made to pay twice for the same services.

2. Where, on the final account of executors, the court finds the value of the legal services rendered the executors, such finding is conclusive, since, though the court, in the absence of a stipulation, cannot fix an attorney's fee in an estate, it must determine whether a fee charged is a reasonable sum to be charged to the estate on account of legal services rendered for the estate.

Department 2. Appeal from superior court Amador county; R. C. Rust, Judge.

Application to settle the account of Joseph Morizio and others as executors of the will of Bartolomeo Brignole, deceased. From the decree settling the account, Morizio appeals. Affirmed.

R. B. Tappan (Reed & Nusbaumer, of counsel), for appellant. C. P. Vincini, for respondents.

TEMPLE, J. This is an appeal taken by one of three executors from a decree of final settlement and an order fixing the value of legal services. The estate was valued at \$94,000. The administration was all fair sailing. There was no dispute or controversy about anything. It was a mere matter of going through the forms and waiting for the lapse of the time required. In the final settlement the court allowed on account of the services rendered two of the executors \$750, and the same amount for the appellant, Morizio, for the services of his attorneys. Certainly this was enough, especially for the appellant, whose attorneys apparently rendered very little service. The trouble seems to be that Morizio employed three attorneys, McGee, Tappan, and Simpson. During the administration the executor discharged his at-

torneys, and employed Tappan alone as his attorney. In the decree settling the final account the court allowed the executor \$250 on account of services rendered by McGee, and \$500 for services rendered by Tappan and Simpson. The point is made that as Tappan is shown to have rendered some services after his separate employment the court was bound to make an allowance on account of them. But this is not so. It must also find, to justify such allowance, that the executors needed the service of an attorney, and that the services were worth something to the estate. If in this case the court had expressly found that the services of Tappan were of no value to the estate, and had therefore allowed nothing on account of them, there is nothing in the record which in such case would necessitate a reversal. The executor is paid a commission for certain services. If he employs an attorney to do such work instead of doing it himself, the court ought not to make an allowance for it. Such services should be paid for by the executor himself. Otherwise, the estate is made to pay twice for the same services. It is a question whether the affidavit of Mr. Tappan shows the rendition of any service which was needed by the estate, or was of advantage to it.

There is a statement in the bill of exceptions which, as I understand it, is to the effect that at the time the final account was settled the court was not aware that Tappan demanded any pay for services, apart from the claim of McGee and Simpson. This being so, the court must have estimated the value of all the legal service rendered to Morizio at \$750, which was allowed. This is conclusive. If because of some unwise bargain Morizio owes Tappan more, he nevertheless cannot collect it from the estate. The court had no power, in the absence of a stipulation, to fix an attorney's fee in an estate, but it can and must determine whether a fee charged is a reasonable sum to be charged to the estate on account of legal services rendered to the estate. The order and decree appealed from are affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

133 Cal. 154

PEOPLE v. SHEARS. (Cr. 664.)

(Supreme Court of California. May 31, 1901.)

HOMICIDE—JUSTIFIABLE—INVOLUNTARY— EVIDENCE—CHARGE.

1. Where a witness arrived at the place a few minutes after a homicide, and while the body of deceased was still lying where it fell, it was not error to permit such witness to illustrate to the jury, by a diagram, the location of the surrounding objects when he arrived.

2. Where defendant was on trial for murder, it was not error to permit a witness to testify that some hours after the killing defendant said, "I am sorry I got into this trouble, but, as for killing W., I don't care any more for that than I do for killing a jack rabbit."

3. A new trial should not be granted for improper remarks of district attorney, where de-

fendant merely excepted to the statement, since its effect would have been removed if defendant had asked the court to instruct the jury to disregard it.

4. Where the doctrine that the effect of apparent danger is the same as real danger, as regards the right of self-defense, has been fully stated by the court, it is not error to refuse defendant's requests repeating such instructions.

5. On a trial for murder, where defendant had not testified that he saw or apprehended any danger, but only that he knew nothing of what occurred after deceased struck him until the gun was taken from him after the killing, it was proper to refuse an instruction as to a justifiable killing.

6. Defendant requested the court to charge that if the deceased struck the defendant a severe blow on the head with the loaded butt of a whip, at a place where such blow might produce great bodily injury, such striking would be an assault with a deadly instrument, and a felony, and defendant had a right to claim the justification specified in Pen. Code, § 197, which declares homicide is justifiable when committed when resisting an attempt to commit a felony, or to do some great bodily injury on any person. *Held*, the court properly added to such instruction that "it should appear, however, that defendant was actually resisting an attempt to assault him with a deadly weapon likely to produce great bodily injury or a felony, or to do great bodily injury on his person, and that such danger was imminent."

7. Where the court marked one of defendant's requested instructions, "Not given; given in instruction 37," and drew several lines across the instruction, and afterwards erased what he had written, except the word "Given," and the instruction went to the jury in that condition, after being read to them as a part of the charge, the defendant could not complain.

In bank. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Vernea Shears was convicted of manslaughter, and from the judgment and an order denying a new trial appeals. Affirmed.

Thomas T. Porteous and Gibson & Gill, for appellant. Tiley L. Ford, Atty. Gen., and A. A. Moore, Jr., Dep. Atty. Gen., for the People.

BEATTY, C. J. The defendant was tried on a charge of murder, and convicted of manslaughter. He appeals from the judgment and from an order denying him a new trial. A brief summary of the facts of the homicide will facilitate the discussion of such of the numerous assignments of error as require special notice.

The defendant and one McGaw had gone to the place of the killing for the purpose of getting a load of hay, and had with them on their wagon a loaded rifle. While the defendant was engaged in greasing his wagon he was approached by the deceased, who accused him of having circulated reports injurious to a young girl. Defendant denied the accusation, and the deceased called him a liar, upon which defendant attacked him with the butt of a loaded whip. Deceased backed away, and in his retreat was struck once, and perhaps more than once, with the whip, but the blows do not seem to have caused any serious injury. He then succeeded in wresting the whip from defend-

ant, who in turn retreated towards his wagon. When near his wagon defendant was struck on the side of his head with the butt of the whip, the blow being severe enough to knock him down, and cause a considerable flow of blood from a contused wound. The deceased was continuing to strike defendant with the whip, when McGaw interposed, and endeavored to take the whip from him, but he resisted the effort, and while this struggle was going on defendant crept under his wagon to the opposite side, arose, and, snatching his rifle from the wagon, fired instantly, inflicting upon deceased a mortal wound. This being the substance of the testimony for the prosecution, it established a very clear case of manslaughter, against which the only matter urged in defense was certain evidence to the effect that the defendant was or might have been so dazed by the stunning blow on the head, inflicted by the deceased, that he did not know what he was doing when he fired the fatal shot. The defense, in other words, was that the killing was not volitional, but was caused by the wrongful act of the deceased in striking a blow which for the time deprived the defendant of his senses. This, at least, seems to have been the defense most relied on, though there was also an attempt to combine with it the somewhat inconsistent plea of self-defense.

In support of their appeal, counsel for defendant present more than 30 assignments of error, each of which is separately argued and insisted upon in their printed brief. The first 16 points relate to rulings upon objections to the evidence, with respect to which it ought to be sufficient to say that if any error was committed it was trivial and wholly inconsequential. But counsel have pressed these objections so earnestly and with such evident good faith that we feel obliged to notice a few of them by way of example.

The first of these objections relates to a ruling of the court allowing one of the witnesses for the people to illustrate his testimony by means of a rough diagram of the scene of the homicide. It appeared that he arrived upon the scene a few minutes after the killing, and the objection was that he could not possibly indicate on the diagram the position of certain wagons, because one or more of them might have been moved after the killing and before his arrival. The answer to this is that the witness was not pretending to testify to the position of the wagons at the moment of the shooting, but only as to what he found on his arrival, while the body of the deceased was still lying where he had fallen, and that certainly was of the *res gestae*. If the object of the evidence was to show the position of the wagons at the time of the shooting, it had at least a tendency to do so, although it could be surmised that they had been moved. The conclusiveness of such evidence is not a test

of its admissibility. But, aside from this, it does not appear how the position of the wagons had the slightest bearing on the case. Whether they were four feet apart or twenty feet apart seems to us to have been utterly immaterial, and this observation is also pertinent to several of the other exceptions under this head.

An exception of somewhat different character was taken to a ruling allowing a witness to testify to the following language used by the defendant some hours after the killing: "I am sorry I got into this trouble, but as for killing George Warner I don't care any more for that than I do for killing a jack rabbit." This evidence was competent and relevant to a material fact. The charge was murder, and the expression proved had a tendency to show malice.

The various objections to the evidence as to the condition of the hat of deceased and the bruises on his body relate, like those concerning the wagons, only to its conclusiveness, and not to its relevancy.

A hypothetical question asked by the district attorney assumed that defendant had repeated some hours after the homicide a long conversation which occurred in his hearing immediately after he was knocked down by deceased, the object apparently being to show that he was not stunned or deprived of his senses by the blow. Defendant objected to the question upon the ground that there was no evidence to show that the defendant had any conversation with anybody. There was evidence of a conversation, though a short one. The objection as it was made was properly overruled. Besides, the question was never completed, and the answer was unintelligible. The other questions asked this witness, Dr. Parker, on his cross-examination were entirely unobjectionable.

The district attorney in his address to the jury used this language: "It never occurred to me that the defendant was dazed, and I saw him the next day." This was improper, but its effect would have been removed if the defendant had asked the court to instruct the jury that it was improper, and to disregard it. He did not invoke the action of the court, but contented himself with excepting to the remarks of the district attorney.

The court did not err in refusing to repeat, at defendant's request, instructions to the effect that apparent danger is the same as real danger, as regards the right of self-defense. That doctrine was fully and clearly stated in several of the instructions that were given. Instruction 16 on this subject was properly refused, for the additional reason that it was confusing and misleading.

The court, as a part of its charge to the jury, gave the following: "The defendant is entitled to a verdict of acquittal even if you find he was not in a dazed condition of mind when he shot Warner, but was in full possession of his reason and judgment, if

you also find from the evidence that he shot defendant under an honest belief that he was then in danger of great bodily injury from said Warner; and defendant would be entitled also to a verdict of not guilty, if the evidence creates a reasonable doubt in your minds as to whether the defendant did or did not, from the circumstances and the situation in which he then was, really believe that he was then in danger of great bodily injury from said Warner at the time he shot him." This covers the substance of several of the defendant's requests to charge, which were denied by the court on the ground that they had been given elsewhere.

The court, at the request of the defendant, instructed the jury that he had himself testified in the case, and that his testimony should be fairly considered by the jury, but the court in giving this instruction struck out the following clause: "And if it raises a reasonable doubt in the minds of the jurors as to whether the killing was or was not justifiable, he is entitled to an acquittal, even though his testimony is entirely uncorroborated." If the testimony of the defendant had tended in any degree to prove a killing in self-defense, the striking out of this clause of the instruction would have been erroneous, but on examination of his evidence we cannot find that the defendant makes any claim to have been acting in self defense. He does not say that he saw or apprehended any danger at the time of shooting. His testimony is that he recollects nothing from the time he was knocked down until the gun was taken from him after the shooting. This evidence tends to show that the killing was involuntary, not that it was justifiable.

The defendant requested the following instruction: "I also instruct you that it is not necessary that the instrument, in order to be a deadly weapon, should be dangerous in itself, but whether it was or not in contemplation of the law depends upon whether it was a weapon or instrument likely to produce great bodily injury or death, when used to strike a severe blow upon the head of another, at a place where such blow would be likely to produce great bodily injury; and if you find that George Warner did, during the quarrel between himself and the defendant, with no other provocation on the part of defendant than the striking of said Warner a blow or blows upon the legs, not likely to produce great bodily injury, and which did not produce such injury, strike the defendant a severe blow upon the side of the head with the loaded butt of a whip, at a place where such blow would or might be likely to produce great bodily injury to defendant, then, and in such case, I instruct you that such striking by said Warner of defendant would be an assault with a deadly weapon or instrument likely to produce great bodily injury, and a felony, and defendant had a right to claim the justification speci-

fied in section 197, Pen. Code, which declares that homicide is also justifiable when committed by any person in either of the following cases: (1) 'When resisting an attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.'" This the court gave, with the following addition: "It should appear, however, that defendant was actually resisting an attempt to murder him or an assault on him with a deadly weapon likely to produce great bodily injury or a felony, or to do some great bodily injury upon his person, and that such danger was imminent." It is contended that it was error to make this addition to the instruction. We think the addition made by the court was a proper qualification of the instruction as requested. The court would have been justified in refusing it altogether, but the defendant cannot complain that it was given with a proper qualification. The only plausible objection to the words added by the court is that they seem to require that the danger must be actual and imminent to justify a killing in self-defense. But they do not have this effect, for they only qualify the hypothesis stated in the instruction itself, which is one of actual and imminent danger, as distinguished from apparent danger. The law of apparent danger was clearly given in other instructions, and, even if it had not been given, the omission would have been unimportant in this case; for there was no evidence of an apparent, but unreal, danger.

The defendant requested the court to give the following instruction: "(27) I further instruct you that if you find that at the time the defendant shot George Warner the defendant was in such a dazed and uncertain condition of mind, produced by the blow upon his head, that he was not capable of exercising the judgment of an ordinary intelligent man of his years, or was not conscious of, or in a state of mind to recognize or consider, his acts, or the consequences of his acts, then your verdict should acquit the defendant." The judge first decided to refuse this instruction, and wrote underneath it: "Not given; given in instruction 37. Noyes, Judge." He also drew his pencil through several of the lines which were typewritten, and drew a pen across them vertically several times, and diagonally twice. Subsequently he drew his pencil through all that he had written except the words, "Given. Noyes, Judge," and added these words: "Pen and pencil marks not to be considered by the jury. Noyes, Judge." In this condition the instruction was given to the jury on their retirement, after it had been previously read to them. Defendant contends that the instruction was rendered unintelligible by the marks upon it, and that he was thereby injured. There is a photographic copy of the instruction in the record as handed to the jury. It remains perfectly legible and intelligible, and we think that the manner in

which it was first refused and then given—the evidence of which it bears upon its face—was really more calculated to draw the attention of the jury to the proposition it contains than if it had been allowed in the usual manner.

We find no objection to any of the instructions given by the court of its own motion. Those taken from the Hecker Case were proper and pertinent in this view: When the deceased took the whip from defendant, he (defendant) immediately retreated towards his wagon, where deceased knew he had a gun, and the evidence shows that deceased was actually apprehensive that his purpose was to get his gun. This being the case, it was proper to instruct the jury as to the rights of deceased in defending himself against one who had made the first assault. The foregoing exceptions are those which seem the most serious of the many which are discussed in the brief. We find them without substantial merit. The judgment and order of the superior court are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.; McFARLAND, J.; HENSHAW, J.

(133 Cal. 85)

SCHUUR v. RODENBACK. (S. F. 2,456.)¹

(Supreme Court of California. May 29, 1901.)

EXECUTION OF DEED—MENTAL CAPACITY OF GRANTOR—EVIDENCE—DELIVERY IN ESCROW.

1. In a suit to have deed of gift executed by decedent to defendant, her brother, a few days before her death, canceled as fraudulent and void, the evidence was conflicting as to whether at the date of the execution of the deed decedent was drunk, and laboring under delusions. There was evidence that decedent first suggested deeding the property to defendant, and that she had, through defendant, obtained a lawyer's advice as to the way to make the gift so as to take effect at her death. *Held* insufficient to show mental incapacity on decedent's part.

2. Where a deed of gift provided for its delivery to be held in escrow and delivered to the grantee at the moment of the grantor's death, a compliance with the provision constituted a delivery, and operated to convey title to the grantee.

3. Error in striking out an answer to a question which was objectionable as being too general is harmless when witness was afterwards permitted to testify to substantially the same matter that was stricken out.

4. Evidence that witness had received instructions from the grantor, through defendant, to draft a deed of gift of certain property in defendant's favor, as outlined in a previous letter from witness to grantor, while hearsay, was not erroneously allowed to stand, where defendant had testified without contradiction that he received the directions from grantor, and communicated them to witness.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Edward J. Belcher, Judge.

Action by William J. Schuur, administrator, against Gerhard Rodenback. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

¹ Rehearing denied June 28, 1901.

Fisher Ames, for appellant. Alfred Fuhrman and John Heenan (H. S. Foote, of counsel), for respondent.

GRAY, C. The plaintiff was the son and is the sole heir at law of the above-named deceased. The defendant was the brother of said deceased. The suit is to have surrendered and canceled as fraudulent and void a certain deed of gift executed by said deceased to her brother during her last illness, and some four or five days before her death. The plaintiff appeals from a judgment in defendant's favor and from an order denying a new trial.

1. The case was tried without a jury, and the findings of the court on the issues of fraud, undue influence, incompetency, non-delivery and nonexecution of the deed are adverse to plaintiff; and it is against these findings that he directs his principal attack on this appeal. It is claimed particularly that the finding as to the mental capacity of Mrs. Schuur is contrary to the evidence. It was testified, in substance, by appellant and his wife, that at the date of the execution of the deed Mrs. Schuur was drunk, and laboring under delusions. On the other hand, on behalf of respondent it was testified that at that date, prior thereto, and thereafter Mrs. Schuur appeared perfectly sober and sane. There was also evidence tending to show that the first suggestion that the property be deeded to the respondent had come from Mrs. Schuur, and that she had, through her brother, sought and obtained from a lawyer advice as to how she could give the property to her brother so as to exclude the son from it, and have the gift take effect so as to leave her in control of the property while she lived. The finding as to mental capacity of Mrs. Schuur does not rest for its support alone upon the testimony of respondent and his wife, but it is substantiated by the evidence of apparently disinterested witnesses. The finding that the plaintiff was worthless, and that he beat his mother, was not essential or necessary to a disposition of the material issues involved in the case, and it is, therefore, needless to inquire whether said finding has any competent evidence to support it. The evidence established the execution and delivery of the deed without conflict. It was not necessary that the deed should be witnessed under the law of this state. The deed provided as to its delivery as follows: "This deed is hereby delivered to Alfred Fuhrman, to be held by him in escrow, and be delivered by said Alfred Fuhrman to said grantee only at the moment of my death, and not before." This provision of the deed was complied with, and this constituted a delivery of the deed, and operated to convey the title in the property to the grantee. *Rulz v. Dow*, 113 Cal. 490, 45 Pac. 867. We see no reason for interfering with the findings of the court.

2. Lizzie Schuur was examined as a wit-

ness on behalf of plaintiff, and questions were asked, answers given, and rulings made as follows: "Q. What was the appearance of Mrs. Conradine Schuur at that time with respect to health? A. She appeared very sick. Q. What was her appearance with respect to sobriety? A. She appeared to be intoxicated. She had been drinking gin and wine that day,—a flask of gin, and a bottle of wine almost. Q. What happened after Mr. Rodenback left on that day? Mr. Fuhrman: We object to anything which occurred after Rodenback left. The Court: Objection sustained. Mr. Ames: Plaintiff notes an exception. Q. What was the appearance of Mrs. Conradine Schuur at that time, with respect to being rational or irrational? A. She appeared irrational; talking queer; saying very queer things. Q. What was she saying? A. She was talking about imaginary things. She was saying: 'Listen to that polly talking.' 'Listen to the birds sing.' There was no polly nor any birds there. Mr. Fuhrman: We move to strike out what was said—what was testified to—in the last answer. The Court: Strike it out. Mr. Ames: Plaintiff excepts." The foregoing testimony related to the condition of Mrs. Schuur on the day of the execution of the deed. We think there was no error in sustaining the objection to the question as to what happened after Mr. Rodenback left on that day. This question was too general. From it the court could not say whether an answer to it would be pertinent to the subject under inquiry. The court erred, however, in granting the motion to strike out; but the appellant was permitted to testify without objection to substantially the same matter that was stricken out, and for that reason we must hold that the error was without prejudice. *People v. Westlake*, 62 Cal. 303; *Gillaspie v. Hagans*, 90 Cal. 90, 27 Pac. 298. Objection is made to the action of the court in refusing to strike out the testimony of Alfred Fuhrman to the effect that he received directions from Mrs. Schuur, through Rodenback, to draft the deed of gift as outlined in his previous letter to her. Rodenback had already testified fully as to receiving these directions from Mrs. Schuur, and communicating the same to Fuhrman, and there was no error in permitting Fuhrman's evidence to stand as to the fact of his having received the directions. Of course, Fuhrman could not know of his own knowledge that Rodenback received any such instructions from Mrs. Schuur, and his answer, so far as it relates to that matter, is hearsay, no doubt; but that becomes unimportant in view of Rodenback's uncontradicted testimony to facts within his knowledge. Minna Strauss testified that "she [deceased] said everything was to belong to William [the plaintiff]; that her husband wanted it so." This last phrase, "that her husband wanted it so," was struck out on

motion of respondent. In this we see no error. The husband's desire in the premises was entirely immaterial. The important part of the answer related to the desire of Mrs. Schuur, and that was not struck out. Appellant asked respondent on cross-examination, "What conversation did you have regarding the money?" From the record before us it is impossible to see what bearing this question, or any answer to it, could have upon the case. We must therefore hold that no error is made to appear in sustaining an objection to the question. The following answer was struck out on the ground that it was not responsive to the question, to wit: "I did not visit her very much before her death because she was always intoxicated." The question to which this was an answer is not in the record, and we must again hold that error is not made to appear. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

McFARLAND, J. I concur in the judgment of affirmance and in the opinion of the commissioner, but I concur in that part of the opinion which holds that there was a legal delivery of the deed to the grantee after the death of the grantor solely on the authority of *Bury v. Young*, 98 Cal. 446, 33 Pac. 338. My views on the subject, which I still entertain, were expressed in my dissenting opinion in *Bury v. Young*; but that case must be taken as establishing the law of this state. See notes to *Bury v. Young* (Cal.) 35 Am. St. Rep. 186 (s. c. 33 Pac. 338).

(133 Cal. 150)

BAY ROCK CO. v. BELL et al. (S. F. 2,415.)

(Supreme Court of California. May 31, 1901.)

MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—STREET WORK—RESOLUTIONS OF INTENTION.

A resolution of intention to perform street work, prescribing that a certain avenue "be graded for its full width to the official lines and grade, curbed, guttered, and macadamized," and also prescribing certain cross walks and a gutter, said work to be done "in accordance with the special specifications adopted for said work by said board on the day the resolution was adopted," was not sufficiently definite to authorize a contract for such work, and the contractor, having performed it, had no lien therefor on the property benefited.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by the Bay Rock Company against James Evelyn Bell and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

R. M. F. Soto and Charles Stewart (Noble Hamilton, of counsel), for appellants. Wm. Laird Hill, for respondent.

CHIPMAN, C. Action to foreclose lien for street work in the town of Berkeley. Plaintiff had judgment, from which, and from the order denying their motion for a new trial, defendants appeal.

The resolution of intention described the work to be done as follows: "That San Pablo avenue, in said town, * * * be graded for its full width to the official lines and grade, curbed, guttered, and macadamized, and that cross walks be constructed across said San Pablo avenue" at certain named street crossings, "and that a culvert be constructed on the east side of said San Pablo avenue across Hopkins street." The resolution was adopted on September 14, 1891, and contained the following paragraph: "(e) That said macadamizing shall be done, and said culvert and cross walks shall be constructed, under and in accordance with the special specifications adopted for said work by said board on the 14th day of September, 1891."

Respondent's counsel states with admirable conciseness certain principles of settled law in this class of cases, which, to shorten the discussion, they concede without cavil: (1) The resolution of intention is the jurisdictional foundation of the proceedings, and failure to comply with the requirements of the statute with respect to the contents of the resolution is fatal to a contract founded upon it, and to any assessment to pay the contractor for the work; (2) the statute requires that the resolution of intention shall contain an intelligible description of the proposed work, and without such description a contract founded upon the resolution is void; (3) failure of the resolution of intention to describe the work cannot be obviated by putting a sufficient description into any subsequent part of the proceedings; (4) unless the resolution of intention is published as prescribed by the statute, no valid contract can be made under it.

In declaring that the street should be "graded for its full width to the official lines and grade, and * * * macadamized," the resolution sufficiently described that part of the work. *Schwiesau v. Mahon*, 128 Cal. 114, 60 Pac. 683. But the resolution also required that the street "be curbed, guttered, * * * and that cross walks be constructed across" certain streets named, "and that a culvert be constructed on the east side of San Pablo avenue, across Hopkins street." The resolution contained the provision already quoted (paragraph "e"), referring to certain special specifications for said work adopted on the same day on which the resolution was adopted, and probably preceded the latter. But it will be observed that this provision does not include the curbs and gutters, so that, if the specifications may be re-

ferred to as part of the resolution as to the culverts and macadamizing and cross walks, we find no such direction or authority in the resolution as to the material out of which the curbs and gutters are to be constructed, nor does the resolution direct or authorize the property owner to look to the specifications to learn these facts. It is not required by the statute that specifications shall precede the resolution, or that they shall have been prepared at the same time and be made part of it. The act requires only that the resolution should sufficiently describe the work contemplated to convey an intelligent idea of the improvement and its nature and extent, and plans and specifications are not required, except in the case of sewers, before the work is ordered. *Schwiesau v. Mahon*, supra.

In preparing specifications to form part of the resolution, the board would be doing something not required by the act, and, if this course may be permissible,—which we do not decide,—the specifications could be made a part of the resolution only by a clear expression of intention so to do, and it is at least doubtful whether anything short of setting forth the specifications in full in the resolution would accomplish such object. However this may be, it is certain that any reference in the resolution to any of the work to be done in accordance with specifications already adopted, to be effective, would have to clearly point out the work to be so done. The most that can be said of the resolution here, in this regard, is that it directs only a part of the work to be done according to specifications then adopted, namely, macadamizing, culverts, and cross walks, and it entirely omits any reference to the curbs and gutters. Turning to the specifications, we find that they provide that "the curbing shall be of sound No. 1 redwood plank, three inches by twelve inches, free from sap, well and truly set to the official line and grade," stating how to be spiked, etc.; and, as to the gutters, that they "shall be not less than three feet or more than five feet wide, as specified in order of work. They shall be of rock classed as No. 1 in ordinance No. 334. The stones shall be at least of six inches in depth, the upper surface smooth, and an area of not more than four blocks to the square foot." No such particularity is required to be stated in the resolution. It would have been sufficient for the resolution had it stated that the curbing should be constructed of redwood, and that the gutters should be constructed of rock. It has been often held that the resolution need not be sufficient in its description of the work to constitute specifications. But where the work is such as will admit of construction by different materials, varying in value, durability, and cost of construction, something more is called for in the resolution than to simply designate the work itself. As has been already said, when we speak of macadamizing a street the mind at

once comprehends the nature and character of the work; but this is not true of sewers, culverts, and the like work. With regard to curbs and gutters, the specifications show that they fall within this latter class, for stone, wood, or concrete could have been used for either or both, instead of the material designated in the specifications. The only question then is, does the resolution describe the work by reason of the reference therein made to the specifications? Conceding, but not deciding, that reference in the resolution of intention may be made to the specifications adopted by a separate resolution or ordinance on the same day, we do not think the reference in the present case included the curbs and gutters. In providing specifically that the macadamizing, culverts, and cross walks shall be constructed in accordance with "the special specifications adopted for said work," and omitting any such direction as to the curbs and gutters, we must conclude that the omission was intentional. In any event, the proceedings being in *Invitum*, we are not permitted to hold to be certain that which is uncertain (*Labs v. Cooper*, 107 Cal. 656, 40 Pac. 1042); and the resolution is far from being certain in the matter just noticed. The owner of property could not, from an inspection of the resolution, determine that the curbs and gutters were to be constructed according to the specifications. Indeed, seeing other work enumerated so to be done, and not finding the curbs and gutters in the list, he might well conclude that as to them no specifications were made, and, no materials being designated, he might object to the work for this very reason. If he did not object, the omission being fatal to jurisdiction, he may now object. It was held in *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927, that the requirement that the resolution shall describe the work applies to all and each of its material parts; and a failure of description in any material part of the work vitiates the resolution as a whole, and renders void a bid and contract to do the work proposed by the resolution, inclusive of the defective part, and no street assessment can be enforced under such contract.

It is regrettable that so many of these cases occur where the court is forced to so decide as that work done, often in entire good faith, must go without compensation. But no course is open except to consistently adhere to rules and principles established by a long series of decisions, departure from which would not only lead to uncertainty as to what the law is, but would open the door to abuses not to be tolerated.

Appellants present numerous other objections to the proceeding, and among others challenge the constitutionality of the *Vrooman* act. It is not necessary to pass upon these matters. The assessment was void for the reasons already stated, and therefore the decree foreclosing plaintiff's lien cannot

be sustained. The judgment and order should be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

133 Cal. 145

GAMACHE v. SOUTH SCHOOL DIST. et al.
(Sac. 901.)

(Supreme Court of California. May 29, 1901.)

ADMISSIONS IN PLEADING—TRIAL—FINDINGS
OUTSIDE THE ISSUES—DISPOSITION
ON APPEAL.

1. Where a complaint, in an action for labor and materials furnished under a contract, alleges that a certain sum has been paid the plaintiff under the contract, and the answer avers payment of the sum stated in the complaint, a finding that a larger sum was paid will be disregarded, as the admission in the pleadings is conclusive.

2. Where the record contains no pleading or mention of materials said to have been furnished plaintiff by a certain person, a finding that such materials were furnished and judgment recovered therefor is outside the issues.

3. Where, in an action for labor and materials furnished under a contract, an answer filed by parties who claimed to have furnished plaintiff with materials used in the construction of the building contained no allegation as to furnishing such materials, but merely that they had commenced actions against plaintiff to satisfy their demands for materials furnished plaintiff for the building described in the contract, and there was no request for a money judgment in their favor, a finding that the parties filing the answer had furnished such materials and recovered judgment therefor was outside the issues.

4. Where certain findings are contrary to the admissions in the pleadings, and others are entirely outside the issues made by the pleadings, and the judgment cannot be sustained on the remaining findings, the judgment will be reversed on appeal, with directions to allow all parties to amend their pleadings.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action on a contract by F. C. Gamache against the South school district and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

A. H. Carpenter, for appellant. Nicol & Orr and O. B. Parkinson, for respondents.

COOPER, C. This is an appeal from the judgment. No brief has been filed in behalf of any of the respondents, and the entire labor of examining the points made by plaintiff has thus been cast upon this court. The contention is made that certain findings of the court are contrary to the admissions in the pleadings, others outside the issues, and that the judgment is not the legal conclusion from the facts found. The action was brought upon a written contract, made by appellant with the trustees of the South school district, for the erection of a school house in said district for the agreed sum or

\$3,289. It is alleged in the complaint that plaintiff, on the 7th day of October, 1897, commenced furnishing materials and building said school house, and had nearly completed the same according to the agreement, when, on the 29th day of January, 1898, the district, through its trustees, in violation of the agreement, prevented him from completing the same; that plaintiff furnished materials and performed said contract according to its terms, until so prevented by the trustees of said district; that plaintiff was paid one-half the amount of said contract price, to wit, \$1,644.50, and no more. Plaintiff, in a separate count, alleged that the defendant school district was indebted to him in the sum of \$3,800 for material furnished and work done in the school house, no part of which has been paid except the sum of \$1,644.50, leaving a balance due of \$2,155.50, for which judgment is prayed. The court found that defendant was and is a school district as alleged, and that the contract was duly made and executed as set forth in the complaint, and further found: "(3) That plaintiff duly performed all the terms and conditions of said contract on his part, until the 31st day of January, 1898, and was ready and willing thereafter to duly perform all the terms and conditions of said contract on his part, but the defendants Seeley, Tole, and Grider, claiming to act for said school district, took possession of the school-house building, mentioned in said contract, and ousted plaintiff therefrom, and prevented him from performing thereafter the terms and conditions of said contract on his part; and they without any authority from plaintiff, and with the materials therefor which he had purchased to complete said building, completed and finished the same on the 28th day of February, 1899, and the same was accepted by said school district on that day. (4) That it was by said contract agreed that out of the moneys payable to the plaintiff by the terms of said contract the school district should first pay the amounts due for materials furnished for said building by any person to said Gamache to complete said contract on his part, and which he had not paid for, and that the residue of said money should be paid to said Gamache. (5) That said Simpson & Gray furnished to said Gamache for said building materials for the construction of said building, and which were used in the construction of said building, and which he did not pay for, of the contract price of, and of the reasonable value of, \$419.88, and they recovered judgment in their said action against Gamache, said South school district, and its trustees for said sum of \$419.88 and costs of suit. (6) That said Thomas & Buell furnished to said Gamache, which have not been paid for to them or for them, materials for the construction of said building, and which were used in the construction of said building, of the contract price of, and of the reasonable val-

ue of, \$746.48, and they recovered judgment in their said action against Gamache, said South school district, and its trustees for said sum of \$746.48 and costs of suit. (7) That said F. Ruhl furnished to said Gamache for said building materials for the construction of said building, and which were used in the construction of said building, which were not paid for by said Gamache, of the contract price of, and of the reasonable value of, \$144.17, and he recovered judgment in his said action against Gamache, said South school district, and its trustees for said sum of \$144.17 and costs of suit. (8) That the said school district has paid to and for said Gamache, under and by reason of said contract, the sum of \$2,069.11, and no more." "(11) That plaintiff never abandoned the construction of said building under said written agreement. (12) That said Gamache did not fail in any respect, either in furnishing materials or labor or otherwise, to complete the work of construction of said building, as he was required to construct the same by said contract, and the defendant said South school district has not, by any act or omission of said Gamache, suffered any injury or damage whatever. (13) That the unpaid balance of the money which was to be paid by said school district was by the terms of said written contract to be paid, on the completion of said building, to persons furnishing materials to said Gamache for the construction of said building, and which has not been paid for." As conclusions of law, the court found "that the plaintiff should take nothing by this action, and that no party to this action is entitled to judgment for costs in this action." Judgment was accordingly entered.

The eighth finding is contrary to the admissions in the pleadings.

The complaint, which is verified, alleges that \$1,644.50, and no more, has been paid to plaintiff. The answer does not deny this, but, on the contrary, alleges "that the sum of \$1,644.50 was paid to plaintiff under and by the terms of said contract." The admission in the pleadings as to this matter is conclusive, and the finding must be disregarded. *Hendy Mach. Works v. Pacific Cable Const. Co.*, 99 Cal. 421, 33 Pac. 1084. The answer, after setting up a claim for furnishing materials and finishing the building, further alleges that there remains of the contract price in the hands of said district "the sum of \$412.51, and no other or greater sum of money." The court entirely fails to make any disposition as to this sum so admitted to be due by the district.

The seventh finding is entirely outside of any issue made by the pleadings. We find no answer or pleading in the record as to Ruhl. Not only this, but his name nowhere appears except in the finding. A finding outside the issues cannot aid in sustaining a judgment. *Green v. Chandler*, 54 Cal. 627.

The fifth and sixth findings are also out-

side the issues. The answer of Simpson & Gray and of Thomas & Buell contained no allegation as to furnishing materials for the construction of the school house. They simply alleged that they had commenced actions against plaintiff, in which they alleged and set forth their right to obtain judgment against him "in satisfaction of their claims and demands for material furnished said Gamache to be used, and which was used, in the construction of the building described in the said contract." They did not ask any money judgment, but that "plaintiff take nothing hereby, and that they be dismissed hence with their costs."

We cannot eliminate the findings herein discussed, and order judgment upon the remaining findings. As the judgment must be reversed, it will subserve the ends of justice to allow the parties to amend their pleadings, if they so desire, so that proper issues may be made. If plaintiff performed all the conditions of the contract on his part in good faith, and was prevented by the wrongful acts of defendant school district from completing it, as the court found, he may have been damaged. If so, the court should find the amount of such damage under appropriate pleadings. If under the contract the district had the right to pay Simpson & Gray, Thomas & Buell, and Ruhl for material furnished in the erection of said building, the court, under proper pleadings, should find the amount due them, respectively, and direct its payment. Some one ought to be entitled to judgment for some amount. If there is a balance on hand, after the trustees of the district have paid in full for completing the building, and for all labor and materials used thereon, and plaintiff has in all respects complied with his contract, then plaintiff should have it. If it would have cost plaintiff the full unpaid balance to have completed the contract, it would not appear that he was damaged by being prevented from completing it, unless by the profit he would have made upon his own labor.

The court has found that plaintiff duly performed all the terms and conditions of the contract on his part, until the defendant district wrongfully entered and prevented him from completing it; that without authority from plaintiff the trustees of the district took and appropriated the materials which plaintiff had purchased to complete said building, and with said materials completed it. It would seem that, under such circumstances, the plaintiff, if damaged, should recover. The findings do not show whether or not the amounts for which Simpson & Gray, Thomas & Buell, and Ruhl recovered judgment in different actions have been paid. If plaintiff has paid them, they would appear to have no further interest in the matter. If this case should be tried anew, it should be upon proper pleadings, and all the issues should be disposed of so as to carry out the

provisions of the contract as far as possible. If there is money on hand, and if under the contract material men have rights to it, the court should determine and direct to whom it should be paid. It certainly is not proper that plaintiff take nothing, and that defendants take nothing, and that no one is entitled to costs. The judgment should be reversed, with directions to the court below to allow all parties to amend their pleadings, if so advised.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to allow all parties to amend their pleadings, if so advised.

133 Cal. 120

PEOPLE v. TERRILL. (Cr. 699.)

(Supreme Court of California. May 29, 1901.)

CRIMINAL LAW—FORGERY—UTTERING FICTITIOUS INSTRUMENT—INDICTMENT AND INFORMATION—JUDGMENT—VENUE—EVIDENCE.

1. Pen. Code, § 476, provides a punishment for uttering a fictitious written instrument, purporting to be an instrument of an individual calling for the payment of money, when there is no such individual in existence. An indictment, under this section, charged defendant with uttering a note of a certain individual, when there was no such person in existence. *Held*, that the use of the word "person," instead of individual, was not a material variance, since it referred to the antecedent individual named.

2. In a prosecution under Pen. Code, § 476, for uttering a fictitious instrument, the fact that the court adjudged the defendant guilty of "forgery" was not reversible error, since the word "forgery," if properly used, could not injure defendant; the record furnishing a complete protection against another prosecution for the same offense.

3. Evidence that witness' residence was A.; that he gave defendant \$400 to be loaned, which defendant afterwards claimed to have done, and that defendant read the papers to witness, the note alleged to have been fictitiously uttered being among them; and that all these facts took place in a certain county,—is sufficient, in a prosecution under Pen. Code, § 476, for uttering a fictitious instrument, to prove the venue to be in that county.

4. In a prosecution under Pen. Code, § 476, for uttering a fictitious instrument, evidence that a person's name did not appear in the directory is competent as tending to show that there was no such person in the county.

5. In a prosecution under Pen. Code, § 476, for uttering a fictitious instrument, the fact that the indictment did not set forth the rate of interest of the note alleged to have been fictitiously uttered, and the provision in regard to attorney's fees, was immaterial.

6. Where defendant procured a judgment, on appeal, that the indictment on which he was tried and convicted is void, he cannot rely on such conviction as a bar to a second prosecution for the same offense, since he was not in jeopardy on a valid indictment.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Samuel B. Terrill was convicted of uttering

a fictitious instrument, and he appeals. Affirmed.

Jackson Hatch, for appellant. Tirey L. Ford, Atty. Gen. (J. H. Campbell, of counsel), for the People.

COOPER, C. Appeal from judgment and order denying motion for a new trial. The indictment is in the following language, to wit: "The said Samuel B. Terrill is accused by the grand jury of the county of Santa Clara, state of California, by this indictment, found this 12th day of June, A. D. one thousand eight hundred and ninety-nine, of the crime of forgery, committed as follows: The said Samuel B. Terrill, on the second day of January, A. D. eighteen hundred and ninety-seven, at the county and state aforesaid, with intent to prejudice, damage, and defraud Richard J. Hawke, uttered, published, and passed to him, as true and genuine, a fictitious note, apparently genuine and of legal efficacy, knowing the note to be fictitious; said note bearing said date, and purporting to be the note of an individual, to wit, Leon McAbee (when in fact there was no such person in existence), whereby said Leon McAbee promised to pay to said Richard J. Hawke three hundred and fifty dollars in gold coin of the United States of America, one year after said date."

1. The defendant claims that his demurrer to the indictment should have been sustained upon the sole ground that the facts stated do not constitute a public offense. The indictment was evidently based upon section 476 of the Penal Code, which reads as follows: "Every person who makes, passes, utters, or publishes, with intention to defraud any other person, or who, with the like intention, attempts to pass, utter, or publish, or who has in his possession, with like intent to utter, pass, or publish, any fictitious bill, note, or check, purporting to be the bill, note, or check or other instrument in writing for the payment of money or property of some bank, corporation, copartnership, or individual, when, in fact, there is no such bank, corporation, copartnership, or individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious, is punishable by imprisonment in the state prison for not less than one nor more than fourteen years." The defendant argues that the note referred to in the indictment purported to be the note of an individual, and that the indictment alleges that there was no such "person" in existence, whereas it should have alleged that there was no such "individual" in existence. It is evident, under the section, that, where the instrument is alleged to be that of an individual, the indictment must show that there is no such individual in existence, but we think the indictment in this case does show such fact. It does not contain the word "individual," but it plainly says, "the note of

an individual," to-wit, Leon McAbee (when in fact there was no such person in existence). The word "person," in the connection in which it is used, evidently and plainly refers to the antecedent "Leon McAbee." The words "such person" plainly mean such person as Leon McAbee. They do not, and cannot, by any reasonable construction, be held to refer to a bank corporation or copartnership, because the indictment does not mention any bank corporation or copartnership. We think that a "person" of common understanding would know what is intended by the indictment.

2. It is claimed that the court adjudged the defendant guilty of "forgery," and that this was error. The verdict of the jury was: "We, the jury in the above entitled cause, find the defendant guilty as charged in the indictment." The judgment recites: "The defendant was duly informed by the court of the indictment presented against him, on the 12th of June, 1899; of his arraignment, and plea of 'Not guilty'; of his trial, and the verdict of the jury, on the 9th of November, 1899, 'Guilty of forgery as charged in the information.' The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none; and, no sufficient cause appearing to the court, thereupon the court renders its judgment. That, the said Samuel B. Terrill having been duly convicted in this court of the crime of forgery, it is therefore ordered, adjudged, and decreed," etc. It is evident that the judgment was for the crime charged in the indictment, and that a crime is charged under said section 476. There is no form prescribed in the Penal Code as to what the judgment shall contain. "If no sufficient cause is alleged or appears to the court, why judgment should not be pronounced, it must thereupon be rendered." Pen. Code, § 1202. "When a judgment upon a conviction is rendered the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, * * * and must, within five days, annex together and file the following papers which will constitute a record of the action: (1) The indictment or information, and a copy of the minutes of the plea or demurrer. (2) A copy of the minutes of the trial. (3) The charges given or refused and the indorsement thereon. And (4) a copy of the judgment." Pen. Code, § 1207.

In speaking of the record in a criminal case, this court said in *Re Ring*, 28 Cal. 252: "The several papers specified, when so annexed together and filed, are expressly declared to be the record of the action, and that is the record which would have to be produced in support of a plea of former conviction. That the several papers specified in the four hundred and sixty-second section enter into and become a part of the record must not be lost sight of when we come to

determine what it is essential that the judgment itself should contain; for where several papers are thus united in chronological order, and made one in legal intent, it cannot be claimed that the contents of one should be repeated in another. If they all, taken together, furnish facts sufficient to protect the defendant against another prosecution for the same offense, it cannot, with any show of reason, be claimed that the record is defective in any matter of substance. From the mere fact that these several papers are taken into and made a part of the record, it is clear that each one was intended merely to tell its own story, or, rather, to relate its particular branch of the whole history. Thus the indictment states the jurisdictional facts, the nature of the offense, and the facts and circumstances, so far as they are material. The other papers give the history of the trial, including the verdict; and the judgment, which constitutes the last chapter, merely furnishes the account by stating of what offense the defendant was finally convicted, and the penalty imposed by the court. The judgment need not, and it was not intended that it should, repeat anything contained in the papers which precede it; for, in view of the fact that they go into the record and make a part of it, such repetition would be idle, and serve no useful purpose." Applying the rule laid down in the above case, the defendant cannot be again prosecuted for the same offense. The word "forgery," if improperly used in pronouncing judgment, need not in any way have misled or injured defendant. The indictment, verdict, minutes, and judgment, taken together, furnish defendant complete protection against another prosecution for the same offense.

It is provided in the Penal Code (section 1404): "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake, therein renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right." Section 1258 provides, after hearing the appeal, this court must "give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." In *People v. Eppinger*, 109 Cal. 294, 41 Pac. 1037, where a similar objection was made to the arraignment, this court said: "The minutes of the court show that defendant was arraigned upon an information charging him with forgery, whereas, in fact, it was upon an indictment charging him with uttering a fictitious instrument. But these ministerial irregularities do not affect any of the substantial rights of the defendant, who was in fact arraigned upon indictment, a copy of which was given to him, and he was thus fully informed of the nature of the charge against him, and answered it by his plea." Indeed, we are not prepared to say that defendant was not found guilty of "forgery." The acts

set forth in the indictment would be forgery at common law. 2 McClain, Cr. Law, § 764, and cases cited; 1 Bish. Cr. Law, § 572; 1 Whart. Cr. Law, §§ 659, 660.

The common law of England, so far as not repugnant to, or inconsistent with, the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state. Pol. Code, § 4468. Under the heading of "Forgery and Counterfeiting" (sections 470-482, c. 4, tit. 13, Pen. Code), we find section 476. Sections 470, 471, and 472 provide that every person who, with intent to defraud another, does certain acts therein enumerated is guilty of forgery. Section 473 provides that forgery is punishable by imprisonment in the state prison for not less than 1, nor more than 14, years. Then, among other sections, follows section 476, which provides that any person who utters or has in his possession any fictitious note, with intent to defraud any other person, is punishable by imprisonment in the state prison for not less than 1 nor more than 14 years. The acts enumerated in section 476 are thus punished the same as forgery. Such acts are made a crime. No name is given to such crime, unless we regard it as a species of forgeries concerning which the chapter treats. Section 470 expressly says that every person who utters, or attempts to pass as true and genuine, any false or forged promissory note, knowing the same to be false or forged, with intent to prejudice or damage another person, is guilty of forgery. The indictment in this case charges defendant with uttering and passing as true and genuine a false note. It also describes the note as fictitious, and thus brings it within the express provisions of section 476. In *People v. Elliott*, 90 Cal. 586, 27 Pac. 433, it was held that, where there is no such person or firm in existence as that the name of which is signed to the check, then the check is fictitious, and the prosecution should be under section 476, but the court did not say that such act was not forgery. In the opinion it is said: "The law appears to recognize a distinction between forged instruments purporting to have the signature of a person in existence and those where the signature is purely and entirely fictitious. * * * Section 470 of the Penal Code is quite broad in its terms, and, in the absence of said section 476, it might probably be construed broad enough to include fictitious instruments as referred to in said section; but the legislative mind having been directed specially to that class of instruments with reference to the offense of forgery, it would seem the act of making or passing a fictitious check could only be prosecuted when brought within the requirements and conditions of said section." The court did not say such fictitious instrument was not forgery. On the contrary, it speaks of forged instruments when the signature is fictitious. In *People v. Eppinger*, 105 Cal. 38, 38 Pac. 538, it is said: "A distinction

is thus made between the forgery of a check upon an existing person and the making and passing of a fictitious instrument purporting to be the check of a person who has no existence." There the principal point was that the information alleged that the check was signed by "M. Howell & Co.," but did not allege that there was no such partnership or corporation in existence at the time. In *People v. Lee*, 128 Cal. 331, 60 Pac. 854, it is said: "The defendant, a Chinese, was accused of the crime of forgery, committed by uttering," etc., "a fictitious check."

It thus seems to have been generally regarded as forgery by this court. To decide that the uttering of a fictitious check should be prosecuted under section 476 is not to decide that a fictitious check is not a forged check, and that the uttering of such a check is not forgery. In a late case the supreme court of Oregon appears to have fully considered the matter, and in its opinion says: "The law is well settled that the signing of a fictitious name to an instrument with a fraudulent intent constitutes forgery." Rev. St. Mo. § 3653, provide that the false making or forging of any instrument in writing for the payment of money, purporting to be the act of another, to which shall be affixed any fictitious name, or the name or pretended name of any person not in existence, shall be deemed a forgery. It was held in *State v. Minton*, 116 Mo. 616, 22 S. W. 808, that although the statute made such act a forgery, yet the indictment, under the statute, must allege that a fictitious name was affixed to the instrument. This is in entire accord with the holding of this court in the cases hereinbefore cited. The indictment or information must allege facts showing that a crime has been committed within the terms of section 476, because the legislature has specially defined the acts making it a crime to utter or forge a fictitious instrument. *People v. Eppinger*, 114 Cal. 353, 46 Pac. 97, seems to be in conflict with what has been said, and is evidently based upon a misapprehension of *People v. Elliott*, 90 Cal. 586, 27 Pac. 433. The opinion commences by saying: "That the crime of forgery, as defined in section 470 of the Penal Code, and that of making and passing a fictitious check, with intent to defraud, under section 476 of the same Code, are different offenses, was held in *People v. Elliott*, 90 Cal. 586, 27 Pac. 433." An examination of *People v. Elliott* shows that the ruling was not quite so broad as stated. The court simply held that, as the legislature had made special provision as to the forgery of fictitious instruments, the act of making or passing a fictitious check could only be prosecuted when the allegations of the information showed an offense under said section 476. The opinion in *People v. Eppinger*, 114 Cal. 350, 46 Pac. 97, proceeds upon the theory that in the same case (109 Cal. 294, 41 Pac. 1037) this court had directed the contents of the judgment. In the latter case the judgment was

reversed because the jury did not find upon the issue as to prior conviction. What is said as to the contents of the judgment to be thereafter entered was obiter dictum.

3. It is urged that the evidence is insufficient to sustain the verdict, for the reasons that the venue is not proven; that the evidence does disclose the existence of the person claimed to be fictitious; that the note received in evidence differed materially from the note described in the indictment; and finally, that defendant has been already convicted of the same offense charged in the indictment. The witness Hawke testified that his place of residence was Almaden; that he gave defendant \$400 to be loaned; that in a conversation defendant said to him that he had loaned the money to Leon McAbee on good security, and that he would send witness the papers; that he received the papers a week or two afterwards, which included the note; that the papers came to witness by mail; and that all these matters took place in Santa Clara county. This was sufficient proof of the venue.

The prosecution offered evidence tending to show that there was no such man as Leon McAbee in Santa Clara county; that his name did not appear in the directory. This evidence was competent. *People v. Eppinger*, 105 Cal. 41, 38 Pac. 538. The purported Leon McAbee was a male person, as appears from the certificate of acknowledgment to the mortgage given to secure the note, and the statement made by defendant to Hawke. The defendant offered evidence as to the existence of a Leon McAbee in Santa Clara county, but the evidence shows this Leon McAbee was a married woman, and never owned any property in the county; that she came from Watsonville; began proceedings for a divorce in October, 1897; that the suit was still pending at the time of the trial of this case, in November, 1899; and said woman told one Jacobs that she was going to Marysville about 2½ months before this trial. In such case it was not incumbent on the prosecution to prove that the woman Leon McAbee did not authorize her signature to the note. There is no evidence tending to show that the signature purported to be hers. The note received in evidence corresponded with the note described in the indictment. There was no material variance. The fact that the indictment did not set forth the rate of interest and the provision in regard to attorney's fees was immaterial. *People v. Terrill* (this day filed) 64 Pac. 894.

It is finally claimed that the evidence shows that defendant had already been convicted of the offense charged in this indictment. The evidence shows that the crime of which defendant was convicted, and which it is claimed is a bar to the present action, was the uttering of a certain mortgage dated January 2, 1897, purporting to have been made by Leon McAbee in favor of Richard Hawke upon lands in Santa Clara county to secure the payment of an indebtedness of \$350. The

first indictment in said case was demurred to in the court below, and the demurrer sustained. The court ordered the case "resubmitted to the present grand jury." The same grand jury, upon the same facts upon which defendant had been charged in the first indictment, returned into court another indictment for the same offense. Defendant was tried upon the last indictment so found, and a verdict of guilty returned against him. He applied for and was granted a writ of prohibition by this court, prohibiting the court below from pronouncing judgment or proceeding further in said matter, for the reason that the second indictment found by the same grand jury was void. The defendant, therefore, having at his own request procured a judgment of this court that the indictment upon which he was tried and convicted is void, cannot be heard to rely upon such conviction as a bar to the present indictment. He has never before been in jeopardy upon a valid indictment for the same offense. Pen. Code, §§ 1021, 1023; *People v. Schmidt*, 64 Cal. 261, 30 Pac. 814; 1 Bish. New Cr. Law, §§ 1021, 1022. It follows that the judgment and order should be affirmed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

133 Cal. 139

ARQUES et al. v. UNION SAV. BANK OF SAN JOSÉ. (S. F. 2,232.)

(Supreme Court of California. May 29, 1901.)
ACTIONS UNDER BANK COMMISSIONERS' ACT—
INSOLVENT BANKS—PROCESS OF LIQUIDATION—SEQUESTRATION—PLEADING.

1. Under the bank commissioners' act, as amended in 1895, providing a scheme of liquidation for insolvent banks by which the assets are created a trust in the hands of the directors for the benefit of creditors, and the corporation enjoined from the transaction of any business except that of trustee for the purpose of liquidation, an ordinary action for the collection of a debt cannot be maintained against an insolvent bank in process of liquidation under the act.

2. An action may be maintained by a creditor against the directors in their own name or under the corporate name on a claim disallowed by them.

3. In such action allegations of the disallowance and justness of the claim are essential to the sufficiency of the complaint.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Louis Arques and others against the Union Savings Bank of San José. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Jackson Hatch and E. M. Rea, for appellant. J. R. Welch, for respondents.

SMITH, C. Appeal from a judgment against the defendant for the sum of \$354,-

\$82.70. The appeal is on the judgment roll. The complaint is in the ordinary form by the assignees of numerous depositors and other creditors of the defendant, simply alleging the various items of indebtedness, and their assignment to the plaintiffs, and praying for judgment for the aggregate amount, with interest at the rate of 7 per cent. per annum from January 1, 1899; and judgment was rendered accordingly. From the answer, and findings it appears that the defendant, when the suit was brought, was in process of liquidation under a judgment of the superior court of Santa Clara county of date March 13, 1899, in an action brought by the attorney general under the provisions of the bank commissioners' act as amended in 1895. The only question involved is whether an ordinary action for the collection of a debt can be maintained against an insolvent corporation in process of liquidation under the act. The contrary, I think, must be held, for the reason that to permit such actions would be inconsistent at once with the terms and with the policy of the act.

1. The proceedings against an insolvent bank are prescribed by section 11 of the act, which, as amended in 1895, establishes a scheme of liquidation materially different from that established by the original act, or the amendment of 1887. St. 1895, p. 175. They are commenced by what is, in effect, a seizure of all the property of the bank by the bank commissioners, followed by a suit by the attorney general against the corporation and its directors "to enjoin and prohibit them from the transaction of further business." The judgment in the suit—if the result be adverse to the bank—is that the "injunction applied for" be issued, and that "the commissioners * * * surrender to the corporation the property thereof in their possession for the purpose of liquidation." The business of liquidation is committed to the directors of the corporation, "under the direction of the bank commissioners"; and these directors, so called, are made subject to removal on the application of the bank commissioners, and in certain contingencies others may be appointed by the court. Thus the directors, while they remain nominally officers of the bank, become, by the provisions of the statute, trustees for the creditors, and, as subordinate agents of the commissioners, officers of the law. Their functions as directors of the bank are left to them, but these are subordinate to those imposed upon them as statutory trustees, and for all the purposes of the act they are to be regarded as acting in their statutory capacity. The case is therefore, in effect, the same as though the act had provided for the appointment of other trustees; that is to say, the directors, to all practical intents and purposes, are to be regarded merely as trustees, and their official relation to the corporation regarded, for all the purposes of the act, as immaterial. The effect of the act is, there-

fore, to sequester the assets, and, so far as necessary for the purposes of the act, the powers of the corporation, and to place them for the purpose of liquidation in the hands of the directors, acting, under the direction of the bank commissioners, as officers of the law. Nominally, indeed, the assets are said to be restored "to the corporation * * * for the purpose of liquidation," but, as the business of liquidation is committed exclusively to the directors, under the direction of the bank commissioners, it is only in name that the assets can be said to be restored to the corporation. In fact they are committed to the directors, who are the real trustees. The operation of the act is therefore twofold: First. It creates a trust fund for the use of the creditors, and an express trust to administer it, which, like other trusts, is subject to the jurisdiction of the proper court for administration. Of this trust the directors, in their capacity as officers of the law, are the real trustees, and they are subject as such to the direction of the bank commissioners, and ultimately to that of the court. But nominally the corporation is the trustee, and it may be convenient sometimes to speak of it as such, though in thus speaking of it it is to be borne in mind that it is trustee only in name, and that it is thus spoken of solely for convenience of expression. Secondly. The corporation is enjoined "from the transaction of any other business," which means, if we have regard to the real fact, from the transaction of all business, or, if we regard its nominal character as trustee, all business except that of trustee for the purpose of liquidation, which is in fact to be performed by the directors as officers of the law. This prohibition implies *ex vi termini* either a total suspension of the functions and powers of the corporation, or—what amounts to the same thing—a suspension of all its powers except those to be exercised by the directors in the execution of their trust. The powers of the corporation thus suspended include that of suing and being sued, except as representative of the directors as statutory trustees; and this again implies that it cannot sue or be sued for any cause of action other than one existing, as the case may be, in favor of or against the directors as trustees, who, in all actions for or against the corporation affecting the trust fund, are the real parties, and who alone, either *eo nomine* or under the corporate name, can, in such actions, be sued. But under the trust created by the act the relation of trustee and *cestui que* trust is established between the directors and the creditors, and the assets of the corporation are held by them in trust as a fund in which all the creditors are jointly interested; and this is the only legal relation existing between them, or (during the time of the suspension of the powers of the corporation by operation of the act) the only relation—relating to the sequestered assets—between the creditors and the corporation that can be en-

forced by action. It follows that the corporation can be sued only as trustee, and that no action can arise in favor of a creditor against the directors, or against the corporation, as nominal trustee, representing them, except for some failure of the trustees to perform the duties of their trust; for, so long as they perform their obligations to him as *cestui que* trust, he has no cause to complain. But, where there is default by the trustees in the performance of any duty, an action may be maintained in equity for the appropriate relief. An action may therefore be maintained by a creditor against the directors in their own names or under the corporate name on a claim disallowed by them, for it is a duty imposed upon them by the very nature of their trust to allow all just claims. But until the claim be disallowed there is no action, and hence the disallowance of the claim is an essential part of the cause of action, and must be alleged in the complaint. In the suit at bar it appears from the complaint that all the claims sued on, except certain drafts amounting to \$2,405.55, have been allowed, and that a dividend of 5 per cent. has been paid, or ordered to be paid, on them. With reference, therefore, to the bulk of the amount sued for, the trustees are not in default, and there is no cause of action. With reference to the drafts there are no allegations from which it can be judged whether they are just claims against the corporation or the directors. The suit, therefore, cannot be maintained for lack of essential allegations in the complaint.

2. The conclusion thus reached from a consideration of the intention of the statute, as indicated by its language, is in accord with the obvious policy of the act, with which the contrary view would be manifestly inconsistent. The purpose of the act is to effect an equitable and economical distribution of the assets of the insolvent bank among its creditors, and for this purpose all the assets of the insolvent corporation, and all its powers, so far as necessary to effect the object, are sequestered, and taken into the hand of the law. The end proposed implies that the dividend of each shall be according to the amount of his debt, and that no one shall receive more or less; and also that the liquidation shall be accomplished without unnecessary expense. But to permit suits to be maintained against the corporation, in the absence of any failure on the part of the trustees to perform their duty, would be to add to the claims sued on the expenses of the suit, and also to increase the rate, and add interest on interest,—as in the case at bar, where the interest allowed in the judgment is over \$18,000,—thus imposing on the corporation, or rather on the trustees, unnecessary costs and counsel fees. And this would happen not only in isolated cases, but all the creditors would be compelled to sue in order to protect themselves, and the trust fund would be thus largely consumed in unnecessary expenses.

It is manifest, therefore, that the administration of the trust would thus be seriously interfered with, and that the policy of the act would be defeated. The case, therefore, comes within the reason of the decision in *People v. Superior Court of City and County of San Francisco*, 100 Cal. 105, 34 Pac. 492, where it was held that section 11 of the bank commissioners' act "necessarily superseded the provisions of the insolvent act of 1880, so far as this class of corporations is concerned"; the reason given being that "this section was intended by the legislature to provide for every case involving the winding up of the business of a banking corporation," and that "the enforcement of the insolvent act would defeat the plain purposes contemplated by the * * * act,"—a reason (at least in kind) equally applicable here.

The question has not been heretofore definitely determined by the decisions of this court. In *Lanz v. Bank*, 125 Cal. 458, 58 Pac. 63, it is said "that, in the absence of the judicial declaration contemplated by the banking act, the right of action against the bank by creditors stands exactly as though its doors had never been closed, and its business was progressing in the usual and ordinary channels," and that, "until such action is taken, the bank's legal status as to its creditors is not changed." There is here some intimation that, after the bank is put in liquidation under the act, the case would be different; but nothing decisive is said on the point. In *Long v. Superior Court*, 102 Cal. 449, 36 Pac. 807, the powers of the court under section 11 of the act (which has since been amended) were considered, and it was held that the directors could not be ousted, and a receiver appointed; but there is nothing in the decision bearing on the question here involved. In *People's Home Sav. Bank v. Superior Court of City and County of San Francisco*, 103 Cal. 27, 36 Pac. 1015, the same general question was presented, and the same conclusions arrived at; the court saying that even after the judgment of the court under the act "the corporation continues in existence for the purpose of liquidation." This remains true of the act as amended in 1895, but that amendment contains specific provisions as to liquidation that were previously wanting. The decision in *Crane v. Bank*, 106 Cal. 64, 39 Pac. 215, 27 L. R. A. 562, bears on this case only as affirming the decision in *People v. Superior Court of City and County of San Francisco*, 100 Cal. 111, 34 Pac. 492. In *Anderson v. Bank*, 112 Cal. 598, 44 Pac. 1063, 32 L. R. A. 479, the action was for the recovery of a special deposit, and whether the deposit was of this nature is the only point discussed in the briefs or considered by the court. The proceedings under the act are not referred to. In *Murphy v. Bank*, 119 Cal. 334, 51 Pac. 317, and *Id.* (Nov. 28, 1900) 62 Pac. 1059, the action was for money claimed to be due as a dividend, which had been disallowed by the di-

rectors. In *Bank v. Stone*, 121 Cal. 202, 53 Pac. 634, the directors, under the corporate name, were the real plaintiffs; and the counterclaim—which was for professional services due on a special contract—was disallowed because the contract was not authorized by the directors. In *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 56 Pac. 787, the action was for a dividend disallowed by the directors. These, I believe, are all the cases bearing on the general subject, and in none of them, it will be observed, was the amendment of 1895 under consideration. I advise that the judgment be reversed, with directions to the lower court to allow the complaint to be amended if the plaintiffs shall be so advised, and otherwise to dismiss the action.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the lower court to allow the complaint to be amended if the plaintiffs shall be so advised, and otherwise to dismiss the action.

133 Cal. 102

BANAZ v. SMITH et al. (L. A. 792.)

(Supreme Court of California. May 29, 1901.)

MUNICIPAL CORPORATIONS—IMPROVEMENT OF STREETS—CONSTRUCTION OF SEWERS—"VROOMAN ACT"—CONSTITUTIONALITY—DELEGATION OF MUNICIPAL FUNCTIONS—ASSESSMENT DISTRICTS—SPECIFICATIONS FOR SEWER—CLAIM OF CONTRACTOR—DEMAND BY ASSIGNEE.

1. Act March 18, 1885, concerning the improvement of city streets, and authorizing the collection of assessments therefor by the contractor doing the work, is not in conflict with Const. art. 11, § 13, providing that the legislature shall not delegate to any individual power to levy taxes or assessments, or perform any municipal functions, since the contractor is merely the city's agent for the collection of the assessment.

2. Act March 18, 1885, being a general law, the provisions of the Los Angeles charter of 1889, relative to the improvement of streets, which are in conflict with it are void, since the constitution at that time authorized the formation of such municipal charters as would be consistent with the laws of the state.

3. Where the provisions of a city charter were in conflict with the general law and void when adopted, the subsequent amendment, in 1896, to section 6, art. 11, of the constitution, which so changed it that the charter provisions would have been harmonious therewith, did not operate to give life to such provisions.

4. The provisions of Act March 18, 1885, relative to the formation of assessment districts, and levying assessment for street improvement according to the frontage of the lots, and not in proportion to the benefits received, are not in conflict with Const. art. 1, § 14, prohibiting the taking of property without just compensation, since there is merely a possibility that an assessment might be unjust.

5. Act March 18, 1885, pt. 2, § 27, provides the manner in which assessment for street improvement shall be made, and hence it is not necessary that a resolution of intention to con-

struct a sewer should state the manner of the assessment.

6. Under Act March 18, 1885, the fact that a resolution of intention to construct a sewer did not state that the work was necessary did not render the resolution invalid.

7. Where specifications for the construction of a sewer described the work to be done so that the street commissioner, though empowered to decide whether the contract had been performed and decide as to minor details, could not require more or accept less than the specifications required, they were not fatally indefinite.

8. Where notice of the award of a contract under Act March 18, 1885, was published on the 8th of the month, and the contract was entered into on the 19th, the contract was not prematurely let, so as to violate the provision that the owners of three-fourths of the frontage may, within 10 days after the first publication of the notice, elect to do the work.

9. Act March 18, 1885, § 7, subd. 12, as amended by St. 1889, p. 165, requiring a diagram to be made of the section benefited by sewer work, does not require such diagram to be made before the contract is let or the work performed, but only in time to enable property owners to suggest corrections.

10. Where the assignee of a contract for the construction of a sewer made demand on a property owner, and his affidavit stated that he made it on behalf of the contractor, such demand was sufficient, since the assignee was the owner of the claim, entitled to payment, and the taxpayer could not be injured by the form of the demand.

Department 2. Appeal from superior court, Los Angeles county; Lucian Shaw, Judge.

Action by George Banaz against Edwin Smith, as trustee, and others. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Julius Lyons, for appellants. Lewis O. Preston, for respondent.

TEMPLE, J. Action to foreclose lien for construction of a sewer in the city of Los Angeles, under the so-called "Vrooman Act," passed March 18, 1885, as amended in 1889, 1891, and 1893. The second amended complaint was demurred to for insufficient facts. It was overruled, and the appellant answered. Judgment was for plaintiff, and this appeal is from the judgment, and from an order denying a new trial.

Most, if not all, points urged here arise upon the demurrer. The first is that the authority given the contractor to collect is in violation of section 13, art. 11, of the constitution. That section reads as follows: "The legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever." Upon a mere reading, it is perfectly obvious that there is here no delegation of a municipal function. The contractor acts

only as the agent or servant of the city. He has no discretion, and can create no liability, nor can he impose any duty, or exercise any control or authority, over any one. He makes no assessment, levies no tax, and performs no municipal function. The municipal officers who enforce the ordinances of the city do not perform municipal functions, and in the collection of the street assessment the contractor does no more. This precise point was decided in *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771.

2. The council proceeded under the provisions of the so-called "Vrooman Act," and it is contended that the city charter should have controlled. The freeholders' charter of Los Angeles was adopted in 1889. At that time the Vrooman act was in force, and as was held in *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615, was a general law. At that time the constitution authorized the formation of such municipal charters as would be consistent with the laws and constitution of the state. The charter contained, so far as affects this case, a complete substitute for the Vrooman act, and the provisions of the charter are in many respects inconsistent with the provisions of that act. In *Yarnell v. City of Los Angeles*, 87 Cal. 603, 25 Pac. 767, it was said: "The amendment to section 8 of article 11, under which the Los Angeles charter was framed, provides that certain cities may frame charters for their own governments, consistent with, and subject to, the constitution and laws of the state. If, therefore, the provisions above stated of section 44 of the charter (St. 1889, p. 467) in question are inconsistent either with the constitution or any law which is 'general' in the sense in which it is used in the clauses above quoted, then they are invalid and void." If void from the beginning, the amendment to section 6, art. 11, in 1896, did not give life to such provisions. That would give the amendment the effect of enacting laws instead of merely authorizing the legislature to do so, and it would be to enact a law to which no reference was made, and which the people in adopting the amendment could not have had in mind. Such is not the ordinary function of a constitutional provision, and such effect will not be given to it unless it is expressly so provided. The case of *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433, treats of a case where the charter provisions when adopted were perfectly valid, and immediately went into operation. Subsequently a general law was passed which was inconsistent with some provisions found in the charter. As to that the constitution provided that all such charters shall be subject to and controlled by general laws. It was in effect held that the mere fact the charter provision was to be subject to, and controlled by, general laws implied a continued existence, and that when the general law was repealed the charter was in force and uncontrolled by the superior law. Here, the

charter provisions being void, there was nothing held under control which could be restored to free operation.

3. The next point is that the provision for the formation of an assessment district is in violation of section 14, art. 1, of the state constitution, and of article 5 of the constitution of the United States, because it may result in taking private property for public use without just compensation. The brief was filed before the case of *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500, was decided, and all the questions here raised are there disposed of. The suggestion that a board or court, corruptly abusing its powers, may in fact take private property for public use without just compensation, does not raise a constitutional question. Whether the property will be benefited in proportion to the burden is for the legislature. "Unless, therefore, it is made to appear, upon the face of the proceedings, or by some competent showing, there is a gross or substantial variation from this principle, it is the duty of the court, under the rules and authorities cited, to uphold the assessment." *Hadley v. Dague*. See, also, *Lent v. Tillson*, 72 Cal. 428, 14 Pac. 71, and *Irrigating Dist. v. Bradley*, 164 U. S. 176, 17 Sup. Ct. 56, 41 L. Ed. 369.

4. It is contended that the resolution does not declare that it is necessary to construct the sewer, nor the manner in which the costs and expenses shall be assessed, as it is alleged is required by section 27, pt. 2, of the Vrooman act. It is not necessary that the resolution of intention, which is but a notice of contemplated action on the part of the board, shall state that the board finds the contemplated work necessary. The manner in which the assessment is to be made is prescribed by the act itself. The resolution did show that costs and expenses were to be assessed upon the district benefited, and the district was described.

5. The next point is that the specifications were too uncertain, and left much to the discretion of the street superintendent which the board should have determined for itself. There was no delegation of authority to the street superintendent except what is necessarily involved in the power on the part of that officer to determine in the first instance whether the contract has been performed. What is to be done is specifically described, but the requirements to some extent vary according to the nature of the earth in which the sewer is to be constructed. For instance, when the ground is wet the soft earth is to be removed and gravel filled in; but the specifications do not determine the amount of wet, soft ground to be removed, or the quantity of gravel required to fill the excavation. It is not left to the street superintendent to say how much shall be done in any case. The contractor must do the work as required by his contract, and the street superintendent cannot accept less or require

more. The board, on appeal, must finally determine. As to the indefiniteness of detail, it may be said that, however minute they may be, some unsettled points might yet be suggested. This matter was considered in the late case of *Haughwout v. Hubbard* (Cal.) 63 Pac. 1078. Under the rule there laid down, this assessment cannot be set aside upon this ground.

On the appeal from the order denying a new trial it is contended:

1. The contract was prematurely let. The notice of the award was published on the 8th and 9th of November. The contract was entered into on the 19th of November following. The law provides that the notice shall be posted for five days, and published in a newspaper for two days. The owners of three-fourths of the frontage may, "within ten days after the first posting or publication of said notice," etc., elect to do the work. This law does not require the lapse of one day before the ten days shall begin to run, and, excluding the first day, the time allowed was ample.

2. The diagram of the district benefited, required by subdivision 12, § 7, Vrooman Act (St. 1889, p. 165), was not made and approved before the work was let, and in fact performed. It was made in time for the assessment. The district itself was described in the resolution of intention, and from that time owners of property knew whether they were interested in the proceeding. The diagram showing the amount owned by each person was in time to enable property owners to suggest corrections. The statute does not require it to be made sooner.

3. The demand is objected to. The contract had been assigned, and the assignee made the demand in person, but in his affidavit showing demand he states that he made it on behalf of the contractor. It does not appear that he so stated in his demand, but if he did it is immaterial. He was the owner of the claim, and if he notified the lot owner to pay to his agent, or to any other person, or that he demanded payment for another, it did not injure the taxpayer. Under such a demand, payment to the contractor would have been sufficient. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(133 Cal. 129)

PAINTER v. J. B. PAINTER CO. et al.
(S. F. 1,795.)¹

(Supreme Court of California. May 29, 1901.)
JUDGMENTS—ACTION TO SET ASIDE—JURISDICTION OF EQUITY—GROUNDS OF ACTION.

1. Where a party defendant procures a dismissal of the action as to himself, and he charges no fraud or collusion between the other parties thereto, he cannot maintain a suit in equity to set aside the judgment.

2. A judgment will not be set aside by an independent suit in equity unless the plaintiff

¹ Rehearing denied June 24, 1901.

alleges facts showing that the judgment is wrong, or that a different result will be reached on another trial.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Theodore P. Painter against the J. B. Painter Company and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Pringle & Pringle, for appellant. Francis J. Heney and Edward Mills Adams, for respondents.

PER CURIAM. This suit was brought to obtain a new trial of the case of the defendant the J. B. Painter Company against the defendant Colton, as receiver of the late firm of Painter & Co., in which judgment had been entered for the plaintiff therein for the sum of \$11,085.73, and also to enjoin the execution of the judgment against property in the hands of the receiver. The suit referred to had been brought on a contract executed, with the approval of the court in which the receivership was pending, by Colton, as receiver, to the J. B. Painter Company. To this suit the plaintiff herein and the firm of Painter & Co. (not the defunct corporation, but a new firm of the same name, composed of this plaintiff and his brother Milton) were originally parties defendant with the receiver. But on the trial, on their motion, the case was dismissed as to them on the ground that a sufficient cause of action against them had not been proved. Thereafter judgment was entered against the receiver as above stated, which is the judgment from which plaintiff in this present action seeks relief. A demurrer to the complaint was sustained, and judgment entered for defendants.

The sole grounds on which plaintiff's claim for a new trial is based are insufficiency of the evidence to justify the finding as to a large part of the amount found to be due, and material errors of law occurring at the trial, and the additional fact that "the court [presumably the court in which the receivership was pending] declined to permit the receiver to * * * appeal," and that the receiver in fact did not appeal. Of course, courts of equity have jurisdiction, in proper cases (which are not very numerous), to set aside judgments rendered in other actions, and to grant new trials thereof; but we do not know of any principle or precedent on which the present action could be maintained. No fraud on the part of the J. B. Painter Company or the receiver, or collusion between them, is charged. The plaintiff herein was a party to that action, and, if he was interested in preventing a judgment against the receiver, he had ample opportunity to defend against such judgment. If he had himself dismissed from the action, and relied upon the receiver making a proper defense, he must abide the result. Moreover, he alleges no facts showing that the judg-

ment was wrong or that the result would be different upon another trial; and, as was said in *Davis v. Chalfant*, 81 Cal. 630, 22 Pac. 972, "in this class of cases it should be made to appear with reasonable certainty, at least, that a new trial would result more favorable to the party asking it than the judgment sought to be set aside." For these reasons, and many others which could be given, the demurrer was properly sustained. The judgment appealed from is affirmed.

6 Cal. Unrep. 684

MILLER & LUX v. KERN COUNTY LAND CO. (S. F. 1,766.)

(Supreme Court of California. May 29, 1901.)

VENUE—CHANGE—CORPORATIONS—INJURIES TO REALTY.

Code Civ. Proc. § 392, provides that actions for injuries to real property must be tried in the county in which the subject of the action is situated. Const. art. 12, § 16, provides that a corporation may be sued in the county where the liability arises or the breach occurs, or in the county where it has its principal place of business. Action was brought against a corporation for injuries to real estate in the county where it had its principal place of business, which was other than that in which the land was situated. *Held*, that the provision of the constitution did not affect the Code provision, and hence refusal to grant defendant's motion for a change of venue to the latter county was error.

Commissioners' decision. Department 2. Appeal from the superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by Miller & Lux (a corporation) against the Kern County Land Company (a corporation). From an appeal denying a motion for a change of venue, defendant appeals. Reversed.

Page, McCutchen & Eells, for appellant. Houghton & Houghton and E. B. & Geo. H. Mastick, for respondent.

GRAY, C. It appears from the complaint herein that both the parties to the suit are corporations having their principal places of business in the city and county of San Francisco. The action was brought in said city and county to recover \$25,000 on account of injuries to real estate situated in the county of Kern. It is alleged in the complaint that the plaintiff owns certain lands and an interest in the Buena Vista reservoir, which lands and reservoir are situated in said county of Kern; also that said plaintiff owns an interest in a certain ditch leading out of said reservoir and across said lands; and that defendant, with force and arms, and unlawfully and against the will of plaintiff, placed and maintained a dam in said ditch, thereby preventing the use thereof for the purpose of irrigating plaintiff's said land, to the damage of plaintiff in the said sum of \$25,000. Defendant made demand and motion for a change of venue to Kern county; on the sole ground that, the action being for

damages to real property, the case should be tried in the county where the property was situated. We think this motion should have been granted. Section 392, Code Civ. Proc., provides that "actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as provided in this Code: (1) For the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property." It will be seen that the section is mandatory by its terms, and unless it is controlled by, or is in conflict with, some provision of the constitution, the action "must be tried" in the county where the property is situated. Section 16, art. 12, of the constitution, provides that "a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases." This provision of the constitution does not affect the Code provision quoted. It relates to a different subject, and is not necessarily inconsistent with said Code provision. The constitutional provision does not in express terms refer to actions for injuries to real estate or to actions concerning real estate. We cannot be permitted to infer that it was meant to include injuries to real estate in its provisions because it uses the phrase, "or where the obligation or liability arises"; for to indulge in such an inference would make it include actions for the enforcement of liens on real estate, to quiet title, etc., and render it inconsistent with section 5, art. 6. It cannot be successfully contended that the two sections of the constitution referred to are not in harmony (*Fresno Nat. Bank v. Superior Court of San Joaquin Co.*, 83 Cal. 491, 24 Pac. 157); and the same rule that would harmonize these provisions of the constitution, and give effect to both, would also harmonize the Code provision with the quoted section of the constitution. In *Griffin & Skelly Co. v. Magnolia & Healdsburg Fruit Canning Co.*, 107 Cal. 378, 40 Pac. 495, the court, in speaking of section 16 of article 12 of the constitution, says: "This provision of the constitution is merely permissive to the plaintiff (*Fresno Nat. Bank v. Superior Court of San Joaquin Co.*, 83 Cal. 491, 24 Pac. 157); and the provision therein that the court may 'change the place of trial, as in other cases,' indicates that it is no more controlling upon the action of the court than if it were a mere statutory enactment. Being a provision of the constitution, the legislature cannot deprive the plaintiff of the privilege which it confers, but he has not thereby received any greater privilege than if the same provision

had been made by statute. In either case it is only a rule of procedure, to be acted upon by the court in connection with other rules of procedure."

The very question here involved has been determined in *Drinkhouse v. Waterworks*, 80 Cal. 308, 22 Pac. 252. As shown by the complaint in that action, the defendant had its principal place of business in the city and county of San Francisco, where the action was begun for injury to real estate situated in San Mateo county. The defendant moved to change the venue to San Mateo county, the motion was granted, and this court affirmed the order. It is true that no provision of the constitution is referred to in the opinion or cited in the briefs; but section 392, Code Civ. Proc., is referred to, and it is directly held that under that section the proper place for the trial of an action for injury to real property is in the county where such real property is situated. We should not presume that the court and counsel overlooked a provision of the constitution, but rather that they had it in mind, and saw no inconsistency between it and the Code provision. *Fresno Nat. Bank v. Superior Court of San Joaquin Co.*, *supra*. For the foregoing reasons, we advise that the order be reversed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

133 Cal. 81

HICKEY v. COSCHINA et al. (S. F. 1,769.)
(Supreme Court of California. May 29, 1901.)

CONSTABLES — WRONGFUL ATTACHMENT — DAMAGES—EVIDENCE—DEMAND AND AFFIDAVIT—VALUE OF GOODS—DETENTION.

1. Plaintiff testified that he owned a cigar store, and had been in possession of the goods therein for nearly a month, before defendant constable took possession thereof. A witness testified that at the time the goods were sold to plaintiff they were delivered, and had been in plaintiff's possession ever since. Plaintiff's daughter testified that the goods were moved from the apartments of her husband to those of her father, in the same house, on the night of the sale. Plaintiff thereafter employed his son-in-law about the store to sell the goods bought from him. Held sufficient to show an immediate delivery and an actual and continued change of possession as against defendant constable's levy thereon as the goods of the son-in-law.

2. Where plaintiff's demand and affidavit setting out his title and right to goods wrongfully in the possession of defendant constable were set forth in the verified complaint, and not denied in the answer, and the affidavit and demand were thereafter offered in evidence without objection, there was no error.

3. Where plaintiff testified as to the value of goods wrongfully attached by defendant constable, and offered in evidence without objection an invoice taken a short time prior to the attachment, without contradictory evidence as to the value, a verdict for a less amount is supported by the evidence.

4. In an action to recover possession of personal property, plaintiff may recover damages for the detention thereof.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Action by J. H. Hickey against M. Coschina and others. From an order denying a new trial, defendants appeal. Affirmed.

I. S. Thompson and C. L. Witten, for appellants. Will M. Beggs, for respondent.

COOPER, C. This action was brought to recover of defendant Coschina, as constable, and the other defendants, as sureties on his official bond, a certain stock of cigars, goods, and fixtures in a cigar store at No. 116 West Santa Clara street, in the city of San Jose, or, in case a delivery cannot be had, the value thereof, with damages for the detention. The case was tried with a jury, and a verdict returned for plaintiff fixing the value of the property at \$315, and the damages to plaintiff by reason of the taking at \$140. Judgment was accordingly entered. Defendants made a motion for a new trial, which was denied, and this appeal is from the order denying said motion.

No objection appears to have been made to the instructions given by the court to the jury. The principal question discussed in the case is as to whether the evidence supports the verdict. There is no question here as to the good faith of plaintiff in purchasing the goods, nor as to the payment of the purchase price. The only question is as to whether the sale was accompanied by an immediate delivery, and followed by an actual and continued change of possession. The evidence upon this question was conflicting, but the jurors were the judges of the question of fact, and by their verdict they have determined that there was such immediate delivery and actual and continued change of possession. The court below had the power to, and no doubt did, carefully weigh and consider the evidence for the purpose of determining whether or not the verdict was the correct conclusion from all the testimony in the case. It had the power to set aside the verdict, even though the evidence was conflicting, if convinced that it was unjust, or not in accord with the weight of the evidence. Here we have no such power. The presumptions are all in favor of the correctness of the verdict. To this presumption is added the sanction of the court below in denying the motion for a new trial. We can, therefore, only look to the evidence, and, if the verdict finds substantial support therein, we cannot disturb it. The plaintiff testified: "I took possession of the goods that evening. Some of them were already in my rooms, and the balance was put in my rooms. * * * I was the owner and conducting a cigar store at No. 116 West Santa Clara street, in the city of San Jose, California, on the 6th of April, 1897. I had been engaged in that

business about a month. I commenced fitting up my store on the 1st day of March, 1897, and opened it for business about the 10th day of March, 1897. I continued my business at the same place until the defendant M. Coschina took possession of it on the 6th day of April, 1897." The witness Offield testified: "At the time of the sale the goods were delivered into his possession, and he has had continuous possession of them ever since." Mrs. Offield, the daughter of plaintiff, testified: "The position of the goods was not changed until the evening of the sale. About half were in father's rooms, and half in our rooms, and they were all moved into father's rooms that night." There is other testimony tending to show an immediate delivery and an actual and continued change of possession, but the above is sufficient. It is urged that plaintiff, after the sale, employed Offield, his son-in-law, in and about the cigar store. While this was a suspicious circumstance, and one that should have been carefully weighed by the jury and the court below, yet it was by no means conclusive. It was a circumstance that might be and was explained. The jury had the right to believe the explanation. If the son-in-law, after the sale, had made no delivery, and continued in the sole and exclusive possession, it would amount to a fraud in law. But there is evidence of an actual delivery and a continued change of possession. The employment by plaintiff of the son-in-law who had sold the goods is not prohibited by statute.

It is claimed by appellant that the court erred in admitting in evidence the demand and affidavit of plaintiff setting out his title and right to possession under Code Civ. Proc. § 689. The argument of appellant is that the evidence shows that a copy, and not the original affidavit, was served. It is sufficient to say that no such objection was made when the affidavit was offered in evidence. Further, there was no issue as to the demand and affidavit. The complaint, which is verified, alleged that the demand and affidavit marked "Exhibit A" were served upon defendant Coschina. The answer does not deny the allegation. The verdict fixing the value of the property is supported by the evidence. The plaintiff testified that he took an invoice four days before the goods were attached, and that the stock and fixtures footed up \$482. This evidence is not contradicted. Nor has our attention been called to any other evidence as to the value at the time of the taking. The evidence seems to have been admitted without objection, and we cannot say that it was not competent for all parties to allow the invoice as evidence of value.

There was evidence to support the portion of the verdict awarding plaintiff damages. Plaintiff testified that he was damaged in the sum of \$450 or \$460. No objection appears to have been made to this evidence, nor is

it shown in cross-examination or otherwise how this damage was estimated. But we must take the record as we find it, without regard to what the record under other circumstances might show. In an action to recover the possession of personal property the plaintiff may recover damages for the detention. Code Civ. Proc. § 667; *Kelly v. McKibben*, 54 Cal. 193.

The defendants appear to have allowed a general allegation of damage to go unchallenged in the complaint. They also allowed the plaintiff to make a general statement as to how much he was damaged, without requiring him to state in what manner. The jury seems to have compromised the matter by allowing \$115 damages. We cannot disregard the evidence for the first time in this court, and hold that there is no evidence of damages. The order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

133 Cal. 131

IN RE GREGORY'S ESTATE. (S. F. 2,528.)
(Supreme Court of California. May 29, 1901.)

WILLS—CONTEST—EVIDENCE—DECLARATION
OF DECEASED—HEARSAY.

On application for the probate of an alleged will, which was contested by one named as executor in a former will, on the ground that it was a forgery or procured by undue influence, contestant was permitted to offer testimony and to testify to declarations made by deceased, about the time the alleged will bore date, that the persons charged with procuring such will were hounding her pretty nearly to death, trying to get her to make such a will, and that thereafter and shortly before her death she repeatedly said she had made no will since the one in which contestant was named as executor. *Held*, the reception of such testimony was error, since testimony of declarations of an alleged testator as to menace or duress or as to the fact of his signature is hearsay, and should not be received.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Application by A. C. Freese, public administrator of San Francisco, for probate of the will of Catherine E. Gregory, to which Robert Ash filed a contest. From an order denying a new trial after judgment denying probate, proponent and legatee appeal. Reversed.

J. D. Sullivan and Adams & Adams, for appellants. Robert Ash and Lloyd & Wood, for respondent.

CHIPMAN, C. A. C. Freese, public administrator of the city and county of San Francisco, filed his petition for letters with the will annexed of Catherine E. Gregory, deceased, praying that it be admitted to probate. In the offered will, Charlotte B. Gregory, adopted daughter of deceased, is

named as legatee, and Martha Munson, widow of the late John Munson, as guardian of Charlotte, but no executor was named. It was dated December 10, 1895. Deceased died about August 17, 1898. Robert Ash appeared as contestant, alleging that he is the executor named in the last will of deceased, dated March 22, 1892, and one of the legatees under said will, and guardian of the estate of Charlotte, who is also one of the legatees. As grounds of contest, it is alleged: First. That the will of December 10, 1895, is a forgery, and was written by one W. C. Rippey. Second. That it was not signed by deceased in the presence of any witnesses or acknowledged to have been signed by her. Third. That it "was prepared and procured by one W. C. Rippey, and obtained through the undue influence of the said W. C. Rippey and Martha Munson." The specification alleges that deceased was in ill health, was in the habit of drinking intoxicating liquors to excess periodically, and was of nervous temperament, and susceptible of being easily influenced by persons in her company who would supply her with liquors, a small quantity of which would affect her and render her incompetent to transact or understand important business transactions; that on said 10th day of December, 1895, the said Rippey and Munson were with deceased in her house, and induced her to drink intoxicating liquors, and deceased did drink such liquors, and became under the influence thereof, and while in said intoxicated condition the said Rippey and Munson prepared the alleged will, and induced deceased to sign the same. Fourth. The same specifications are stated in support of the allegation of fraud in the procurement of the will. The allegations of the contest were specifically denied. Certain questions were submitted to a jury, to which they answered, in effect, that the alleged will was not signed by deceased in the presence of the attesting witnesses or at all, nor acknowledged by her to have been signed, nor was it declared by her to be her will. The jury answered that deceased did not sign or acknowledge or declare the will to be her will under undue influence of either Rippey or Munson. The court adjudged that the will offered for probate is not the will of deceased, and denied it probate. The appeal is from the order denying motion for new trial, and is prosecuted by the public administrator and by Charlotte, who appeared by attorney in the action. Mrs. Munson appeared at the hearing by counsel, but she does not appeal.

1. The question of first importance raised by the appellants relates to alleged error in permitting certain declarations of deceased to be given in evidence. Contestant called James Geary as a witness, who testified, against proponent's objection, that he knew Mrs. Munson in 1891; also that he met her three months before her death, at which

time she said: "I think I will die very soon. I have got everything in good shape. My will has been made, and I feel contented if I do die." He stated that he had the child Charlotte at his house in 1891, and while there Mrs. Gregory spoke to him about making her will. "Three months later, after the child went home, she (Mrs. Gregory) told me she had made her will. Q. What did she say about it? A. She told me she had made her will, and that Mr. Ash had consented to take care of the child and be guardian of the child, and that she had made it an object in her will for Mr. Ash to do so, and he had consented. This was late in 1892." He testified that he spoke with her concerning her property and the disposition she had made of it in the event of her death, about three months before her death, and that she told him she had not made any other will. Robert Ash testified in his own behalf. He had been Mrs. Gregory's attorney for several years, and attended to much of her business for which he had been paid. Against proponents' objection, he was asked to, and did, identify a certain promissory note given by Rippey to deceased, and also a certain order for promissory notes purporting to be signed by deceased, and delivered by Rippey to Ash. "Q. State what Mrs. Gregory said about the genuineness of her signature as attached to this paper." The question was objected to, and counsel for contestant stated that he offered it—First, to show the influence that Rippey had over her; and, second, to show that Mrs. Gregory had repudiated the signature which counsel for proponent claimed compared with the signature attached to the will in dispute. By her declarations it was thus sought to establish the forgery of the will by showing what she said as to the genuineness of her signature to a certain paper. He was then asked to state what Rippey was seeking to do "with regard to the making of a will by her, and the disposition of her property. A. It was about two weeks before this will in dispute was made. She said Rippey had been hounding her pretty nearly to death, trying to get her to make a will in favor of the old woman, Mrs. Martha Munson,—annoying her all the time; both Mrs. Munson and Rippey. She said: 'I don't know what he may do. He claims that he can prove and show that the child, Charlotte B. Gregory, was the child of young Jim Fair, and I have got to listen to some of his statements when he comes around in that way. I have been supporting him and taking care of him, and I don't know what he may do.' She further said: 'I will go and get the letters to me on the subject of this note.' And she went and got them, and told me to keep all those papers, and said: 'You may need them some time. Look out now. I don't know what he may do.' She also said that Mr. Rippey had been annoying her and trying to appoint Mrs. Munson as guardian of the

child, and she said: 'He must think I am crazy, to place an old woman as guardian over that little girl.' That is what she said, and she became indignant. At different times subsequent to December 10, 1895, I had conversations with the deceased regarding the matter of her will, up to the time of her death. The night prior to the day before her death (she was sick in bed) she told me she thought she would never get out of the bed; that she was going to die; and she said: 'I want you to carry out my will, and take care of that little girl.' I said: 'I will do it. Don't worry about it.' She told me three or four times then that she wanted me to carry out her will; that everything was in my hands, and she wanted me to see the little girl was taken care of. She told me positively there was no other will in existence." The will referred to by contestant, under which he claimed, had been previously introduced in evidence against proponents' objection, which is the only other error now urged, and will be noticed later.

There was no evidence which in the slightest degree indicated mental incapacity of deceased by reason of periodical drunkenness or any cause whatever. There was evidence that she became intoxicated at times, but no evidence in any way indicating want of mental capacity from that cause, or connecting her drunkenness with the making of any will; and her alleged incapacity to make a will, by reason of her alleged disposition to become periodically intoxicated, was not even submitted to the jury as an issue of fact. The evidence was all addressed to the issues of forgery and undue influence. It requires no argument to show that the declarations of the deceased were prejudicial, if it was error to admit them. That it was error, we entertain no doubt. Appellants cite in support of their objections to the evidence typical cases from very early times to the present. These cases state the rule and the principles upon which it rests. They are: *Strode v. Russel* (1708) 2 Vern. 621; *Jackson v. Kniffen* (1806) 2 Johns. 31, 3 Am. Dec. 390; *Provis v. Reed* (1829) 5 Bing. 435; *Shailier v. Burnstead*, 99 Mass. 112; *Stevens v. Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Robinson v. Brewster*, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265; *Gibson v. Gibson*, 24 Mo. 227; *Jones v. Roberts*, 37 Mo. App. 163; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *In re Palmateer's Will*, 78 Hun. 43, 28 N. Y. Supp. 1062; *Bush v. Bush*, 87 Mo. 480; *Gordon's Case*, 50 N. J. Eq. 397, 26 Atl. 268; *Kennedy v. Upshaw*, 64 Tex. 411; *Boylan v. Meeker*, 28 N. J. Law, 274. And from our own Reports: *In re Calkins' Estate*, 112 Cal. 296, 44 Pac. 577; *In re Kaufman's Estate*, 117 Cal. 288, 49 Pac. 192; *In re James' Estate*, 124 Cal. 653, 57 Pac. 578, 1008. To which may be added *People v. Rodley*, 63 Pac. 351. The answer made to these cases is that this "whole line of authorities refers to cases where a deed,

bond, or will has been in fact executed, and its execution proved." It is claimed that the paper filed as a will by proponent "was never established even by alleged attesting witnesses, or either of them. It was claimed to be a forgery. Its execution was not established, and the jury pronounced it a forgery." Contestants rely upon *Throckmorton v. Holt*, 12 App. D. C. 552, and cases there cited; also *Johnson v. Brown*, 51 Tex. 65; *Hoppe v. Byers*, 60 Md. 381; *Colvin v. Warford*, 20 Md. 367; *Neel v. Potter*, 40 Pa. 483; *Boylan v. Meeker*, supra; *Turner v. Hand*, 3 Wall. Jr. 88, Fed. Cas. No. 14,257; and sections 1800, 1850, Code Civ. Proc. *Throckmorton v. Holt*, on which respondent relies as a leading case, we are informed was reversed by the United States supreme court on appeal. 21 Sup. Ct. 474, 45 L. Ed. —. It is true that in some of the cases cited by appellants the question arose where the fact was that the will had been duly executed and proved by subscribing witnesses, but we cannot say that this fact was regarded as essential to the operation of the rule. We are unable to see why this should be an invariable test by which the rule is to be applied. The danger in admitting declarations would be equally great in both cases. Where the very question under examination is one of execution, how could it be said that the execution had been proved? Such a situation might exist where the proceeding is to revoke a will that had been proved. Code Civ. Proc. § 1327. But where, as in the present case, the initiatory proceedings are to determine the question of execution or no execution, there could be no such thing as an existing duly executed and proved will to overthrow. The very offer to prove the will is arrested by the contest. The Code of Civil Procedure (section 1312) provides that in cases of contested wills "the contestant is plaintiff and the petitioner is defendant." For the purposes of the contest there are no issues before the jury, except such as are presented by the contestant, and evidence on no other issues can be submitted to the jury. "It is necessary, before the court can admit a will to probate, to require proof of all the acts requisite to constitute the execution of a valid will; but the proof of the acts, as to which the contest is not addressed, will be heard and passed upon by the court alone, and is not to be submitted to or passed upon by the jury" (In re *Cartery's Estate*, 56 Cal. 470); but, so far as contested issues are concerned, the burden of proof is on the contestant. It devolves on him to allege and prove the facts on which he relies to prevent probate of the will. His evidence is first called for and first submitted, and not until he rests is the proponent called upon to submit any evidence. As to matters or acts necessary to a valid will not put in issue by the contest the contestant has no voice. It is with the court to require the proofs from the proponent. In re *Gharky's*

Estate, 57 Cal. 274; In re *Dalrymple's Estate*, 67 Cal. 444, 7 Pac. 906; In re *Burrell's Estate*, 77 Cal. 479, 19 Pac. 880. Why should contestant be permitted to attack the will by declarations which would not be admissible in a proceeding to revoke where the will has been proved? We can perceive no good reason. The petition states, among other things, "that said deceased left a will * * * [describing it and offering to produce it] which your petitioner believes, and therefore alleges, to be the last will and testament of said deceased," etc. It cannot be that the door to declarations of the deceased is thrown wide open, and that a contestant is at liberty to appropriate indiscriminately whatever the deceased may have said in her lifetime in support of the contest, simply because the execution of the will has not been proved; that contestant is permitted to prove by declarations what perhaps he could prove in no other way, solely because as yet the will has not been proved; and this, too, where the orderly course of the proceeding prescribed by the statute places proponent in a position where he can submit no proofs until after the contestant has rested. We cannot believe that the rule governing the admissibility of declarations can depend upon or is controlled by the fact that the proposed will has been already proved or admitted to have been executed by the deceased. There may be different and greater reason in the one case than the other, but the principle upon which declarations are excluded as hearsay applies in both cases. The declarations admitted in this case do not go to the question of mental capacity at all. They go directly to the issue of forgery and undue influence and fraud, and to the independent, substantive fact that deceased did not execute the will in question, by showing that she said in her lifetime she made no will except that of March 22, 1892. In short, contestant was permitted to prove declarations of the deceased which went to the principal issues in the contest, and did not go, nor were they intended to go, to mental capacity or the state of her mind in any perceptible degree. It was said in *Re Calkins' Estate*, supra: "Where a will is contested on the ground of undue influence or other like cause, not drawing into question the mental capacity of the testatrix at the time of its execution, neither her prior nor subsequent declarations are admissible to show either that the influence was exercised or that it affected her actions. To the extent that they purported to be declarations of the acts of others or her own acts, they were but matters of hearsay, merely, whose truth rested in the veracity of the utterer, and upon which there was no opportunity for cross-examination or explanation by the party who uttered them, and were not entitled to any weight by the jury, and cannot be considered for the purpose of sustaining the verdict. The court should not have permitted evi-

dence to go to the jury of any declarations of the testatrix regarding the statements or acts of those by whose influence it is alleged that she was induced to make the will." These remarks apply equally to the issue of forgery. It was said in *Re James' Estate*, 124 Cal. 653, 57 Pac. 578, 1008, that in cases upon contest of probate of wills, where contestants had claimed that the testator never signed the instrument, or that he signed it under duress or menace, and like cases, "it has always been held that the declarations of the testator as to menace or duress, or as to the fact of his signature, are hearsay, and cannot be received." The declarations with which we are dealing must have influenced the jury in its conclusions as to the issue of forgery, and this would be sufficient to make a reversal necessary, although the jury found in favor of proponents on the issue of undue influence.

2. The objection to the introduction of the Ash will on the ground that no proof was offered that it was executed by Mrs. Gregory or witnessed by anybody need not be considered. We do not think the objection was sufficiently specific. We cannot consider an objection made in general terms, without some specification of the point of incompetency, if the evidence is admissible for any purpose. *Thompson v. Thornton*, 50 Cal. 142; *Brumley v. Flint*, 87 Cal. 471, 25 Pac. 683; *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271. It is not likely the alleged error will be repeated. It is advised that the order be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

6 Cal. Unrep. 687

LEIBBRANDT v. SORG. (S. F. 2,241.)

(Supreme Court of California. May 29, 1901.)

BREACH OF MARRIAGE PROMISE—EVIDENCE
—ADMISSIBILITY—PREJUDICIAL ERROR—DAMAGES.

1. Code Civ. Proc. § 1845, provides that a witness can testify to those facts only which he knows of his own knowledge. Held that, in an action for breach of marriage promise, the admission of plaintiff's declarations to third parties, who were not invited to attend the wedding, and before any wedding day had been set, that plaintiff and defendant intended to marry, constituted prejudicial error.

2. The fact that there was competent evidence to prove a contract of marriage in an action for breach of promise did not render the admission of declarations of plaintiff to third parties that plaintiff and defendant intended to marry harmless, where the court stated in the presence of the jury that such evidence was competent.

3. Where, in an action for breach of promise, the court charged that, if plaintiff and defendant entered into an agreement to marry, plaintiff was entitled to damages if defendant wrongfully violated the agreement, a further charge that the shock and injury to plaintiff's

affections occasioned by defendant "having violated his promise" was a proper element of damages was not misleading.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Bertha Leibbrandt against Jean Sorg. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Jackson Hatch and E. M. Rosenthal, for appellant. Sargent & Wyatt, for respondent.

COOPER, C. Plaintiff recovered judgment for \$4,500 damages for breach of promise of marriage. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order.

Plaintiff testified fully as to all the facts and circumstances connected with the alleged contract of marriage. Her counsel then asked her this question: "Did you ever tell anybody about your contemplated marriage with Sorg?" Defendant objected to the question as immaterial, incompetent, and irrelevant, and the objection was overruled. The judge at the time of the ruling remarked that the question would be allowed, not for the purpose of proving a promise of marriage, but to show humiliation on the part of plaintiff. The witness then answered that she said to Mrs. Barkley: "Mrs. Barkley, I am going to tell you the truth. I am going to get married, and I am going to marry a rich man, and will not have to work so hard any more." The witness further said that she thought she told Mrs. Barkley that the man's name was Sorg. The plaintiff's attorney afterwards called Mrs. Barkley, who testified that she had a conversation with plaintiff in Santa Cruz about the last of August, 1898, in which plaintiff spoke about getting married. Then this question was asked: "Just relate what was said at that time." To this question the defendant objected upon the ground that it was incompetent, and that declarations made by plaintiff are inadmissible to show a contract of marriage on the part of defendant. The court overruled the objection, to which ruling defendant excepted, and the witness said: "No, I cannot tell." The plaintiff's counsel then asked the following question: "Did Mrs. Leibbrandt at that time say to you that she was to marry Mr. Sorg?" This question was again objected to, the objection overruled, and the witness answered: "Yes, sir." The court did not limit the evidence of Mrs. Barkley in any manner. On the contrary, the objection went directly to the point that the declarations of plaintiff are incompetent to show a contract of marriage on the part of the defendant. The testimony was hearsay and incompetent, and the ruling of the court clearly erroneous. It is provided in the Code of Civil Procedure (section 1845): "A witness can testify of those facts only which he knows of his own knowledge; that is

which are derived from his own perceptions, except in those few cases in which his opinions or inferences or the declarations of others are admissible." This is not one of those few cases. We might search the text-books and decisions in vain for the purpose of finding any authority for the admission of the declarations of a party to a contract made to third parties in his own favor and in his own interest for the purpose of proving such contract. It is said in 2 Rice, Ev. p. 863, in speaking of evidence as to breach of promise: "The conduct of the defendant may be evidence of a promise by him in favor of a plaintiff, because the conduct or declarations of a party are, upon general principles, competent evidence against him; but the conduct or declarations of a party are not generally evidence in his favor. And there seems to be nothing in the nature of a contract of marriage which should distinguish it from other contracts in this respect."

* * * The acts of the plaintiff, until they are communicated to the defendant, are not binding upon the plaintiff as constituting a contract. Why should they be evidence for the plaintiff of any part of a contract to bind the defendant?" It was said by the supreme court of Michigan in discussing this kind of evidence in *McPherson v. Ryan*, 59 Mich. 39, 26 N. W. 321: "And every reason that applies to the exclusion of this kind of testimony in other cases forbids its further use in actions of this nature. The plaintiff, as courts and juries must ever be constituted, has certainly advantage enough of the defendant, without giving her the opportunity of fabricating by her acts and declarations, without his consent or knowledge, evidence to make a case against him. It would place almost any man at the mercy of an evil-disposed and designing woman. An adventurer could come into court and swear to a promise of marriage, and then bring others of like ilk, her friends and intimates, to sustain her with testimony of the stories she had told them in furtherance of her plan to secure damages. Where the plaintiff has the equal right with the defendant to place fully before the jury the story of her wrongs, aided, as she will ever be, by the sympathy always accorded to both the weakness and the beauty of her sex,—a sympathy which the most rigid administration of justice cannot entirely prevent,—right and equity demand that she shall no longer have the aid which the law refuses in all other cases." The question of the admissibility of such evidence has been very fully discussed by the supreme court of Oregon in *Osmun v. Winters*, 25 Or. 260, 35 Pac. 250, and in the opinion it is said: "And there was no reason for allowing her to use her bare declarations, made without the knowledge or consent of the defendant, to support her case. Every reason which exists for the exclusion of such evidence in other cases forbids with equal force its use in a case of this nature." In

Russell v. Cowles, 81 Mass. 582, it was held that such evidence was not admissible, and in the opinion this language is used: "And there seems to be nothing in the nature of the contract of marriage which should distinguish it from other contracts in this respect." To the same effect are *Cates v. McKinney*, 48 Ind. 563, 17 Am. Rep. 768; *Graham v. Martin*, 64 Ind. 567; *Walmsley v. Robinson*, 63 Ill. 41; *Dunlap v. Clark*, 25 Ill. App. 575; 2 Pars. Cont. (8th Ed.) 62.

Our attention is called to the case of *Reed v. Clark*, 47 Cal. 199, in which it was held that, for the purpose of enhancing damages, the plaintiff was properly allowed to prove that within a few days after the proposal and acceptance the plaintiff announced her engagement to a few ladies with whom she was intimate, and whom she invited to attend the wedding. No authority is cited in the opinion, and the evidence was evidently held admissible upon the theory, as announced in some cases, that plaintiff, by way of damages, may prove that she made "preparations for the wedding." We are not inclined to extend the authority of that case beyond the facts therein appearing. The trend of modern decisions is that evidence of preparations for the wedding by plaintiff without the knowledge of defendant is not admissible. *Osmun v. Winters*, supra, and cases cited. The facts of this case do not come within the rule in *Reed v. Clark*. The witness Mrs. Barkley was not invited to the wedding. No wedding day was set or even talked of. She was permitted to testify to the bald declaration, in answer to a leading question, that the plaintiff told her she was to marry the defendant. The plaintiff was permitted to testify that she told Mrs. Barkley that she was going to marry defendant. Mrs. Barkley had not been invited to any wedding, and the conversation was not in the course of preparations for the wedding. We cannot say how much effect this improper testimony had upon the minds of the jurors. It will not be presumed that the jury disregarded it. In fact, the presumption is that the jurors relied upon it, in view of the fact that the judge, in their presence and hearing, held it to be competent. The fact that there was other competent evidence tending to prove the contract of marriage does not show that error was not prejudicial. *Silveira v. Iversen*, 128 Cal. 188, 60 Pac. 687. As the record contains the improper testimony, as herein stated, it becomes unnecessary to discuss the question as to the sufficiency of the evidence to justify the verdict.

The court did not err in giving the instruction numbered 12 to the jury. The shock and injury to plaintiff's affections therein spoken of as an element of damages by "defendant having violated his promise to marry" could not have misled the jury. The sentence had reference to the preceding part of the instruction, to the effect that if the jury should find from the evidence "that

plaintiff and defendant entered into an agreement to marry, one or the other, and that said defendant wrongfully broke and violated said agreement, and the plaintiff is entitled to damages therefor," then in assessing such damages the rule is given. The judgment and order should be reversed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

HENSHAW, J. I concur in the foregoing opinion and judgment. Such evidence is never admissible to prove the contract to marry. But, after competent proof of the contract, I think the evidence clearly admissible for the limited purpose of showing damage by reason of the humiliation following the breach of contract. A woman whose engagement is known only to herself and recreant lover will not, it may be assumed, suffer for his faithlessness quite so many and so keen pangs as the woman who has made announcement of her engagement to her circle of friends. Therefore I think the ruling in *Reed v. Clark* is correct on principle, without supporting authority.

133 Cal. 78

ANDRUS v. SMITH. (S. F. 1,990.)

(Supreme Court of California. May 29, 1901.)

APPEAL — FINDINGS — EVIDENCE — ADVERSE POSSESSION — PLEADING — COMPLAINT — AMENDMENT.

1. A finding supported by substantial evidence will not be disturbed on appeal.

2. Code Civ. Proc. § 323, provides that, for the purpose of constituting adverse possession by any person claiming title founded on a written instrument, land is deemed to have been possessed and occupied where it has been usually cultivated or improved; where it has been protected by a substantial inclosure; where, though not inclosed, it has been used for pasturage, husbandry, or the ordinary use of the occupants. In 1885 a party in possession of certain land deeded the same to plaintiff's testator, the deed being recorded, and the grantee took possession under the deed. Grantee ever since paid the taxes, and there was evidence that he piled lumber on the land, kept up the fence most of the time, but at times it was destroyed by children, but was up at the time of the grantee's death, in 1895; that he planted potatoes and permitted a tenant to pasture a cow on the land during one season. *Held*, that a finding that such testator ever since 1885, and up to 1895, had been in exclusive, open, and notorious occupancy and possession of the land was not erroneous.

3. In an action by an administratrix to quiet title to land, it was not error for the court to permit plaintiff to amend her complaint after the cause was tried and submitted, but before findings had been filed or judgment given; the submission being set aside, and defendant allowed to answer the amended complaint and to introduce further evidence.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; G. P. Hall, Judge.

Action by Mabel B. Andrus, as administratrix of the estate of Washburne R. Andrus, deceased, against Sarah M. Smith, as administratrix of the estate of Stirling A. Hopkins, deceased. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

C. W. Cross, for appellant. W. J. Robinson and Robinson & Miller, for respondent.

COOPER, C. The action was brought for the purpose of quieting plaintiff's title to the lots described in the complaint, situated in the city of Alameda. The plaintiff relied on title by adverse possession. The court found that plaintiff's testate "ever since the 16th day of April A. D. 1885, and up to the 6th day of June A. D. 1895, * * * has been and was in the exclusive, open, and notorious occupancy and possession of" the lands described in the complaint. Defendant claims that this finding is not supported by the evidence, for the reason that the evidence does not show the possession to have been adverse and continuous for five years. This is the only material point in the case. We think the evidence is sufficient to support the finding. The evidence was, to some extent, conflicting, but the judge of the court below heard it as it fell from the lips of the witnesses. He observed their conduct and manner while testifying, and was therefore much better able to pass upon their credibility and arrive at the truth than we can possibly be from the written record. All presumptions here are in favor of the finding, and we cannot, under the well-settled rule, disturb it, if there is any substantial evidence to support it. The evidence shows that on April 8, 1885, one Rachael Frazier was in the peaceable and undisputed possession of the lots, and had them fenced; that on said date she executed to W. R. Andrus, plaintiff's testate, a deed of said premises, which deed was acknowledged and recorded on April 16, 1885; that the said Andrus went into possession of the lots under the deed. It was a grant, bargain, and sale deed, and described the lots in contest here, and no other property. The title of plaintiff's testate was therefore founded upon a written instrument, and in such case land is deemed to have been possessed and occupied: "(1) Where it has been usually cultivated or improved. (2) Where it has been protected by a substantial inclosure. (3) Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant." Code Civ. Proc. § 323. The entry, therefore, by Andrus, under a deed purporting to convey the title, made by one in possession of the property, is a significant circumstance tending to show a claim adverse to all the world. As said in *Unger v. Moonney*, 63 Cal. 593, 49 Am. Rep. 104: "This is strong evidence of an ouster or disseisin. It bears the appearance of a declaration by the

grantee that his entry under the deed is for himself exclusively and not for another, that he enters in his own exclusive right."

There is no conflict here as to the deed and entry thereunder. The undisputed evidence shows that continuously after the entry under the deed the grantee paid all the taxes of every kind upon the lots. There was evidence that the plaintiff's testate used the land, piled lumber upon it, kept up the fence surrounding it, built a cesspool thereon, employed a carpenter, to keep the fence in repair; that the fence was kept up the most of the time, but at times was destroyed by the schoolboys pulling off the pickets or breaking the boards, but was up at the time of Andrus' death; that a tenant of Andrus kept a cow on the land while inclosed. In the season of 1886 Andrus had the land plowed and planted in potatoes. He had a cow shed built on the property, for holding feed and for storage. The witness Waltz testified that he had known the property since 1868, and that Mrs. Frazier lived there until Andrus bought the place. The witness further said: "My orders from Mrs. Andrus were to keep the fence in good order, and whenever I saw it out of repair I would go and fix it. During those times that I have testified that the boards were taken off the fence, they did not remain off any considerable length of time. My place was right in the next block. As a matter of fact, this fence remained in substantial repair until Mr. Andrus' death." Andrus died in June, 1895. The fact that Andrus held possession for over 10 years, and paid all the taxes upon the land, is evidence of his claim of right. The fact that the fence was at times torn down and out of repair does not, of itself, show that the possession was not continuous. The land was used for the ordinary purposes of the occupant. It was said by Judge Field in *Coryell v. Cain*, 16 Cal. 573: "By 'actual possession' is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property." It has been held that, where the property is in some way subjected to the will and control of the claimant, an inclosure is not always necessary. *Hicks v. Coleman*, 25 Cal. 132, 85 Am. Dec. 103; *McCreery v. Everding*, 44 Cal. 252; *Sheldon v. Mull*, 67 Cal. 300, 7 Pac. 710. In case of grazing land in a grazing country, herding sheep upon it would be "an appropriate use, according to the particular locality and quality of the property." *Webber v. Clarke*, 74 Cal. 15, 15 Pac. 431. And where a party enters under color of title, and has actual possession of a part of the whole tract, he has constructive possession of the whole. *Webber v. Clarke*, 74 Cal. 15, 15 Pac. 431, and cases cited.

The court did not err in allowing plaintiff to amend her complaint after the cause was

tried and submitted, but before findings had been filed or judgment given. The submission was set aside, and defendant allowed to answer the amended complaint and to introduce further evidence. This was the correct practice, and was in furtherance of justice, and for the purpose of having the case disposed of upon its merits. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

134 Cal. 603

HAMILTON v. HUBBARD. (Sac. 749.)
(Supreme Court of California. May 29, 1901.)
DEEDS—OPERATION—HUSBAND AND WIFE—
SEPARATE PROPERTY.

1. A deed is not merely evidence of a gift or other grant, but is the gift or grant itself, and ipso facto operates to transfer the title of the property described to the grantee.

2. Under Civ. Code, § 162, providing that all property acquired by the wife after marriage by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property, where a deed conveying realty to the wife recites that it is made in consideration of one dollar, and exchange for a certain lot, which lot was the separate property of her husband, owned by him before marriage, and it appears that such deed was made with the husband's consent, the wife takes such realty as her separate property, the transaction operating as a gift to her.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; G. W. Nicol, Judge.

Action by Moses Hamilton, as administrator of the estate of Frances Hamilton, against Maria S. Hubbard, sued with another. From a judgment in favor of defendant Maria S. Hubbard, plaintiff appeals. Reversed.

A. H. Carpenter, for appellant. Budd & Thompson, for respondent.

SMITH, C. The plaintiff is the administrator of Frances Hamilton, his deceased wife, to whom he was married May 22, 1867, and who died March 29, 1887. He sues as administrator to quiet the title of her estate to lot No. 3, block 56, etc., in the city of Stockton. Both parties deraign title under a deed from one Weber to Frances Hamilton, the deceased, of date July 6, 1867, purporting to convey to her the lot in question,—the plaintiff as her administrator; the defendant under foreclosure of mortgage made to her August 26, 1892, by the plaintiff, in his personal capacity, and commissioner's deed executed to him in pursuance thereof. The court found that the property in question was the community property of Moses Hamilton and his deceased wife. But this finding rests wholly upon the deed of Weber to the latter, the acknowledged source of

title of both parties. Hence the question presented is as to the effect of this deed. If the deceased, Frances, as grantee therein, took the property conveyed as her separate property, the plaintiff, as her administrator, was entitled to recover; otherwise not. Under our law as it stood prior to the amendment of section 164, Civ. Code, March 19, 1889, the presumption was that all property acquired by either spouse during marriage was community property. *Meyer v. Kinzer*, 12 Cal. 247, 37 Am. Dec. 538; 1 Notes on Cal. Rep. 547, 548; Civ. Code, §§ 162-164. Hence, assuming—without deciding—that the amendment of section 164, March 19, 1889, and the subsequent amendments of March 3, 1893, and of March 4, 1897, did not change the rule with reference to deeds made prior to the first amendment, the presumption, in the absence of evidence to the contrary, would be that Frances, the grantee in the deed in question, took the property for the community. But here there is a recital in the deed that it is made “in consideration of one dollar, and exchange for lot No. 13 in block Q west,” etc.; and it appears from the evidence without contradiction that the lot mentioned, “No. 13,” was the separate property of Moses, the husband, owned by him before the marriage. And from a deed made by him 12 days after the deed to his wife, conveying to Weber lot No. 13, and reciting as the consideration “one dollar and exchange for lot 13 in block 56,” etc., it further appears that the deed of Weber to Frances was made with his consent, and in pursuance of his agreement with the grantor. Thus far the nature of the transaction is apparent, and there is no room for presumption. We have, therefore, only to determine the legal effect of the facts thus established; and this, under well-established and familiar principles of the law (assuming for the present that the result would not be affected by the peculiar laws of this state, affecting the marital relations), is sufficiently obvious. A deed of conveyance is not merely evidence of a gift or other grant. It is the gift or grant itself, and ipso facto operates to transfer or convey the title of the property described to the grantee. Civ. Code, §§ 1053, 1146; *Shanahan v. Crampton*, 92 Cal. 11, 13, 28 Pac. 50. Nor—unless, under the peculiar rules of equity, to raise a trust—can its terms or legal effect be contradicted. Ordinarily, indeed, where a conveyance is made to one, and the consideration paid by another, a trust is “presumed” in favor of the latter. Civ. Code, § 853. But this presumption arises only in transactions between “strangers to each other” (1 Perry, Trusts, § 126), and is not indulged where the conveyance is to the “wife or child, or other person, for whom [the person paying the consideration] is under some natural, moral, or legal obligation to provide.” In such cases the presumption is “that the purchase and conveyance were intended to

be an advancement for the nominal purchaser.” 1 Perry, Trusts, § 143; Hill, Trusts, 97, and note. The transaction was, therefore, a gift to Mrs. Hamilton, and, under the express provisions of the Code, her separate property. Civ. Code, § 162.

Nor are there any provisions of the Code or decisions of this court that affect this result otherwise than as confirming it. Under our law a husband may make a deed—whether of his own or community property—to his wife; and in such case it is well settled that, in the absence of evidence of a contrary intent, the deed will vest in her the land conveyed as her separate property. Civ. Code, § 158; *Tillaux v. Tillaux*, 115 Cal. 672, 47 Pac. 691; *Ions v. Harbison*, 112 Cal. 260, 44 Pac. 572; *Carter v. McQuade*, 83 Cal. 274, 23 Pac. 348; *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715, 3 L. R. A. 781; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869. In the last-named case the rule is thus stated by the court: “In the absence of any evidence of intention outside of the deed, it must be taken as evidencing the intention which, upon its face, it imports. * * * To deny it that effect would be to render the deed inoperative and void. *Story v. Marshal*, 24 Tex. 305, 76 Am. Dec. 106. * * * The prima facie presumption arising from a deed of the husband to the wife of community property is that it was intended to change its character from community property to the separate property of the wife,”—citing *Platt, Prop. Rights of Married Women*, § 34. The contrary was held in an early case in this state (*Kohner v. Ashenauer*, 17 Cal. 581), and in the Texas cases there cited; but these decisions must be regarded as overruled by the later authorities. The principle of the cases cited applies equally to the case here. There is no essential distinction between a deed direct from husband to wife and a deed from him to her per interpositam personam. *Michoud v. Girod*, 4 How. 553, 11 L. Ed. 1076; *Smith v. Strahan*, 16 Tex. 321, 76 Am. Dec. 622; *Baldrige v. Scott*, 48 Tex. 189. Possibly, with reference to the latter case, it may be claimed that, where the consideration of the deed to the wife is community property, a presumption may arise—or, rather, might have arisen prior to the amendment of section 164—that the conveyance to the wife was for the use of the community; and it is in fact so held in Texas with regard both to deeds from husband to wife and deeds to her from third parties by his direction, though with regard to the former, as we have seen, the doctrine has been repudiated in this state. But the rule has no application, either in terms or intention, to cases where the consideration is the separate property of the husband. Accordingly, in the Texas cases cited supra it is held that in such cases the presumption is in favor of the wife's right, and that she takes to her own use. And the same distinction is made in *Kohner v. Ashenauer*, 17 Cal. 581,

and in the previous case of *Meyer v. Kinzer*, 12 Cal. 251, 73 Am. Dec. 538. Nor in the numerous decisions in this court in which deeds to the wife by direction of the husband have been held to inure to her use has the contrary ever been ruled. Nor, indeed, is it held in any of those cases that the rule would be otherwise, even in cases where the consideration is community property. In all of them, indeed, some circumstance, in addition to the mere conveyance to the wife by direction of the husband, appeared; as, e. g., declarations of the husband at the time of the deed, or the use in the deed of the expression "as her separate property," or similar expressions. But it cannot be inferred that, in the absence of the particular circumstances shown in these cases, the decisions would have been otherwise. *Peck v. Brummagin*, 31 Cal. 444, 89 Am. Dec. 195; *Higgins v. Higgins*, 46 Cal. 263; *Swain v. Duane*, 48 Cal. 358; *Read v. Rahm*, 65 Cal. 344, 4 Pac. 111; *Jackson v. Torrence*, 83 Cal. 529, 23 Pac. 695. Nor, if it could be so inferred, and the rule assumed that in such cases the presumption should be against the wife, would the case here be affected; for the consideration in this case was not community property, but the separate property of the husband, and with reference to such cases the rule, as we have seen, is different. The case is in principle precisely the same as though the consideration had been paid by the father of the wife, and the deed made to her by his direction. I advise that the judgment and order appealed from be reversed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

133 Cal. 165

PEOPLE v. WILLIAMS. (Cr. 688.)

(Supreme Court of California. May 31, 1901.)

CRIMINAL LAW—APPEAL—EVIDENCE—REVIEW
—RAPE—CONFESSION—INSTRUCTIONS
—SEPARATE OFFENSES.

1. In a criminal prosecution the supreme court is not authorized to set aside a conviction on the ground of insufficiency of evidence, unless there is a total absence of evidence on an essential point.

2. Where defendant, charged with rape, was induced by the brothers of the prosecutrix to go to the office of the city marshal, where he was confronted with the prosecutrix, who there made her statement in his presence, giving considerable details as to the alleged occurrences, and defendant was urged to make a statement, and threatened that the magistrate would be applied to for a warrant, but made no reply, and one of the brothers had said to defendant that if he would make a statement exonerating his sister he would be allowed to leave the city, statements made by the prosecutrix and by others were not admissible as a confession on the ground that defendant's silence implied an admission thereof, he being under restraint, though not arrested, at the

time, and he having been promised immunity from punishment if he spoke, and threatened with prosecution if he defended himself and declared himself innocent.

3. Where, in a prosecution for rape, the prosecutrix testified that she had lived with defendant for four months, and on nearly every day during the time, and sometimes five or six times a day, they had sexual intercourse with each other, an instruction that, if the jury found that defendant had sexual intercourse with the prosecutrix at any time within three years before the finding of the indictment, she being under 16 years of age, they should find him guilty, was erroneous, as it did not limit the prosecution to any particular act.

4. In a prosecution involving sexual intercourse by consent, the state should be compelled to elect at the commencement of the trial on which of several acts it intends to rely for a conviction; and, in the absence of such election, the first evidence which would tend in any degree to prove an offense should be deemed a selection, and, unless that precise offense is proven, defendant is entitled to acquittal.

Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Z. Williams was convicted of rape, and he appeals. Reversed.

J. G. Rossiter and J. W. McKinley, for appellant. Tiley L. Ford, Atty. Gen., and Henry A. Melvin, Dep. Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted upon a charge of rape upon the person of a child aged 13. The appeal is from the judgment and from an order denying a new trial.

As I think the judgment must be reversed, many of the points made will not require consideration. Only those will be noticed, other than the one which necessitates a reversal, which may be necessary for the guidance of the court upon a retrial. The briefs contain a long discussion as to the sufficiency of the evidence. It is not claimed that there was not sufficient evidence if the prosecuting witness was worthy of credence. But her story is said to be improbable, and opposed to testimony more credible. We have so often called the attention of the profession to the fact that the appellate jurisdiction of this court does not extend to matters of fact that we are surprised that learned counsel should spend their time in the presentation of such questions. If there is a total absence of evidence upon some essential matter, and perhaps if the evidence is so slight as not to amount to satisfactory proof within the meaning of section 1835, Code Civ. Proc., a question of law is presented. The credibility of the witnesses is for the jury, or at least for the trial court, which may grant a new trial for insufficiency of the evidence, when we could not interfere. There was an abundance of evidence in the present case, and, if the jury believed the testimony for the prosecution, the verdict was right, so far as this point goes; and on the same condition the court properly re-

fused to grant a new trial. But, even if the court ought to have granted a new trial on that ground, we cannot review its action. I think the testimony of W. S. Lacey and of the brothers of the prosecutrix as to what occurred at the office of Mr. Lacey, who was city marshal, was improperly admitted. The defendant was not then under arrest, but was induced to go with the two brothers to the office of the city marshal, and was there confronted with the prosecutrix. There considerable conversation was had. The child made her statement as to what had occurred, apparently giving considerable detail as to alleged occurrences. The defendant was urged to make a statement, and frequently threatened that the magistrate would be applied to for a warrant. The marshal testified that, after the prosecutrix made her statement, he asked the defendant what he had to say about it. "Don't think he made any reply to what she said at all. He just sat there, and kind of cowed right down." After this testimony he was permitted to recite what the prosecutrix had said. This was admissible, if at all, only upon the theory that the defendant admitted the truth of what was thus said in his presence. So considered, it was clearly a confession, or that is not a confession which simply admits all the facts charged, but stops short of a confession of guilt in the precise words, "I am guilty." The defendant was under restraint. The brothers Tomlinson had told him, as one of them testified, that if he would make a statement exonerating their sister he would be allowed to leave the city; and it appears the magistrate was called in, and, after he had heard the statement, advised him to leave town. What was meant by exonerating their sister, after she had stated what had been done to her, was probably that he should admit the truth of her statement, and perhaps admit that he had used force. Nothing inculpatory was said by the defendant at the time. It made against him only because he was silent. Under such circumstances his silence did not imply an admission; but, granting that it did, the admission was not voluntary. He was under restraint, and had a suggested promise that he could go free if he admitted his guilt, and a threat of prosecution if he defended himself and declared his innocence. The evidence should not have been admitted.

But one other matter requires notice at our hands. That arises from an instruction given by the court to the effect that, if the jury found that defendant had had sexual intercourse with the prosecutrix at any time within three years before the finding of the indictment, she being under 16 years of age, etc., they must find him guilty. The prosecutrix testified that she lived with the defendant for a period of four months, and on nearly every day during that time, and sometimes five or six times a day, they had sexual intercourse with each other. In addition

to this sweeping general assertion, many alleged acts were specifically described with circumstances of time, etc. Each of these acts was a separate offense, and the defendant could be tried for either, and separately for each of them. The jury were not even told that they must all agree that some specifically described act had been performed. A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge as to any one of these separate offenses. Even worse than that was possible. As to every specific offense which there was an attempt to prove, and which could be met by proof, the defendant may have established his defense, and yet upon the general evidence of continuous crime, which, in the nature of things, he could only meet by his personal denial, he may have been convicted. And how could he defend when he was not informed as to what particular offense out of hundreds testified to by the prosecutrix he was to be tried? Such a trial upon a charge so indefinite as to circumstance of time or place, or any particular except by the general designation, would be a judicial farce, if it were not something a great deal worse. That it was wrong was held in the recent case of *People v. Castro* (Cr. No. 704) 65 Pac. 13. The trouble arises from the fact that upon a charge of crime involving sexual intercourse by consent other like offenses may be shown to prove that the parties are lewdly inclined, and that the barriers of modesty have been broken down with reference to each other; not primarily to prove habitual or continuous criminality or other offenses. In this case, as well as in any other, the prosecution must charge a specific offense; and the conviction, if one is had, must depend upon the proof of that offense alone. Other incidents are important only as tending to prove the one specific offense for the alleged commission of which defendant is on trial. But it is said time is not material further than it must appear that the crime was committed before the indictment was found, and within the period of limitations. The statement is not strictly accurate. The proof of an offense on a different date is a variance, but, in general, not a fatal variance. A defendant on trial upon a criminal indictment has a right to demand that the charge against him shall be stated in ordinary and concise language, that he may know upon what specific charge he is to be tried, so that he may prepare his defense. Practically, that is not done in these few anomalous cases where any number of separate offenses may be proven, although the defendant is being tried for the commission of only one. Two cases upon this point are cited, in each of which a rule is declared, but the rules differ. In *People v. Flaherty*, 162 N. Y. 541, 57 N. E. 76, it is said: "The indictment alleges acts constituting but one crime, and,

while the mistake as to the date will not prevent the prosecution from proving the crime charged in the indictment, the indictment will be deemed to cover the offense attempted to be proved nearest in point of time to the date of the indictment." In *State v. Hilberg* (Utah) 61 Pac. 215, it was said, after noticing that the prosecution could have proved any one act committed: "When evidence was introduced tending directly to the proof of one act, and for the purpose of securing a conviction upon it, from that moment that particular act became the act charged." This rule is uncertain, and unfair to the defendant, because of the qualifying clause, "for the purpose of securing a conviction upon it." I think the prosecuting officer, when he commences the trial of a case of this class, where he is at liberty to prove one of several different offenses under the indictment, should at least as early as the commencement of the trial inform the defense upon proof of what specific offense he intends to rely; and, if he does not, the first evidence which would tend in any degree to prove an offense shall be deemed a selection, and, unless that precise offense is proven, the defendant is entitled to an acquittal. Even this would leave a defendant in such cases at a disadvantage, but he ought not to be tried under less favorable circumstances. The judgment and order are reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

(133 Cal. 74)

PEOPLE ex rel. RICHARDSON v. COBB.
(S. F. 2,684.)¹

(Supreme Court of California. May 29, 1901.)
JUSTICES OF THE PEACE—DEATH OF INCUMBENT—APPOINTMENT OF SUCCESSOR—TERM—CONSTITUTIONAL LAW—REPEAL OF STATUTE.

1. Code Civ. Proc. § 111, providing that, on a vacancy in the office of justice of the peace, an eligible person shall be appointed to hold the office for the remainder of the term, was not repealed by County Government Act 1897, § 25, subd. 19, declaring that, in case of a vacancy in any elective county office, the appointee shall hold office for the unexpired term, or until the next general election.

2. Const. art. 4, § 24, provides that a bill shall contain but one subject, which shall be expressed in its title. Act 1897, entitled "County Government Act" (section 58), provides that city justices of the peace and all county officers shall be elected at the gubernatorial elections. *Held*, that the act of 1897 was not unconstitutional, in so far as it applied to city justices, because that subject was not expressed in the title, since city justices constitute part of the county government.

3. Act 1897, entitled "County Government Act" (section 58), providing that city justices of the peace shall be elected at a gubernatorial election, repealed Code Civ. Proc. § 110, limiting the term of office of city justices of the peace to two years.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; A. S. Rhodes, Judge.

Action by the people, on the relation of one Richardson, against C. W. Cobb, to oust defendant from the office of justice of the peace. From a judgment in favor of plaintiff, defendant appeals. Reversed.

C. W. Cobb and E. M. Rea, for appellant. Tiley L. Ford, Atty. Gen., Howell C. Moore, and Owen D. Richardson, for the People.

SMITH, C. The defendant was appointed by the board of supervisors city justice of the city of San Jose, on the death of the incumbent, November 12, 1900, and has since continued in occupation of the office. His predecessor had previously been appointed, on the death of the original incumbent, one Gass; and prior to the appointment of defendant, November 22, 1900, the board had ordered an election to fill the unexpired term to be held November 6th of the same year. At this election the relator was elected to the office, and qualified, but was not permitted to take possession. The suit was brought by the attorney general to oust the defendant from the office, and also to establish the title of the relator. The decision of the court below was against the defendant and in favor of the relator. Judgment was entered accordingly, and the defendant appeals.

It is contended by the appellant that the case is governed by the provisions of section 111 of the Code of Civil Procedure, and not, as held by the lower court, by the provisions of section 25, subd. 19, of the county government act of 1897 (St. 1897, pp. 452, 463), or, if otherwise, that under the latter act there was no vacancy to be filled at the general election of 1900. By the former statute it is expressly provided that, in case of vacancy in "the office of a justice of the peace," an eligible person shall be appointed by the board of supervisors, "to hold office for the remainder of the term"; and this provision has been held to apply to city justices, as well as others. *People v. Sands*, 102 Cal. 16, 36 Pac. 404. By the latter statute the appointment is "for the unexpired term, or until the next general election." It was held by the lower court that the Code provision was repealed by the provision of the latter act cited, that the term of office of the defendant expired at the next general election following his appointment, and consequently that the election of relator at that election was valid. But precisely the same point was involved in the case of *People v. Col* (Cal.) 64 Pac. 477, and has been ruled otherwise, and the question must now be regarded as settled. This is admitted by the attorney general, whose position now is that subdivision 19 of section 25 of the act cited has no application to city justices, whose terms, under the provisions of sections 110, 111, and 103 of the Code of Civil Procedure, are expressly limited to two years, and that section 58 of the county government act, providing for the election of "city justices

¹ Rehearing denied June

of the peace," along with county and township officers, at the gubernatorial elections, and thus lengthening their terms to four years, is, in so far as it applies to city justices, unconstitutional and void; the ground of the objection being that the subject legislated on (namely the tenure of office and election of city justices of the peace) is not expressed or referred to in the title. Const. art. 4, § 24. It seems, therefore, that both parties now agree that the Code provisions were not repealed by the county government act, and this may be assumed to be the law. *Kahn v. Sutro*, 114 Cal. 335, 46 Pac. 87. The case must therefore be governed by the provisions of section 111 of the Code of Civil Procedure; and the sole question to be considered is whether, so far as city justices are concerned, the provisions of section 58 of the county government act, in prolonging the term, are unconstitutional.

This question, we think, must be answered in the negative. It may be admitted that city justices of the peace do not come, or at least do not altogether come, within the category of county or township officers; but it is equally clear that they do not come altogether within that of city officers. They cannot, therefore, strictly speaking, be said to be either county officers or city officers, for that would imply that they were exclusively such; but, without much impropriety, they may be said to be either. *People v. Sands*, 102 Cal. 15, 36 Pac. 404. More accurately speaking, they, as well as county justices, form part of the judicial system of the state; and both come equally within the provisions of section 11, art. 6, of the constitution, which authorizes the legislature to "determine the number of justices of the peace to be elected in townships, incorporated cities and towns or cities and counties," and to fix "by law [their] powers, duties and responsibilities." *Kahn v. Sutro*, 114 Cal. 331, 46 Pac. 87, et seq. Under this provision the legislature has power to fix the terms of justices of the peace generally. *Id.*; *People v. Sands*, 102 Cal. 15, 36 Pac. 404; *Rauer v. Williams*, 118 Cal. 408, 50 Pac. 691; *In re Mitchell*, 120 Cal. 390, 52 Pac. 799. It does not follow, however, from the peculiar nature of their offices, that justices of the peace or other judicial officers do not constitute part of county or city governments. The administration of justice is an essential part of every government, whether local or general; and the subject of their appointment, terms of office, and duties is therefore entirely germane to an act to establish such governments. Otherwise, it would be necessary to regard all provisions as to justices of the peace, whether city or county, as beyond the scope of the title of the act. Nor is the case affected by the fact that the duties of city justices are to be performed in cities. Cities, though for certain purposes distinct political entities, still remain part of the counties in which they are

situated; and many of the functions of county officers—as, e. g., of sheriffs, recorders, assessors, etc.—are exercised within their limits. Pol. Code, § 3901 et seq.; *Kahn v. Sutro*, 114 Cal. 323, 46 Pac. 87, et seq. "An act should not be declared unconstitutional and void unless there is a clear repugnance between the act and the constitution." *University v. Bernard*, 57 Cal. 613. We do not perceive such repugnance in this case, and must therefore hold the provision of the act in question valid. It follows that its effect was to repeal section 110 of the Code of Civil Procedure, and to extend the term to four years, as provided in the act. The judgment should be reversed, and the cause remanded, with directions to enter judgment for the defendant.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to enter judgment for the defendant.

133 Cal. 91

FRAZIER v. MURPHY et al. (S. F. 2,280.)
(Supreme Court of California. May 29, 1901.)

EXECUTORS AND ADMINISTRATORS—CLAIM—PRESENTATION — PARTNERSHIP — DENIAL—ESTOPPEL—EVIDENCE—ADMISSIBILITY.

1. Code Civ. Proc. § 1502, provides that, if an action is pending against the decedent at the time of his death, plaintiff must present his claim against his estate to the executor for allowance or rejection, and that no recovery should be had unless proof be made of such presentation. Defendant died before trial, and his executors were made parties defendant. *Held*, that defendant's objection to the taking of evidence in support of the action on the ground that no claim had been presented to them should be sustained.

2. Plaintiff dealt with H. as H. & Co., and instituted a suit against H. & Co. H. answered, denying the existence of the partnership, and died before trial. H.'s executors were made parties defendant in the place of "H., sued as H. & Co.," and it was proved without objection that H. & Co. was only another name for H. *Held*, that the executors were not estopped from denying the partnership relation.

3. Code Civ. Proc. § 1880, subd. 3, provides that a party in whose behalf an action is prosecuted against an executor or administrator on a claim or demand against the estate of a deceased person cannot be a witness to any matter of fact occurring before the death of the deceased. Plaintiff instituted a suit against H. & Co., and H. answered, denying the existence of the partnership, and died before trial. His executors were made parties defendant, and proved without objection that H. & Co. was only another name for H. *Held*, that the contention that the evidence of plaintiff as to what H. said and did prior to, during, and after plaintiff's engagement to work for H. & Co. was admissible for the purpose of showing that H. was estopped from denying the partnership relation because the claim sued on was against the partnership, and not against the estate, could not be sustained, since the action had been narrowed by the pleadings to one against H.'s executors.

Commissioners' decision. Department 2.
Appeal from superior court, city and county

of San Francisco; William R. Daingerfield, Judge.

Action by F. O. Frazier against S. G. Murphy and another, as executors of the estate of Charles Hanson, deceased. From a judgment in favor of plaintiff, defendants appeal. Reversed.

William H. Jordan, for appellants. Isidore B. Deckweiler, Jos. F. Geary, and Dockweiler & Carter, for respondent.

CHIPMAN, C. Plaintiff brought the action by a verified complaint filed September 8, 1896, against Hanson & Co., an alleged co-partnership, for a balance due for labor performed for said co-partnership from June 1, 1890, until October 1, 1894, under a written contract alleged to have been entered into May 13, 1890, with said Hanson & Co. The cause was tried by a jury, and plaintiff had the verdict, and judgment followed. Defendants appeal from the judgment on bill of exceptions.

The third amended complaint was filed August 23, 1897, and an answer was filed October 27, 1897, denying the alleged co-partnership and the alleged contract. The answer was verified by Charles Hanson. A separate defense was alleged, which need not be noticed. Charles Hanson died March 21, 1898. There appears in the transcript an amendment to the answer, marked "Filed in open court September 16, 1898," reciting: "Now comes Charles Hanson, and by leave of court amends his answer on file herein by striking out subdivision 1 of said answer, and in lieu thereof inserting the following: [Subdivision 1 was a denial that there ever existed such co-partnership.] Defendant alleges that the designation Hanson & Co. is the name under which Charles Hanson, during all the times mentioned in plaintiff's complaint, has transacted his business, and that said designation stands for, always has stood for, means, and always has meant, Charles Hanson, and no other person or persons; and the said Charles Hanson, responding to said designation and name, states that he is the person on whom a copy of the complaint and summons in this action was served, and that he makes answer thereto as and for the said Hanson & Co.; and he expressly denies that the said Hanson & Co., herein named as a defendant, is, or ever was, a co-partnership." Plaintiff's counsel filed in open court a written waiver of verification of the proposed amendment and waiver of notice of motion to file said amendment, adding: "But nothing herein contained shall be deemed or construed to be a consent upon the part of the plaintiff that said amendment may be allowed." No objection to this amendment, nor to the petition and order, next to be noticed, appears in the record, except as it may be inferred from the above, which we do not think can be construed to be an objection. On the same day—September 16th—defendants, Samuel G. Murphy

and H. C. Cheseborough, executors of the last will of Charles Hanson, deceased, applied to the court to be substituted as defendants in the cause, alleging that Hanson died March 21, 1898, and also alleging their appointment as executors, and on the same day the court made an order that said executors "be, and they are hereby, substituted as defendants in the place and stead of Charles Hanson, sued as Hanson & Co." There is in the record no order allowing the amendment to the answer above stated. But, as it recites that it was filed by leave of court, and is found among the pleadings, and as the substitution of the executors, made by order of court the same day, appears to recognize the fact that the amendment was part of the pleadings, we must assume that it was treated as a pleading in the case, notwithstanding it was filed after Hanson's death. Defendants, Murphy and Cheseborough, asked and obtained leave of court to file a supplemental answer to the amended complaint, in which they allege the death of Hanson, and their appointment as executors. A demurrer to the proposed pleading was sustained. It is of no particular consequence that this supplemental answer cannot be considered, as it elsewhere appears that defendants were substituted on petition showing their appointment as executors and the death of Hanson, and these facts were proved at the trial without objection. In this condition of the pleadings the cause went to trial. To perfectly understand the question involved, it should, perhaps, be stated here that upon the coming in of the verdict, plaintiff, to make it conform to the pleadings, caused it to be put in the following form: "F. O. Frazier v. S. G. Murphy and H. C. Cheseborough, as executors of the last will and testament of Charles Hanson, deceased, substituted herein as parties defendants for and in place of Hanson & Co., defendants. We, the jury in the above-entitled cause, find a verdict in favor of plaintiff and against defendants," etc.; and the court entered judgment on the verdict against the executors, "payable in due course of administration."

1. Defendants objected to further proceedings, and to the taking of evidence in support of the action, on the ground that no claim had been presented to or filed with the executors for the indebtedness sued upon. The court overruled the objection, and defendants excepted. At the close of the trial, defendants objected to the verdict, and moved to set it aside on the ground that "it now appears to be a verdict entered against the executors of the estate of Charles Hanson, deceased, whereas the evidence shows there never has been any claim presented to those executors in the matter sued upon." The motion was denied, and defendants excepted. The complaint did not allege any presentation of the claim to the executors, and it was admitted at the trial that the claim sued upon had not been presented to them. Sec-

tion 1500, Code Civ. Proc., provides as follows: "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: * * *." This case is not within the exception. Section 1502 of the same Code provides as follows: "If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator, for allowance or rejection, authenticated as in other cases; and no recovery shall be had in the action unless proof be made of the presentation required." Unless the case is in some way relieved from the operation of the statute, it was error to proceed with the trial after the executors were substituted for the only answering defendant, and it was error to enter a judgment against the executors in the absence of any proof that the claim had been presented to them. It was held in *Derby v. Jackman*, 89 Cal. 1, 26 Pac. 610, that, "although due presentation of the claim be not denied, still it must be proven." And it was held in *Falkner v. Hendy*, 107 Cal. 49, 40 Pac. 21, 386, that, while "proof of the presentation of the claim is not a fact essential to the validity of a judgment where no issue has been made upon that question, * * * the failure to make proof is ground for reversal when objection is made in the trial court, and the exception properly preserved." In some respects the *Hendy* Case is like the one at bar. The trial was in progress when *Hendy* died. His death was suggested, and it was ordered that the case be continued in the names of the executors; and at the first session after his death defendants objected to further proceeding with the trial or the taking of further testimony in the case, upon the ground that the claim upon which the action was based had not been presented for allowance to the executors of deceased. The evidence was being taken before a referee. The court said: "The referee should not have proceeded at all with the case until letters had been issued, and the representatives brought in. * * * Litigants must know, at their peril, of the death of an adversary. * * * Undoubtedly, respondent had the right to present his claim to the representatives of *Hendy* at any time within the period allowed by law for the presentation of claims, but he was not entitled to recover a judgment which will bind the estate of *Hendy* until such presentation had been made."

2. Respondent invokes the doctrine of estoppel, and in support of his contention claims that, as *Hanson & Co.*, as a firm, dealt with plaintiff, neither plaintiff nor *Hanson* could dispute the firm relationship, and that the personal representatives of *Hanson* stand in no better position. Citing *Wise v. Williams*, 72 Cal. 546, 14 Pac. 204; *Yancey v. Morton*, 94 Cal. 558, 29 Pac. 1111. We

cannot see that either the rule, or the reason of the rule, in these cases has any application here. The pleadings on which the parties went to trial showed, and it was proved without objection, that *Hanson & Co.* was only another name for *Charles Hanson*; that *Hanson & Co.* and *Charles Hanson* were one and the same person. When the court ordered the substitution of the executors "in the place and stead of *Charles Hanson*, sued as *Hanson & Co.*," they were not substituted as representatives of any partnership. The court could not make them representatives of a co-partnership, and deal with them as such, for they represented only *Charles Hanson*, deceased. If the action was to proceed on the theory that a partnership existed, the survivors of the partnership alone could close its affairs, and they should have been brought in as defendants, and the executors not made parties at all. If it was not a partnership, but merely another designation for *Charles Hanson*, then it was necessary to substitute his executors after his death, and the court very properly—we suppose on this latter assumption—made the order. In this attitude the case narrowed itself to an action against the executors representing *Charles Hanson*, deceased, and not representing in any sense a partnership. It so resulted, for the verdict was against the executors, and the judgment was against them with direction to pay the same in due course of administration. This was in direct violation of the statute, which required presentation of the claim before any judgment could be entered. Section 1502 "simply means that, when an action is pending against a decedent at the time of his death, the plaintiff therein is not relieved from the duty of presenting for allowance the claim upon which it is based, when the claim is of that character that he would have been required to make such presentation in order to preserve its validity as a claim against the estate if such action had not been brought in the lifetime of the decedent." *Society v. Wackenreuder*, 99 Cal. 503, 34 Pac. 219. Against the objection of defendants that it was in violation of subdivision 3, § 1880, Code Civ. Proc., plaintiff was permitted to testify to what *Charles Hanson* said and did prior to, at the time of, and after plaintiff's engagement to work for *Hanson & Co.*, and after his work had ceased, as well as other facts occurring before the death of the deceased. The trial court held that plaintiff could testify to any facts occurring from the beginning of his employment to the close thereof, which would tend to establish an estoppel against the executors, now the defendants; and that, upon the estoppel being shown to the satisfaction of the jury, the jury could then consider the plaintiff's testimony on the merits, regardless of the Code provision, which declares: "The following persons cannot be witnesses: (3) Parties or assignees of parties to an action or proceed-

ing, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." Code Civ. Proc. subd. 3, § 1880. The estoppel set up by plaintiff was that plaintiff was induced by Charles Hanson to engage with Hanson & Co., believing the latter to be a co-partnership, and that neither Charles Hanson nor his representatives can now be heard to dispute the fact; that the claim sued upon was not against the estate, but was against the partnership; and hence this was not "an action pending against the decedent at the time of his death," and section 1880, Code Civ. Proc., does not apply. If it was merely a question whether Hanson was a member of Hanson & Co., and plaintiff was seeking to reach the assets of the co-partnership of which Hanson had led plaintiff to believe he was a member, Hanson might be estopped from denying the partnership. But that is not the situation here. Plaintiff is endeavoring to reach the property of Hanson's estate in disregard of a positive statute requiring the presentation of the claim. Hanson may not have been entirely ingenuous when he first answered, and denied the partnership, without disclosing the real truth as to Hanson & Co. But the truth was made manifest when it was answered after his death that he was Hanson & Co., and his executors were substituted "for Charles Hanson, sued as Hanson & Co." Nothing then stood in the way but the presentation of the claim to the executors, as in *Falkner v. Hendy* was decided to be essential to recovery against the executors. We can see no reason why it was not done, unless it be that plaintiff feared it might create some impediment in the matter of making the proof under the statute (Code Civ. Proc. § 1880); and, if the theory of counsel was to avoid this statute by invoking the doctrine of estoppel, it only furnishes another reason for the view we have expressed, since the theory involved the violation not only of section 1880, but also sections 1500 and 1502. We see no reason for permitting an estoppel to be proved in violation of section 1880, any more than any other fact in the case. We do not believe the doctrine of estoppel can be invoked where, to give it effect, there must be entire disregard of statute law. Sections 1500 and 1502 admit of no exceptions. *Wise v. Williams*, supra, did not involve these provisions at all. In that case the note and mortgage were presented to the administratrix, and no question of presentation of the claim arose. To prove the estoppel, plaintiff was permitted to show the facts in the very way that the statute (section 1880) says may not be done, and this in order to evade the other statute (sections 1500 and 1502). In other words, one statute was violated in order to create a situation which

would render the other statute inapplicable, or which would permit its violation. We do not believe the statute can be thus evaded. Even if plaintiff could show a state of facts constituting an estoppel in pais, as this was, and could thus qualify himself to testify as to the merits, he would still have confronting him the prohibitive provisions of sections 1500 and 1502. In no view of the matter can we see how the judgment can stand. This conclusion renders it unnecessary to determine whether plaintiff succeeded in proving an estoppel, which defendants, with some reason, contend they failed to do; and it is also unnecessary to pass upon the alleged errors in admitting evidence, to establish the estoppel, as to the conduct and acts and declarations of Hanson long after plaintiff had changed his position by engaging in Hanson's service. These and other questions become immaterial. It is advised that the judgment be reversed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

133 Cal. 114

SANTA CRUZ ROCK-PAVEMENT CO. v. LYONS et al. (S. F. 2,066.)

(Supreme Court of California. May 29, 1901.)

MECHANICS' LIENS — STATUTE — REPEAL BY IMPLICATION — HUSBAND AND WIFE — HUSBAND'S CONTRACT — RATIFICATION — PROPERTY — OWNERSHIP — STATEMENT — SUFFICIENCY.

1. St. 1885, p. 143, provides that any person who, at the request of the reputed owner of any lot in any incorporated city, grades or otherwise improves the same, or the street or sidewalk in front or adjoining it, shall have a lien on the land for the work done and materials furnished; and was amended in 1887 (Code Civ. Proc. § 1191) by extending the lien in favor of any one who should construct any areas or vaults or cellars or rooms under a sidewalk, or make any improvements in connection therewith, at the request of a reputed owner. *Held*, that the contention that the amendment of 1887 repealed the law of 1885 by implication, and that, therefore, after the amendment was declared unconstitutional, there no longer existed any law authorizing a lien for paving and curbing a street, could not be sustained, since a repeal by implication cannot result from an unconstitutional provision in a statute.

2. Where a husband contracted for a street improvement in front of his wife's property, as her ostensible agent, and she had knowledge that he signed the contract, and took no steps to repudiate his authority, the evidence was sufficient to support a finding that the contract was made by the husband on behalf of his wife.

3. Code Civ. Proc. § 1187, provides that a notice for mechanic's lien shall contain the name and the nature of the title of the person who caused the improvement to be made. *Held* that, where there was evidence tending to show that plaintiff was justified in assuming that the property was owned by the husband, the fact that he alleged that the husband was the reputed owner, and that the wife claimed some

interest in the property, will not defeat his right to a lien, though the property belonged to the wife.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; C. J. B. Hebbard, Judge.

Action by the Santa Cruz Rock-Pavement Company against Ellen Lyons and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

William H. Jordan, for appellants. Alex. G. Eells, for respondent.

CHIPMAN, C. Action to enforce a lien for street work claimed under the mechanic's lien law. Plaintiff had judgment, from which defendants appeal on bill of exceptions. This is the second appeal of the case. In the first appeal the judgment for plaintiff was affirmed in department (43 Pac. 599). On rehearing in bank (48 Pac. 1097, 59 Am. St. Rep. 174), the judgment was reversed, on the ground that section 1191, Code Civ. Proc., is unconstitutional, in so far as it attempts to impose a lien on land by virtue of an agreement on the part of one who is merely reputed to be the owner of such land.

1. Appellants claim that the effect of the decision is to leave no law in force creating a lien for the street work. The argument is that, by the amendment of 1887, the section as it read in 1885 was repealed, and, as the court holds it to be unconstitutional as it now reads, there is no longer any lien provided for or remedy given to enforce any lien. Section 1191, as amended in 1887 and as it now reads, is as follows: "Any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalk, or makes any improvements in connection therewith, has a lien upon such lot for his work done and materials furnished." As the section stood in 1885 it read as above, omitting the words in italics.

It is unreasonable to suppose that the legislature intended to take the lien from the person who furnished labor or material where he contracts with the owner of a lot, and yet to give him a lien where he contracts with the reputed owner, who is not the real owner of a lot. Before we should hold that the statute was enacted with any such absurd intention some rule of construction must be pointed out that would compel it. It is altogether reasonable to believe that the legislature intended to retain the lien where the owner makes the contract, and to give also a lien where the reputed owner makes the contract. If the legislature failed in the latter object, it does not necessarily follow that the law, as it previously stood, was repealed. Repeals by implication are not favored, and it is a rule that no repeal by implication can

result from a provision in a subsequent statute, when that provision is itself devoid of constitutional force. *McAllister v. Hamlin*, 83 Cal. 361, 23 Pac. 357; *Orange Co. v. Harris*, 97 Cal. 600, 32 Pac. 594. A still further rule was stated in *People v. Sutter St. Ry. Co.*, 117 Cal. 604, 49 Pac. 736, as follows: "The portions of the amended section, which are copied without change, are not to be considered as repealed, and again re-enacted, but to have been the law all along." Pol. Code, § 325. In a recent case the rules of construction were quite fully stated, and the authorities cited. *People v. Pacific Imp. Co.* (opinion filed Nov. 8, 1900) 62 Pac. 739. It was said on the former appeal: "The owner of real property may, by his acts or conduct, be estopped from questioning the acts of a reputed owner of such property, and may be bound by the acts of such reputed owner; but, in the absence of the elements of an estoppel, he will not be bound by the unauthorized acts of one who is merely reputed to be the owner." 117 Cal. 212, 48 Pac. 1097, 59 Am. St. Rep. 174.

This could not be so if the section as it stood in 1885 was repealed by the amendment of 1887; for, if there is no law making a lien where the owner contracts for the work, nothing a reputed owner could do with the authorization of the owner would create the lien. The reputed owner could not create the lien if the owner could not. But appellants contend that the portion of the decision last above quoted is obiter, and cannot be taken as authority; and it is urged that what was said in *Mack v. Jastro*, 126 Cal. 130, 58 Pac. 372, applies here, namely: "It is not so much a repeal by implication as it is that, the legislature having made a new and complete expression of its will upon the subject, this last expression must prevail, and whatever is excluded therefrom must be ignored." We have examined the case of *Mack v. Jastro*, supra, and the cases cited in the opinion. They are all instances where the rule as to repeals by implication could not by any possibility be applied because the legislative intent was unmistakably shown to be that the later law should supersede the former law, in which case it is true that it is not a question of repeal by implication, but it is a question of enforcing the will of the legislature last expressed on the very same subject. Our mechanic's lien law was first enacted in 1868 (Laws 1867-68, p. 589). Section 9 of that act gave the lien here contended for, and the section was carried into the Code of Civil Procedure upon its adoption in 1872, and became section 1184. It so remained unchanged until 1885 (St. 1885, p. 143), when it became section 1191 of the Code, and was amended by adding the words "or sidewalk" after the word "street." By the act of 1887, four sections of the Code relating to mechanics' liens, including section 1191, were amended, leaving the other sections untouched. There has been no general revision of the

mechanic's lien law since the adoption of the Codes, but changes have been made by amendments and modifications of, and additions to, the various sections. The law deals with the owner of the land in most instances, but in some cases it is provided that the owner and any person having an interest in the land shall be bound where the improvement is made with his knowledge, unless he shall within a certain time give the notice required by statute (section 1192); but at no time has the law been that the owner could not make the contract out of which a lien would arise. We cannot believe that the legislature intended to repeal the law as it has stood for a third of a century, and deprive laborers and material men of a lien heretofore given, and in such entire harmony with the general purpose of the law and of the constitution of the state. No such repeal has been made except it be by implication, and we do not think that any such consequence has resulted from the amendment in question.

2. It is contended that the evidence is insufficient to establish the alleged agency of defendant J. M. Lyons in acting for his co-defendant wife, Ellen Lyons. The court found that the lot in question belonged to Mrs. Lyons as her separate property, but that her husband individually was the reputed owner thereof. The court also found "that, while said James M. Lyons was so the reputed owner of said lot of land, he requested said plaintiff to do the work hereinafter named, and he, both in his own individual behalf, and as the ostensible agent of his wife, Ellen, and in her behalf, though in his own name, entered into a written contract with the plaintiff for the performance of the same," etc. Again it is found "that said defendant Ellen Lyons had full knowledge of said contract, and of the performance of said work, and that she did not within three days after having obtained knowledge thereof, nor at all, give notice that she would not be responsible for the same, by posting notice * * * or at all." As the case was presented on the first appeal, and as first decided, the evidence went in on the theory that the lien would hold if the contract was made by the reputed owner. 43 Pac. 599. The question of agency was not then considered. At the last trial much additional evidence was taken, and particularly to show that the husband was acting as the agent, actual or ostensible, of his wife. Upon this point there is a conflict in the evidence. The testimony of both husband and wife is that the husband acted without any direct authority from his wife. The evidence adduced on behalf of plaintiff is largely circumstantial, although there is some evidence quite directly to the point that the husband had authority from his wife, and the husband testified that he told her he had signed the contract for the work not

long after the work was started, and it is not pretended that she took any steps to disavow his act or to disclaim personal liability for the work. The court held in the former appeal that the notice required to be given by the owner under section 1192 did not apply to a case arising under section 1191, but was limited to cases arising under section 1183. Still the fact that Mrs. Lyons had notice that the work was going on under a contract made by her husband, and made no objection to it, would bear upon the question of agency and estoppel. There is, we think, sufficient evidence to support the finding that the contract was made on behalf of Mrs. Lyons, and by her husband as her agent, ostensible or actual.

3. It is contended that the evidence fails to support the allegation in the notice of lien as to reputed ownership. The statement was: "The said Ellen Lyons had full knowledge of the signing of said contract, and agreed to the same being done, and claims some rights in the property, but at all the times herein mentioned said James M. Lyons was, and now is, reputed to be owner of said lot of land." There is evidence tending to show that plaintiff was justified in assuming that Mr. Lyons was the reputed owner, and plaintiff states, also, that Mrs. Lyons claimed some rights in the property. If plaintiff made any mistake in thus stating the ownership, it was an honest one, and in no sense was it fraudulently made, or made for the purpose of deceiving any person, and the mistake could not prejudice his right to a lien. There was a substantial compliance with the requirements of section 1187. It has been held here that, if the lienholder in good faith "gives the name of the reputed owner, he shall not lose his lien if he shall afterwards ascertain that some other person was the owner." *Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873.

4. Appellants call attention to several alleged errors of law committed by the trial court relating to the admission of evidence offered by plaintiff. We are not informed by the brief of the grounds of objection, further than as they appear in the transcript when the objections were made. We have examined the transcript at the points indicated, and find no ruling that, in our judgment, could have prejudiced defendants' case. The general demurrer to the complaint is urged on the ground principally that there is now no law authorizing the lien. The view already expressed disposes of that question. We advise that the judgment be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

133 Cal. 242

SOUTHERN CALIFORNIA LUMBER CO. v. JONES et al. (L. A. 813.)

(Supreme Court of California. June 14, 1901.)
MECHANICS' LIENS—PAYMENT OF CONTRACT PRICE—RETENTION OF PORTION—AMOUNT OF CONTRACT—STATUTES.

1. Code Civ. Proc. § 1184, relative to mechanics' liens, and providing that no part of the contract price shall, by the terms of any such contract, be payable before commencement of the work, but shall be paid in installments, and that when a price is not so paid the materials furnished shall be deemed to have been furnished at the special instance of the owner, has no application to a case where the contract price is less than \$1,000; and hence where the owner, under such a contract, has paid an amount not yet due to the contractor, he is not liable to material men as on a premature payment.

2. Code Civ. Proc. § 1201, provides that it shall not be competent for the owner and contractor, or either of them, by any terms of their contract or otherwise, to waive, affect, or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and that any term of the contract to such effect shall be null and void. *Held*, that where there was a verbal contract for the construction of a building for less than \$1,000, and the material man gave no notice of his contract with the contractor until after an abandonment of the work by the contractor, when nothing remained in the owner's hands except what was required to complete the building, the statute had no application.

3. That the owner of a building voluntarily paid a hardware bill arising in the course of the construction of a building,—the bill being in excess of the contract price of the building,—did not prejudice a material man furnishing materials to the contractor.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Proceedings for the enforcement of a mechanic's lien by the Southern California Lumber Company against E. W. Jones and another. From a judgment foreclosing the lien, defendants appeal. Reversed.

F. W. Burnett, for appellants. Borden & Carhart, for respondent.

HAYNES, C. This appeal is from a judgment against appellants foreclosing a lien for materials furnished for the construction of a building. C. A. Conant, the contractor, and certain fictitious persons were made defendants, but no judgment was taken against them. Mrs. E. S. Jones is the owner of the lot upon which the house was built, and E. W. Jones is her husband, and acted as her agent. On August 1, 1898, appellants entered into a contract with Conant for the erection of the house, by which Conant agreed to furnish the materials and labor and erect it for the sum of \$837, and plaintiff agreed with Conant to furnish, and did furnish, lumber therefor of the value of \$470.65, of which sum \$389.05 remained unpaid. This lumber was furnished between August 6th and September 15, 1898. The contract between appellants and Conant was in writing, and provided that the contract price should be paid in installments, as follows: "When

lumber is on the lot and frame is up, ready for the roof, \$200; when roof is on and shingled, \$200; when outside is finished, \$200; when building is completed, \$237.00,"—payments to be made on certificate of the architect. On September 16th Conant abandoned the work in an incomplete condition, and work was not resumed for more than 30 days. The court found that prior to September 16th there were paid to Conant three installments, of \$200 each, in accordance with the terms of the contract, and that \$237 remained unpaid, and that it would cost \$89.70 to complete the building. The court also found that on September 27th respondent gave written notice to appellants that it had furnished said lumber, and the value thereof, and, as a conclusion of law, that the amount of the contract price applicable to respondent's lien is \$147.30, and gave judgment for that sum, with an attorney's fee of \$50, and costs.

It was shown, without controversy, that there was paid to Conant on September 16, 1898,—\$150 in addition to the \$600 found by the court to have been paid; but the court ruled that said \$150 was paid prematurely, as it was not due, under the contract, until the building was completed, and should therefore be treated as money in the owner's hands, and applicable to plaintiff's claim. In this ruling the court erred. If Conant had completed the building, he would have been entitled to \$237,—the final payment. It was found that it would require \$89.70 to complete the building. This amount, added to the payment of \$150 claimed to have been prematurely made, exceeds the contract price by \$2.70. In the case of *Denison v. Burrell*, 119 Cal. 180, 182, 51 Pac. 1, it is said: "The contract price being less than one thousand dollars, the provisions of section 1184 of the Code of Civil Procedure relative to the mode and time of payment, and the withholding of a percentage of the contract price, are not applicable. It was permissible for the parties to contract for the payment of the whole amount to the contractor before the commencement of the work, or, as was done in this case, to contract that payment should not be made until the whole building was completed" (citing *Lumber Co. v. Cummings*, 86 Cal. 22, 24 Pac. 814); and it was held that the plaintiff's lien could not be for an amount greater than the sum in defendant's hands, due and unpaid to the contractor under the contract at the time of abandonment.

In the case at bar there was nothing due or unpaid to the contractor at the time he abandoned the work. The check for \$150 left in the hands of the owner \$87 of the contract price, the whole of which was required to complete the building. It is contended, however, that the payment of \$150 was prematurely made, and therefore that sum must be deemed to be still in the hands of the owner, and applicable to the payment

of the plaintiff's claim. But this contention cannot be sustained. The contract price was less than \$1,000, and in such case the requirements of section 1184, Code Civ. Proc., relating to contracts where the amount exceeds \$1,000, do not apply. In that case no part of the contract price is permitted to be paid before the commencement of the work, and at least 25 per cent. of it must be retained for a specified time after completion, and the contract must be recorded. These requirements are for the benefit of third parties who furnish labor or materials. But, where the contract price is less than \$1,000, the contract may be verbal. If written, it need not be recorded, and the whole of the contract price may be paid in advance of the commencement of the work, or upon completion, or in installments, as the parties may agree. In such case the payment of installments is subject to change by the agreement of the owner and contractor, both as to time and amount, as in the case of private contracts relating to other matters. If it were otherwise,—if the provisions as to the time and amount of payments, and the penalty imposed upon the owner for having anticipated payments, were intended to apply to contracts where the price was less than \$1,000,—we may safely assume that the statute would have required them to be in writing and recorded, or, in other words, would have made no distinction based upon the amount of the contract price. Section 1201, Code Civ. Proc., has no application to this case. The contract was not in violation of the statute, and the plaintiff had no lien to be affected. Whether plaintiff would have acquired a lien if it had given notice of its contract with Conant to furnish lumber while any part of the contract price to which the contractor was entitled remained unpaid, need not be considered, as notice was not given until after the abandonment of the work, when nothing remained in the owner's hand, except what was required to complete the building. The payment by the defendant of the hardware bill was voluntary, and, being in excess of the contract price of the building, did not prejudice the plaintiff. The judgment should be reversed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

133 Cal. 214

LOFTUS v. DEHAIL et al. (L. A. 892.)

(Supreme Court of California. June 8, 1901.)

NEGLIGENCE — INJURIES — UNGUARDED CELLAR — PLACE ATTRACTIVE TO CHILDREN — ABILITY TO APPRECIATE DANGER—PROXIMATE CAUSE.

1. Where defendants owned an unfenced city lot, from which a house had been removed, leaving a cellar 2 to 6 feet deep, 30 and 50

feet, respectively, from two adjacent streets, and plaintiff, who was a child of 7, was injured by being pushed into the cellar while playing near, it was not peculiarly attractive to children and necessarily dangerous, so as to render defendants liable for plaintiff's injuries.

2. Where plaintiff, who was a child 7 years old, was injured by being pushed into a cellar, and testified that she knew it would hurt her if she jumped in, a finding that she was of such tender years as not to appreciate the danger was not supported by the evidence.

3. Where plaintiff was injured by being pushed into an unguarded cellar by her 4 year old brother, his act was the proximate cause of the injury, and not the owner's failure to fence, and hence the owner was not liable therefor.

Department 2. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Action by Bessie May Loftus, by Mollie Loftus, her guardian ad litem, against Isaac F. Dehail and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Barnwell & Newby and Knight & Jones, for appellants. J. L. Murphy, for respondent.

HENSHAW, J. This action was brought to recover damages for injuries sustained by the plaintiff, an infant 7 years of age, from falling into a cellar of defendants situated on a vacant lot in the city of Los Angeles. The cause was tried without a jury, and upon the findings the court gave judgment in favor of plaintiff. Defendants moved for judgment upon the findings. Their motion was denied. So, also, was their motion for a new trial. From the judgment and from these orders of the court defendants appeal.

From the undisputed facts and from the findings it appears that the defendants were the owners of a lot on the corner of Second and San Pedro streets, in a populous and thickly-settled quarter of the city of Los Angeles. Upon the lot had stood a house, which had been removed, leaving upon the premises a cellar, partially filled with bricks, cans, and other debris, varying in depth from 2.3 feet to 6.3 feet, having a length of about 17 feet and a width of about 14 feet. The lot was upon a level with the sidewalk, was open and unfenced on the San Pedro street front, and partially open on the Second street front. The cellar was located at a distance of from 22 to 30 feet from Second street, and about 56 feet from San Pedro street. For about three weeks prior to the accident the premises had remained in this open and unguarded condition. The plaintiff lived in the neighborhood of the lot, and upon the day of the accident was engaged, with other children, in playing around the cellar, and while so engaged was, by her little brother, Teddy Loftus, aged 4 years, pushed into the cellar, falling a distance of about 6 feet, sustaining the injuries complained of. It is further found that at the time of the injury the plaintiff was of such

tender years and immature judgment as to be incapable of knowing and comprehending the danger to which she was exposed in playing about the excavation, and that her little brother, who, in a fit of anger, had pushed her into the cellar, was also incapable of knowing and comprehending the danger to which he exposed his sister in so pushing her into the excavation. The parents are found to have been guilty of no contributory negligence in the matter. The defendants are found to have been guilty of negligence in failing properly to guard and inclose the cellar. A judgment of \$350 was awarded plaintiff.

It is sought by respondent to bring this cause of action within the rule of the Turntable Cases (*Barrett v. Railroad Co.*, 91 Cal. 296, 27 Pac. 666); but it is to be remembered, in the first place, that the Turntable Cases are themselves exceptions to the general rule. It is true that in the discussion of those cases the attractiveness of the object to children is considered and discussed, but it by no means follows that, because a thing is or may be attractive to children, the owner must guard and protect it against their trespasses upon and unlawful dealings with it. The gist of the decision in the Turntable Cases is pointed out by Chief Justice Beatty in his concurring opinion in *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598. It lies not alone in the fact that it was a danger especially created by the act of the owner, but it was a danger which could be removed, without destroying or impairing the usefulness of the machine, by a simple lock. To what was there said it may be added that the turntable might well be considered peculiarly attractive to children,—a movable machine in the nature of a merry-go-round; but at the same time, the children being ignorant of the dangers and injury to which they were exposed in revolving it, the unprotected machine itself became a trap for them; and these cases may therefore be properly classed with those which hold the owner responsible for that reason. Such was the case of *Malloy v. Society* (Cal.) 21 Pac. 525. That action came before this court upon the demurrer to the sufficiency of the complaint. It is true that damages were there sought for the death of an infant, occasioned by falling into a cesspool; but the complaint would have been sufficient to have warranted a recovery had an adult been killed under the same circumstances; for the complaint showed a veritable trap,—a cesspool open and unguarded, yet with its surface covered with a layer of deceptive earth to a level with the adjacent land. Into such a trap any one, adult or child, might have walked. But it by no means follows, as has been said, that anything or everything which a jury may find or a court may determine to be attractive as a playground or plaything for children casts a responsibility of guard and care upon the own-

er of that thing. Moving street cars and moving vehicles upon the street are irresistibly attractive to many children, and thousands daily imperil their lives by climbing on and off of them while in motion. Venture-some boys and even girls make playgrounds of unfinished buildings, climb perilous heights, and scamper over insecure boards and rafters. If an owner became responsible merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight. The case at bar, therefore, is not referable to that class of cases, like the Turntable Cases, where the owner is held responsible for negligently exposing dangerous machinery attractive to children. And no more can it be referred to the other class of cases, likewise forming an exception to the general rule, which permit a recovery where a dangerous excavation has been constructed and negligently maintained so near a public highway that one lawfully using the highway has been injured thereby; for here it appears not only that no one in the use of the highway was injured, but that no one in use of the highway could have been injured, since the excavation was some 30 feet from one street, and more than 50 feet from the other.

Nor, finally, is the case referable to the last exception to the general rule, where one upon the premises of another by invitation or license is injured by their neglect and unsafe condition. The children were there neither by license nor by permission. The only evidence at all upon this question is that by I. F. Dehail, one of the defendants, to the effect that he saw children playing upon the lot upon one occasion, and warned them off, because they were breaking his bricks and wheelbarrow. No further elaboration upon this question is necessary. It has recently received the detailed consideration of this court in *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598.

But there is still another reason why in this particular case the findings, and consequently the judgment, cannot be upheld. Where such an action as this lies at all, it can be successful only upon a showing that the infant was of such tender years as not to appreciate the danger to which it was exposed. Such was the finding of the court in this case, but the evidence utterly fails to support it. The child herself shows by her testimony an appreciation of the danger, and says that she knew that it would hurt her to jump from a high point into the cellar. In fact, she did not jump at all. She was pushed in, in a fit of temper, by her younger brother. His act was the proximate cause of the injury; and while he, because of his tender years, would not be legally responsible therefor, the situation of the injured child, who shows that she appreciated the danger to which she was exposed, was no different from what would

have been the position of an adult who, under similar circumstances, had been thrust over the embankment. In this respect, also, is the case to be distinguished from the Turntable Cases, where several children are engaged in moving the turntable, all being equally ignorant of their danger, and one is injured; for in the present instance it was not in her play, and as part of her play, and in ignorance of the danger of her play, that she was injured. She was injured by the violence of her little brother in a matter apart. For these reasons, the judgment and orders are reversed, and the court is directed to enter judgment for the defendants upon the findings.

We concur: McFARLAND, J.; GAROUTTE, J.

133 Cal. 191

VALENTINE et al. v. DONOHUE-KELLY BANKING CO. (S. F. 2,168.)

(Supreme Court of California. June 7, 1901.)

PAYMENT—PLEDGE—CORPORATION DEBT—ACCEPTANCE OF PRINCIPAL—DEATH OF SURETY—INTEREST.

1. A stockholder of a corporation, liable to a bank as surety for a corporate debt, died, and the bank filed a claim against his estate, in which no demand was made for interest. Thereafter the executor paid the amount which the bank stated as the principal and interest, and the notes were surrendered. *Held*, under Civ. Code, § 3290, providing that the acceptance of the whole principal as such waives all claim to interest, that such payment relieved the estate from a further claim for interest.

2. Under Civ. Code, §§ 2986, 2987, 2992, defining a pledge as a deposit of personal property as security, and providing that every contract by which personal property is transferred as security shall be deemed a pledge, and authorizing property to be pledged for a debt of another, an assignment of a mortgage to a bank by a stockholder of a corporation to secure a corporate debt is a pledge, and he occupies the position of surety for the corporation.

3. A guaranty for future advances ceases when the guarantor dies and the guarantee has notice of his death.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Jennie A. Valentine, as executrix of the last will of T. B. Valentine, deceased, and others, against the Donohue-Kelly Banking Company, to recover a deposit. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Philip G. Galpin, for appellant. Lindley & Eickhoff, Lloyd & Wood, and A. Heyneman, for respondents.

PER CURIAM. This appeal is by the defendant corporation from the judgment and an order denying its motion for a new trial. The facts are substantially as follows: Prior to January 24, 1896, a certain co-partnership existed under the name and style of Francis & Valentine. T. B. Valentine, plaintiff's tes-

tate, was at all times during its existence a member of said firm. The said co-partnership did its banking business with defendant. Prior to March, 1896, the said co-partnership became indebted to defendant upon seven promissory notes aggregating \$33,975.85, which notes were executed by the said co-partnership to said T. B. Valentine, and by him indorsed and transferred to defendant. On February 8, 1896, the said Valentine assigned to defendant a certain note and mortgage made to him by the Belvedere Land Company, of the value of \$50,000, as security for the payment of all of said promissory notes, of all sums due by said co-partnership to defendant, and of all advances that might thereafter be made by said defendant to said firm. On January 24, 1896, the members of the said co-partnership incorporated under the corporate name of Francis-Valentine Company; the corporation becoming the successor in business of the former co-partnership. The account current of the co-partnership with defendant was closed, and on March 2, 1896, the corporation, Francis-Valentine Company, opened an account with defendant, depositing on said date to its credit \$1,220. At the time of so opening said account with the defendant by the corporation, Francis-Valentine Company, the said T. B. Valentine made a new agreement with defendant that the \$50,000 note and mortgage should continue to be held by defendant as security for the said seven notes, and also for all indebtedness and loans then existing, and for all future advances that might be made by defendant to said Francis-Valentine Company. The transactions by defendant with the co-partnership may therefore be considered eliminated from the case, and are only stated for the purpose of clearly showing the circumstances leading up to the contract by which the \$50,000 mortgage was transferred and delivered to defendant by said Valentine in his lifetime. After March 2, 1896, the said Francis-Valentine Company continued its account current with defendant, in which account the monthly interest on the seven notes was charged to the Francis-Valentine Company. The interest upon the said notes was payable monthly, and during the existence of the co-partnership, and before the incorporation of the Francis-Valentine Company, it had been charged by defendant to the co-partnership. In fact, the same arrangement continued, as to the security, notes, advances, and overdrafts, after the incorporation of the Francis-Valentine Company as before, except the account was kept with the new corporation, instead of the former co-partnership. No change had been made, as to the arrangements herein narrated, up to October 27, 1896, at which time Valentine died. The defendant received knowledge of the death of Valentine on the same day. At the time Valentine died, the Francis-Valentine Company had a credit of \$201.07 in its account current with defend-

ant. After the death of Valentine, defendant presented a claim against his estate for the principal of the seven notes, in which claim no interest was included. It is therefore evident that at the time of the death of Valentine the interest upon the notes had been fully paid.

After Valentine died the Francis-Valentine Company continued its account current with defendant, in which account the defendant continued to charge the monthly interest upon the notes as it had done during the lifetime of Valentine. This continued until November 23, 1897, at which time the executors of the Valentine estate sold the note and mortgage for \$50,000. The defendant at the time of the said sale agreed with the representatives of Valentine's estate to deliver up the note and mortgage upon condition that the \$50,000 should be deposited with defendant in lieu of the mortgage, to be held by defendant as security to the same, and no greater, extent than the mortgage had been held. The money was accordingly deposited with defendant in accordance with the agreement, and a new account opened in the name of the estate of Valentine, to which account the \$50,000 was credited. The plaintiffs then informed defendant that they desired to pay the said notes, and asked defendant how much money was required. Defendant gave them a written memorandum as follows:

Principal	\$30,835 10
Interest	147 92
	\$30,983 02

The item of interest was for 23 days in November, the interest up to November 1st having been charged to the Francis-Valentine Company in its account with defendant. The plaintiffs then gave defendant a check for said sum of \$30,983.02 against the new account, which check was accepted by defendant, and the notes delivered up and canceled. Plaintiffs drew further checks against the \$50,000, leaving finally a balance of \$7,459.78 to their credit on the deposit account, which is the amount in controversy here, and for which plaintiffs recovered judgment. The defendant, although having charged this amount to the Francis-Valentine Company in its current account, claims that the said amount is the amount of interest that the notes earned after they were sold to defendant, including interest earned after the death of Valentine as well as before. There is no question as to the facts that the interest is charged to and is due defendant by the Francis-Valentine Company, and that the notes were surrendered up and canceled. We are therefore clearly of the opinion that the notes have been fully paid. This was manifestly the intention of all the parties, as shown by their conduct. The fact that the notes were surrendered up and canceled upon payment of what defendant stated to be the balance due for principal and interest is

almost a conclusive circumstance, in the absence of fraud or mistake. It is provided in section 3290, Civ. Code, that "accepting payment of the whole principal, as such, waives all claim to interest." This section is broad in its language, and applies to express contracts. *City of Los Angeles v. City Bank*, 100 Cal. 22, 34 Pac. 510.

The remaining question, then, is as to whether or not the estate of Valentine is responsible for the overdraft of the Francis-Valentine Company that accrued after the death of Valentine. It is claimed by both plaintiff and defendant—and we think correctly—that the \$50,000 mortgage which was deposited and assigned to defendant was a pledge. It was a deposit of personal property by way of security, and as such comes within the definition of a pledge as laid down in Civ. Code, §§ 2986, 2987, 2992. By the deposit of the mortgage, Valentine became a surety for the Francis-Valentine Company. A surety is defined to be one "who at the request of another and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person or hypothecates property as security therefor." When Valentine hypothecated the note and mortgage as security for the notes and for future advances, he became a surety for the Francis-Valentine Company, under the definition given in the above section. Not only this, but the note and mortgage occupied the position of surety for said company to defendant. It is said in *Brandt, Sur.* (2d Ed.) § 34: "When property of any kind is mortgaged or pledged by the owner to answer for the debt, default, or miscarriage of another person, such property occupies the position of a surety or guarantor; and anything which would discharge an individual surety or guarantor who was personally liable will, under similar circumstances, discharge such property. This rule is applicable to every variety of circumstances." See cases cited in note 4, said section. The guaranty for future advances ceased when Valentine died and defendant had notice of his death. He could at any time during life have terminated the guaranty as to future advances by giving notice. His death, with knowledge thereof, was notice. At his death his property vested in others, subject to all valid liens thereon. In case of a continuing guaranty, each advance made by the guarantee constituted a fresh consideration, and, when made, an irrevocable promise on the part of the living guarantor. A dead guarantor can make no promise. The guarantee, after knowledge of the death of the guarantor, cannot be held to have made the advance at the request of a dead man. *Jordan v. Dobbins*, 122 Mass. 170, 23 Am. Rep. 305; *Hyland v. Habich*, 150 Mass. 112, 22 N. E. 765, 6 L. R. A. 383; *Gay v. Ward*, 67 Conn. 156, 34 Atl. 1025, 32 L. R. A. 818; *Brandt, Sur.* (2d Ed.) § 134. In this case the note and mortgage were security to

defendant for the amount of indebtedness due to it from the Francis-Valentine Company at the time of the death of Valentine, and for all interest that would have accrued upon the notes, according to their terms, after Valentine's death, but the interest was paid by being charged in the running account of the company. It was so regarded by defendant, and we must so regard it. The judgment and order are affirmed.

132 Cal. 606

JOHNSTONE v. MULCAHY. (S. F. 1,777.)

(Supreme Court of California. June 4, 1901.)

In bank. Petition for rehearing denied.

For opinion in department, see 64 Pac. 1077.

PER CURIAM. The petition for rehearing in this case is denied, but that part of the opinion heretofore rendered in which a supposed mistake in the written contract is discussed is withdrawn.

133 Cal. 185

BANK OF NATIONAL CITY v. JOHNSTON.
(L. A. 601.)

(Supreme Court of California. June 5, 1901.)

INSOLVENT BANKS — DIRECTORS — ASSESSMENTS ON STOCK—RESOLUTIONS—VALIDITY—ADJOURNED MEETINGS.

1. A stock assessment levied, but not collected, and not yet due, when the adjudication of insolvency was made under the bank commissioners' act, was set aside by the adjudication; and the levy cannot be enforced, as a call for the payment of unpaid subscriptions, by the bank commissioners, since the commissioners had no such authority, nor could the directors act as trustees under the statute before such adjudication was made.

2. Where all of the directors of a corporation were present at a meeting, which was adjourned, but there was nothing to show that all the directors were present at the first meeting, when that meeting adjourned, and no other notice of the second meeting was given, and all were not present at the adjourned meeting, a resolution passed at the latter meeting to proceed by action for the collection of an assessment on stock, which was business which could not have been lawfully transacted at the former meeting, was invalid.

McFarland and Van Dyke, JJ., dissenting in part.

In bank. Appeal from superior court, San Diego county.

Action by the Bank of National City against S. S. Johnston to recover the amount of an assessment on shares of stock in a corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Haynes & Ward, for appellant. G. H. P. Shaw, for respondent.

TEMPLE, J. After the bank commissioners, acting under the authority given them by section 11 of the banking act, as amended in 1895 (St. 1895, p. 175), had seized and taken

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into possession all of the assets of the bank, and had reported the affair to the attorney general, and he had commenced a suit to enjoin the transaction of further business, but before the court had acted in reference to the matter, the directors adopted a resolution levying an assessment for the purpose of paying the debts of the corporation. The resolution recites that it was done at the request of the bank commissioners. There is a general recital in the complaint that the bank was then insolvent. The resolution was made September 8th, and the assessment would become delinquent October 30th following. Before that time, however, on October 1st, the court, in the suit commenced by the attorney general, entered its judgment declaring the corporation insolvent, and enjoined and restrained the corporation and its directors from the transaction of any further business except for the purposes of liquidation, and ordered the property of the corporation to be surrendered to the directors for the purpose of liquidation under the banking act. Upon the rendition of this judgment, the corporate powers of the bank were suspended. It is conceded by appellant's attorney that this ended all power to collect the assessment by sale of the stock, under the statute. There was in fact no stock to sell. As a going concern, the corporation was ended. The former stockholders could never again have any control of the corporation. A liability rested upon them which made them interested in the proceedings, but they had nothing of value to sell. Nor are the directors to whom the corporate assets had been surrendered any longer competent to perform corporate acts except in liquidation. And in the exercise of these powers they are trustees for the creditors, and for the stockholders, for the purpose of liquidation only. This position is fully explained in the late case of *Argus v. Bank* (S. F. 2,232; filed May 29, 1901) 65 Pac. 307. It is there said: "Thus the directors, while they remain nominally officers of the bank, become, by the provisions of the statute, trustees for the creditors, and, as subordinate agents of the commissioners, officers of the law. Their functions as directors of the bank are left to them, but these are subordinate to those impressed upon them as statutory trustees, and, for all purposes of the act, they are to be regarded as acting in their statutory capacity. The case is therefore in effect the same as though the act had provided for the appointment of other trustees; that is to say, the directors, who, to all practical intents and purposes, are to be regarded as trustees, and their official relation to the corporation regarded, for all the purposes of the act, as immaterial." The court then proceeded to discuss the effect of the injunction. "The prohibition implies, *ex vi termini*, either a total suspension of the functions and powers of the corporation, or, what amounts to the same thing, a suspension of all their powers except those to be exercised by the directors

in the execution of their trust." It would necessarily follow, I think, that an assessment levied, but not collected, and not yet due when the adjudication of insolvency was made, was set aside by the adjudication. The statute is in the nature of a special insolvency act, and the functions of the directors, acting as liquidators under the act, are quite analogous to those of assignees in insolvency. The business of the corporation, as such, including the powers to levy and collect assessments, is gone.

But it is said the levy was practically made by the bank commissioners, and was really a call for the payment of unpaid subscriptions upon those who had subscribed for stock. The bank commissioners had no such authority, nor could the directors act as trustees under the statute before the judgment of the superior court. The unpaid subscriptions constitute an equitable fund for the security of the creditors of the corporation. I have no doubt but that in some form the liquidators may, in case of necessity, resort to this fund. But this levy of an assessment is not an attempt to do that, and there are reasons, which it is not necessary or proper now to discuss, why this mode, at this stage of the proceedings, cannot be adopted for that purpose.

But, if it be conceded that the mode adopted was a proper mode in which to resort to the unpaid subscriptions, as an equitable fund for securing the creditors of the corporation, and also that the assessment levied at the time and in the mode described was valid, and continued in force, notwithstanding the adjudication in insolvency, and also that the so-called directors, although really only trustees under the statute, could perform the corporate act of directing the assessment to be collected by suit rather than by sale of the stock, still it is clear to my mind that no valid resolution to that effect was passed. In discussing this matter, I shall assume that the meeting of the directors, on the 27th of October, was a valid special meeting, and that, all being there present, they could have considered any matter which could have been considered if it had been a stated meeting provided for in the by-laws. This position is not conceded by the counsel for the respondent, but, for the purpose of the argument, I will assume the law to be so. At the meeting of the 27th the directors could not have passed the resolution directing the collection of the assessment by suit, for the sufficient reason that it was not then delinquent, and under the statute such resolution could not be passed until after the assessment had become delinquent. Although all were present at the meeting which was adjourned, they were not all present at the meeting at which the resolution was passed. As this was business which was not and could not have been before the meeting which was adjourned, it could not, therefore, have been lawfully transacted at the subsequent meeting, at least un-

less at the final meeting all the directors were present. This proposition, without the special concession made by me, that the proceedings might be sustained if all the directors were present, has been often expressly declared, and is, I think, supported by an unbroken and unvarying line of decisions from the first appearance of corporate law. 1 Dill. Mun. Corp. § 287; Green's Brice, *Ultra Vires* (2d Am. Ed.) p. 441; Redf. R. R. (6th Ed.) p. 70; Warner v. Mower, 11 Vt. 385; 1 Beach, Corp. § 294; Granger v. Grubb, 7 Phila. 350; Scadding v. Lorant, 3 H. L. Cas. 418. These authorities are not in form controverted, but it is said: "The adjournment by all of the directors from October 27th to October 31st was an agreement between them to meet on that day, and dispense with the requirement of any further notice." *Whitehead v. Rubber Co.*, 52 N. J. Eq. 84, 27 Atl. 897, is the only authority cited upon this proposition. The assumption that the adjournment was by all the directors on the 27th of October is derived solely and only from the fact that all attended the meeting of the 27th, and that meeting adjourned. An attempt was made at the trial to prove what was said about the adjournment at the time by the directors, but the evidence was ruled out. The adjournment was therefore only an adjournment, and, if the rule be good, the question to which I have just cited authorities would never have had an existence. Every adjournment would imply such agreement, at least when at the meeting adjourning all had attended. And, while all the directors may have attended the meeting of the 27th, it would not follow that all were present at the precise point when that meeting had adjourned, or consented to the adjournment.

The case cited is not an authority. The remark quoted was confessedly obiter, and it plainly appears by the context that the vice chancellor limited the implication that the proceedings of the adjourned meeting, under the circumstances, would be valid as to the particular business which was before the directors when they adjourned. After stating that the meeting under consideration was not an adjourned meeting, the judge proceeds: "This being so, and conceding that when a meeting is properly called for a specific purpose that it may be adjourned from time to time for the further consideration of the matter so presented, this last meeting of the board of directors in this case was without authority, and the argument made cannot be upheld. If all the directors had been present at any meeting, and had agreed to an adjournment for the purpose of consideration of the question now before us, then the result of their deliberations would have been sustained." Here the vice chancellor very plainly states that the question was not before him, for the reason that the meeting then in question was not an adjourned meeting, and also that if it had been, and all the directors had agreed to the adjournment for

the consideration of the special matter already before the board, and which it would have transacted at the meeting which was adjourned, it could only have transacted that business which it already had in hand. The judgment and order are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; HENSHAW, J.

McFARLAND and VAN DYKE, JJ. We concur in the judgment of affirmance on the ground first discussed in the opinion of Mr. Justice TEMPLE; that is, on the ground that the directors had no authority to enforce the assessment after the adjudication in insolvency, and the injunction against the transaction of further business, except for the purposes of liquidation. It should be said, however, that this point was very obscurely made by respondent in the court below and in his briefs here, and it is not surprising that it was not discussed in the opinion delivered in department. But we dissent from the view that the resolution in question was not regularly and legally passed, if there had been power in the directors to pass such a resolution at all. On that subject we concur in the opinion delivered in department.

(133 Cal. 220)

DOWNING v. RADEMACHER et al.
(L. A. 809.)

(Supreme Court of California. June 11, 1901.)

DEEDS—CONSIDERATION—CONDITIONS—CONTRACTS—LIEN—QUIETING TITLE.

Where an interest in a mining claim was conveyed to plaintiff in consideration of an agreement that he should work the mine, and give the grantor one-third of the minerals obtained, plaintiff and the grantee of a part of his interest cannot have their titles quieted as against the grantor and his grantee, since plaintiff and his grantee took and held their interests subject to the contract.

In bank. On rehearing. Modified.

For opinion in department, see 62 Pac. 1055.

TEMPLE, J. This appeal is taken by defendants Rademacher and Osmont from a decree quieting the title of plaintiff to 32-60 and of defendant Middlecoff to 8-60 of a certain mining claim. Rademacher was, on the 11th day of January, 1897, the owner of a certain mine in the Randsburg district, in this state. On that day he conveyed an undivided two-thirds interest in the mine to the plaintiff, and contemporaneously with the execution of the deed, and as the sole consideration for the conveyance, Downing delivered to Rademacher his agreement in writing. It was an agreement inter partes, Downing being party of the first part, and recited the contemporaneous execution of the deed, and also as follows: "Now, for the purpose of working said mine, said parties agree as follows: Said party of the first

part shall have the exclusive right to work and mine upon said mining claim and mine thereon in any way he shall see fit. He shall mill and reduce all the mineral ore taken out of the said mine by him, and deliver to said party of the second part one-third of all of the gold or other minerals taken from said ore by said first party, free of cost and expense to the party of the second part." The contract proceeds to specify that Downing shall have certain rights as to water owned by Rademacher, and the privilege of selecting the mill at which ores are to be milled, and of erecting mills upon land claimed by Rademacher. It provides, also, that Downing shall secure Rademacher against the claims of certain named persons, and shall have control for Rademacher of a lawsuit then pending. The suit is an action to quiet title, and a cross complaint was filed by defendants Rademacher and Osmont, charging plaintiff and defendant Middlecoff with fraud. In the cross complaint it was also charged that Downing never intended to mine said property, but procured the deed with intent to acquire two-thirds of the mine without consideration. It is averred that he has failed efficiently to prosecute the work of developing and working the mine, and that work has ceased upon the same. The cross complainants, apparently uncertain as to the remedy to which they may be found entitled, have made a very full statement of alleged facts, and have demanded relief in several forms.

The defendants in the cross action have answered, fully denying the charges of fraud, and generally the alleged equities of the cross complainants. It may be considered that the contract entered into when the deed was made was the sole consideration for the deed. It is also admitted that soon after Downing received his deed he conveyed 8-60 of the mine to Middlecoff, and subsequently conveyed the entire property to one Hyde, by a deed absolute on its face, but which deed was in fact simply a mortgage given to secure an indebtedness. The court so finds, but Hyde was not made a party to the suit, and the adjudication does not, therefore, conclude him.

The court found that the charges of fraud were not sustained, but the facts constituting the transaction are left substantially as stated. The court entered a decree quieting the title of Downing and Middlecoff, and adjudging them to own the interests respectively claimed by them in fee against Rademacher and Osmont, and all persons claiming or to claim under them. The decree deprives Rademacher of all equities in reference to the two-thirds interest conveyed by him to Downing, and determines that Rademacher conveyed away two-thirds of his mine for the personal undertaking of Downing that if he should work the mine he would give Rademacher one-third of all he should get, clear and free of expense to Rademacher.

er; also that Downing may sell his two-thirds, and the grantees can work the mine, and under the rule in *McCord v. Mining Co.*, 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686, not be chargeable with waste; and, since Rademacher has by his contract given to Downing the exclusive right to work the mine, he could not offer to work the mine with the grantees of Downing, and therefore could not entitle himself, as against such grantees, to any portion of the proceeds of the mine. They would get the whole mine instead of two-thirds, although Rademacher might possibly have a personal demand for an amount equal to one-third of the proceeds against Downing. But a result less favorable to Rademacher may be worked out. Middlecoff may commence a suit to have the mine partitioned, and would be entitled to his decree. The property, being incapable of division, may be sold, and Rademacher, at the best, would get one-third of the proceeds. In other words, according to the decree, he did not sell, but he gave away two-thirds of his property. He cannot compel Downing to specifically perform his contract, and if, as a matter of law, he could do so, that could, under the terms of the decree, be prevented by the possible action of Middlecoff. In an action for damages, nominal damages only could be recovered. No actual damage could be proven.

There is here no question of innocent purchasers without notice. The deed and the agreement constitute one instrument, and must be read as though each referred to the other and expressly incorporated its terms. And, in legal effect, what do they amount to? As between the parties, at all events, there is no such magic in a conveyance of a title in fee, which can be used to do an owner out of his property. Under this contract and deed all Downing acquired was the right to work the mine in his own way on condition that he deliver to Rademacher one-third of the valuable minerals obtained. The conveyance was, in effect, subject to this condition.

Respondent contends that the deed is not at all subject to the agreement, and that Rademacher had no equitable or other claim upon Downing's two-thirds interest, and to that effect is the judgment of the court. Upon this point counsel rely almost entirely upon the authority of *Hartman v. Reed*, 50 Cal. 485, and *Lawrence v. Gayetty*, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29. In *Hartman v. Reed* the remarks quoted were not made with reference to anything there at issue. That the interest passed to Crosby was there admitted by all parties, but it was claimed that Crosby's title was barred by limitation, and Hartman had obtained a deed from Olvera which purported to convey to him the same interest Olvera had previously conveyed to Crosby. The effect of that deed was the only matter litigated in that case. But the remark has been quoted

as authority in other cases, and it may be admitted that as a proposition of law it is sound. The analogy of that case to this is very slight. There a deed was made in payment for legal services, which it was claimed had not been rendered. The grantor did not seek to avoid the deed for failure of consideration. It was simply said the contract of Crosby to render service was a sufficient consideration for the deed.

Here the consideration of the deed is not simply the agreement to perform service. The purchaser was given exclusive possession of the mine, and as payment for his interest agreed that he would render to the vendor one-third of the gross proceeds obtained by working the mine. It is like a conveyance made of a farm for one-third of the crops which thereafter should be produced. Suppose such a contract could be made, it would amount to a lease, and would imply that the grantee, or his assignees, should farm the land, and no doubt, if they refused to perform, the land could be recovered. This conveyance was for a share in the proceeds of the mine, and is in every way analogous to the case supposed. The technical ideas in regard to leasehold estates do not attach to this, but the equities are the same, and so are the implied obligations to work the mine, that the consideration agreed upon may be paid. A similar comparison may be made with *Lawrence v. Gayetty*. And in these cases, also, if an action for damages had been brought, something more than nominal damages could have been proven. Here the consideration for the deed was a proportionate share of the proceeds of the mine, which, of course, could not be determined until the mine had been worked out. This fact alone is sufficient to show that the grant of the mine was conditional. Rademacher had no possible remedy, except upon the theory that Downing's title was conditional. He did not intend to give his property to Downing without consideration, nor did Downing intend to get it for nothing. There is no other possible mode in which the agreed price can be paid. A sale of an interest in the mine, unless the purchaser takes subject to the equities of Rademacher, would be very likely to deprive Rademacher not only of all remedy, but of his property. Upon this ground Rademacher has a clear equity with reference to the portion of the mine conveyed to Downing. This equity binds Downing and all who purchase from him with notice.

Upon this subject the case of *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698, is directly in point. Richter executed to his son a warranty deed for a farm, for an expressed consideration of \$1,000. The real consideration was a contemporaneous agreement in writing, by the terms of which the son agreed to support his father so long as he should live. A few months afterwards the son refused to perform this contract. After

a demand for reconveyance, the father brought suit to compel it. The defense there was the same as here, that the consideration for the deed was the agreement, and the only remedy the father had was to sue upon it. The contract purported to be a mortgage, though the court held it could not be enforced as such. It was said: "True, neither the deed nor the mortgage states in express terms that the estate is granted upon condition, but the word 'condition' is not necessary to the creation of an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description. *Stillwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240. In the construction of deeds, as in construing other writings, courts seek to ascertain and give effect to the real intention of the parties, as such intention may be gathered from the language of the whole instrument. The intent is what the law applies itself to in deeds. *Watters v. Bredin*, 70 Pa. 235. If from the nature of the acts to be performed by the grantee, and the time required for their performance, it is evidently the intention of the parties that the estate shall be held and enjoyed on condition that the grantee perform the acts specified, then the estate is upon condition. This is especially so when the grantor has reserved no other effectual remedy for the enforcement of performance on the part of the grantee." The court cites the case of *Leach v. Leach*, 4 Ind. 638, 58 Am. Dec. 642. That was a similar case, except that the son agreed to deliver to his father a portion of the crops. It was held that a condition subsequent was created, although the writing did not expressly so provide. After citing the *Leach* Case, the court proceeds to enlarge upon the proposition that there was no other remedy, and concludes that this fact is persuasive of the conclusion that it was intended as a condition attaching to the estate. To the like effect is *Wilson v. Wilson*, 86 Ind. 472. A similar question was elaborately considered by the supreme court of Illinois in *Manning v. Frazier*, 96 Ill. 279. This controversy arose upon a conveyance of all the coal in a certain tract of land, with express license to the grantees to enter and mine for the same, paying a stipulated price per ton for the coal removed. The court held that here was a conveyance of land, and that the vendor had an equitable lien upon the entire interest conveyed for money due under the contract. The principle involved is somewhat analogous to the familiar case where one sells a part of his land, and attempts to restrict the use of the part sold by his vendee for the benefit of the portion retained. This matter was elaborately considered by Judge Bigelow in *Witney v. Railway Co.*, 11 Gray, 359, 71 Am. Dec. 715. The question was how far such restrictions are binding on grantees of the original grantee. It is held that the restriction is binding on those who take with

notice. He says: "In like manner, by taking an estate from a grantor with notice of valid agreements made by him with the former owner of the property concerning the mode of occupation and use of the estate granted, the purchaser is bound in equity to fulfill such agreements with the original owner, because it would be unconscientious and inequitable for him to set aside and disregard the legal and valid acts and agreements of his vendor in regard to the estate of which he had notice when he became its purchaser." He further states that the form of the agreement is immaterial. It need not be a covenant running with the land. It is an equity which attaches itself to the land sold for the benefit of the land retained. The matter was considered in fixing the price. It was a part of the contract of sale. The vendee gets the land at a lower price because of the burden, and so do his grantees. They are continually paying for the land. The matter is elaborately discussed in a note to *Ladd v. City of Boston* (Mass.) 21 Am. St. Rep. 481 (s. c. 24 N. E. 858), where very numerous authorities are cited and considered.

The respondents are not entitled, under the findings, to have their titles quieted as against Rademacher and his grantee, appellants here, but said appellants are entitled, on said findings, to a decree declaring that Downing took, and he and his grantee now hold, their interests in said mining claim subject to the contract entered into by Downing and Rademacher; and it is ordered that the decree be modified accordingly.

We concur: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.; GAROUTTE, J.; VAN DYKE, J.

(133 Cal. 211)

CONROY v. WATERS. (L. A. 850.)¹

(Supreme Court of California. June 8, 1901.)
ACTION ON NOTE—PLEADINGS—ISSUES AND FINDINGS—SUFFICIENCY OF FINDINGS—JUDGMENT—QUANTUM MERUIT.

1. Where an action was brought on a note, in which the court finds that nothing was due on the note, a finding that plaintiff was entitled to recover a certain sum on a quantum meruit for services was not within the issues, and erroneous.

2. On a count in a complaint for services rendered, where plaintiff grouped three items, and alleged a single charge for the value of the services in all, it was not improper for the court to segregate the items, and allow judgment for one of them.

3. A finding showed a conveyance by defendant to plaintiff of an undivided one-third interest in certain realty, and personality. That they afterwards transferred the title to another, reserving certain wool, sheep, and lambs, which were held by the parties jointly, and of which defendant was given the charge and management; and that he disposed of the property by his own admission, receiving a certain sum therefor, which he converted to his own use, though due demand was made by plaintiff for his share of the proceeds. *Held* sufficient to sustain a recovery by plaintiff for his share of the proceeds.

¹ Rehearing denied July 2, 1901.

4. It was not reversible error to permit plaintiff, who was an attorney, to appear with his attorney of record, and assist in the trial of the case.

Department 2. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Action by J. F. Conroy against William G. Waters. From a judgment in favor of plaintiff, defendant appeals. Modified and reversed.

William J. Hunsaker, for appellant. Lucien Earle and J. F. Conroy, for respondent.

HENSHAW, J. Plaintiff's complaint charged in three counts. The first was a simple action upon a promissory note for \$750, executed by defendant to plaintiff. The second was for the value of professional services rendered by plaintiff to defendant as his attorney at law, made up of several items, and aggregating the sum of \$800. The third charged that defendant had been in the custody, management, and control of certain wool, sheep, and lambs, the joint property of plaintiff and defendant, and that he had sold some of this property of a value unknown to plaintiff. An accounting was demanded, and a recovery for the value of plaintiff's share. Defendant answered by denials, by special defenses, and by a cross complaint. The issues presented by these pleadings will be more specifically adverted to as occasion may require. The court made voluminous findings, and gave judgment for plaintiff in the sum of \$793.60, from which judgment defendant appeals.

It is urged against the judgment that the findings are in themselves so conflicting and self-destructive in essential particulars that the judgment thereon cannot be supported. While the findings are undoubtedly open to criticism in this regard, yet we think that sufficient appears from them without conflict to sustain the judgment, if in other respects it is tenable. Upon the first count the court found that, by reason of the nature of the contract of employment between plaintiff and defendant in regard to certain litigation, nothing whatever was due upon the promissory note. However, it proceeded to find that the value of plaintiff's services in the matter of this litigation was \$500, and upon a quantum meruit gave judgment accordingly. But plaintiff was entitled to recover only upon the issues made. His action was upon a promissory note. The finding as to the value of the services was entirely without the issues, and cannot stand. Upon the second count—that for \$800 value of services rendered—the court allowed judgment for \$20 upon a single item. Plaintiff's statement grouped three particulars as follows: "(1) To retainer and services in cause of Pacific Coast Steamship Company; (2) to retainer and services in the cause of Waters v. Superior Court; (3) to retainer and services in cause of Basford v. Waters, \$750." The court refused to allow

anything for the services in the two last-mentioned cases, upon the ground that they were services rendered under the special contract between the parties, and, eliminating them, found the value of the services in the case of the Pacific Coast Steamship Company to be \$20. Appellant objects that, as respondent had grouped the three items, and put a single charge of \$750 for the value of the services in all, it was improper to segregate the items, and allow him judgment for any one of them. We think, however, that the course pursued by the court was proper and legal.

As to the third, objection is made to the sufficiency of the findings in that they do not distinctly declare that plaintiff and defendant were joint owners of property; that they do not distinctly declare what the joint property was, or that defendant had sold any of it, or that plaintiff had a third interest in it; but the findings sufficiently show a conveyance by defendant to plaintiff of an undivided one-third interest in his real and personal property on San Miguel Island; that plaintiff and defendant afterwards conveyed to the San Miguel Island Company their title to the island and its personal property, reserving, however, for their use, all sheep and lambs then on the island in excess of 3,000, together with all wool, clipped and unclipped; "that said wool, sheep, and lambs reserved as aforesaid were held, owned, and possessed by plaintiff and defendant jointly; that said defendant was given by plaintiff, and retained charge, care, and management of, the joint property; that defendant claims to have disposed of same, and refuses to give any account thereof to plaintiff; that due demand therefor was made by plaintiff upon defendant; that defendant admits that he has sold some of the joint property, and received as net proceeds of said sales \$802.85; that the one-third share of plaintiff in said proceeds is \$273.60; that defendant has converted said proceeds to his own use; that defendant is indebted to plaintiff in said sum of \$273.60." These findings are certainly sufficient. And so, without unnecessary discussion, we think are the findings against the cross complaint of defendant, which charged concealment and fraud upon the part of the plaintiff, by which defendant was induced to enter into the contract in question.

Appellant further objects that plaintiff, who is an attorney at law, licensed to practice before all the courts of this state, was represented upon the trial by Lucien Earle, his attorney of record, and that, upon motion of Lucien Earle, plaintiff himself was, by order of court, "associated" with said Earle as attorney in the case. It is contended that this was a special privilege conferred upon the plaintiff, whereby he was allowed not only to appear by attorney, but at the same time to appear in person. Whatever irregularity may be detected in this order of court, we think it sufficient to say that it was clearly an

irregularity without injury, and that no reversal of the cause should be had for the assigned reason.

It follows, therefore, that the judgment of the court, so far as it is based upon the findings directed to the first count of the complaint, must be reversed. In other words, under the pleadings and findings plaintiff is entitled to a judgment for \$20 upon the second count, and for \$273.60 upon the third count. The judgment is ordered modified to this extent, and upon the first count a new trial is ordered, with leave to the respective parties to amend their pleadings, if they shall be so advised.

We concur: **McFARLAND, J.; TEMPLE, J.**

(133 Cal. 180)

In re MAHONY'S ESTATE. (S. F. 2,257.)¹
(Supreme Court of California. June 4, 1901.)

INHERITANCE TAX — VALIDITY — STATUTORY CONTRACTS—APPEAL — REVIEW — ESTATE—DISTRIBUTION—TAX—RETENTION BY ADMINISTRATOR.

1. St. 1897, p. 77, providing that all property of an estate, valued at \$500 or more, which shall pass by will other than to the use of the testator's father, mother, etc., and nieces and nephews, when a resident of this state, shall be subject to a tax of \$5 on every hundred of the market value of such property for the use of the state, is unconstitutional, in so far as it relates to nieces and nephews, as in conflict with Const. U. S. art. 4, § 2, declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

2. The contention that in declaring the law unconstitutional, in so far as it related to nieces and nephews residing in the state, the words, "when a resident of this state," should be eliminated, and the words, "nieces and nephews," allowed to remain, so that nonresident nieces and nephews would be relieved from paying the tax, cannot be sustained, since such a construction would establish a law in direct opposition to the apparent legislative intent.

3. An estate consisted entirely of money on deposit with a trust company, and the heirs appealed from an order directing the administrator to retain a certain amount as taxes against the estate. *Held* that, as the trust company was not a party to the proceedings, the question whether it should have paid the taxes will not be considered.

4. Code Civ. Proc. § 1669, provides that, on the final distribution of an estate, the court shall be satisfied that the taxes against the estate have been paid. *Held*, that where an estate consisted entirely of money, and there was nothing in the bill of exceptions to show that the taxes against the estate had been paid, a decree of the trial court directing the administrator on final distribution to retain the amount of the taxes in his possession cannot be declared erroneous.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Final distribution of the estate of Timothy Mahony. From that portion of the decree deducting 5 per cent. from the respective shares of the distributees as a collateral inheritance tax, and directing the administra-

tor to withhold certain sums as taxes, certain heirs appeal. *Affirmed.*

James Gartland, for appellants. J. D. Sullivan, for respondent.

GRAY, C. The decedent left all his estate by will to his 10 nephews and nieces, all of whom are nonresidents of the state of California, three of them residing in the state of New York, and seven in Ireland. Seven of the said nieces and nephews appeal—First, from that portion of the decree of final distribution herein which deducts 5 per cent. from their respective distributive shares for collateral inheritance tax; and, second, from that portion of said decree which deducts a further sum of \$1.90 on each \$100 for taxes claimed to be due on said estate.

1. Appellants contend that legacies to nephews and nieces are exempt from the collateral inheritance tax, whether they reside in this state or not. This contention cannot be upheld without a violation of the clearly expressed intention of the legislature. The collateral inheritance tax law of this state, as it originally existed, is to be found in St. 1893, p. 193. It provided that all property of an estate valued at \$500 or more, which shall pass by will or by the intestate laws of this state, other than to or for the use of certain relatives of the decedent named in the statute, shall be subject to the said tax. Nephews and nieces are not named among the relatives who are exempt from the tax. The act was amended in 1897, however, so as to exempt "nieces and nephews when a resident of this state" from the said tax. See St. 1897, p. 77. In so far as the statute as thus amended affects the questions involved in this case, it reads as follows: "Section 1. After the passage of this act, all property which shall pass by will * * * other than to the use of his or her father, mother, husband, wife, lawful issue, brother, sister, and nieces or nephews when a resident of this state, * * * shall be and is subject to a tax of five dollars on every one hundred dollars of the market value of such property, * * * for the use of the state: * * * provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax." In 1899 the legislature again amended the said act, and left out the clause exempting nieces and nephews from the tax. The present case rests upon the law as it stood prior to this last amendment, and as it was amended in 1897. The language of the statute, as amended in 1897, shows that it was the purpose of the framers of the law that nieces and nephews nonresident of the state should be subject to the tax; and if, as contended for by appellant, we eliminate from the statute the clause, "when a resident of the state," and leave in the words, "and nieces and nephews," we establish a law as to nieces and nephews nonresident of

¹ Rehearing denied June 23, 1901.

this state in direct opposition to the apparent legislative intent. This we may not do. Where there are two provisions in a statute, the one constitutional and the other one not, the unconstitutional provision may be rejected and the other stand; but here there is but one provision in question, and, being clearly unconstitutional, it should be rejected as a whole, and held invalid. In *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115, it was held that a section of the Georgia Code which reads as follows: "Any person, master, or commander of a ship or vessel bearing toward any of the ports or harbors of this state, except coasters in this state, and between the ports of this state and those of South Carolina, and between the ports of this state and those of Florida, who refuses to receive a pilot on board, shall be liable, on his arrival in such port in this state, to pay the first pilot who may have offered his services outside the bar, and exhibited his license as a pilot, if demanded by the master, the full rates of pilotage established by law for such vessel,"—conflicts with the constitution of the United States, and is annulled and abrogated by the provision in Rev. St. § 4237, that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated." We quote from the opinion of the court by Mr. Justice Mathews, as follows: "It was held, however, by the supreme court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are therefore constrained to hold that the provisions of section 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by section 4237 of the Revised Statutes." In *People v. Perry*, 79 Cal. 105, at page 115, 21 Pac. 426, the court said: "But we know of no precedent for holding

that a clause of a statute, which as enacted is unconstitutional, may be changed in meaning in order to give it some operation, when admittedly it cannot operate as the legislature intended. This would, it seems to us, be making a law, and not merely correcting an excess of authority." Again, in *Cooley*, Const. Lim., at page 211, the author says: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion."

Authorities might be multiplied, all showing that a statute cannot, because it is in conflict with the constitution, be so limited or altered by the court as to make a law beyond or contrary to the apparent purpose of the legislature. In *re Stanford's Estate*, as decided in department (54 Pac. 259), is not an authority upon the question here discussed, because a rehearing in that case was had, and a conclusion differing with that of the department, and based on different grounds, was reached by the court in bank. *Id.*, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462. We are of the opinion that the amendment of 1897 of the collateral inheritance statute, so far as it relates to nieces and nephews, is in conflict with the provisions of section 2, art. 4, of the constitution of the United States, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, as well as with section 1978 of the United States Revised Statutes, providing that all citizens of the United States shall have the same right in every state as is enjoyed by the white citizens thereof to inherit property, and for that reason the amendment in that respect is void, and should be disregarded, thus leaving nieces and nephews subject to the collateral inheritance tax as they were before said attempted amendment.

2. It appears that the estate consisted entirely of money, and that it had been kept on deposit by the executor with the Califor-

nia Safe-Deposit & Trust Company, and it is contended that it was the duty of the assessor to assess the money to said trust company, and it was the duty of said company to pay the tax thereon, and it will be presumed that the assessor performed his official duty. It is not necessary to determine any branch of this contention. The trust company was not a party to the proceedings, and its rights and duties could not, therefore, be determined in the matter. There is no showing in the bill of exceptions that the taxes in question had been paid by anybody, and the last order of the court, made *nunc pro tunc*, shows that taxes to the amount of \$1.90 on each \$100 are claimed to be due upon said estate, and it is ordered by the trial court that the administrator retain that amount in his possession. It will not be presumed that the taxes have been paid in the absence of a showing to that effect, and section 3752 of the Political Code, and section 1669 of the Code of Civil Procedure, make it the duty of the court to see to it that the taxes are paid. On the record before us, we can see no error in the action of the court directing the administrator to retain the amount of the taxes claimed. For the foregoing reasons, we advise that the portions of the decree appealed from be affirmed.

We concur: SMITH, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the portions of the decree appealed from are affirmed.

(133 Cal. 170)

LAIDLAW v. MARYE. (S. F. 1,791.)¹

(Supreme Court of California. June 1, 1901.)
BUILDING CONTRACT—RECORDING—FAILURE
—EFFECT—EVIDENCE—ADMISSIBILITY—CON-
TRACT—CONSTRUCTION—COMPLIANCE—RE-
COVERY—RIGHT.

1. Code Civ. Proc. § 1183, provides that a building contract which is not recorded in the office of the county recorder shall be wholly void. *Held* that, where an original contractor repaired a building under an unrecorded written contract, he cannot recover the reasonable value of his services and material, without showing a substantial compliance with the terms of the contract.

2. Code Civ. Proc. § 1183, provides that a building contract which is not recorded in the office of the county recorder shall be wholly void. *Held* that, where an original contractor sued for the reasonable value of his services and materials in repairing a building, a written contract, though unrecorded, was admissible to show that the work had not been performed in substantial compliance with its terms.

3. Civ. Code, § 1654, provides, that if the language of a contract is uncertain, it shall be interpreted most strongly against the party who caused the uncertainty to exist. *Held* that, where a contract to repair a building was drawn by the contractor, any ambiguity in its terms must be construed most strongly against him.

4. An unrecorded written contract to repair a building stated that a new floor should be laid on the second story, and prior to the execution of the contract the contractor informed the owner that it would be necessary to entire-

ly remove the old floor, and relay it with a new one. The other bidders understood that the floor was to be entirely removed and relaid. *Held*, that laying a new floor over the old one in one-fourth of the second floor, and an entire new floor on the remainder, did not constitute a compliance with the terms of the contract, and hence the contractor was not entitled to recover the reasonable value of his services and material.

Appeal from superior court, city and county of San Francisco; Edw. A. Belcher, Judge.

Action by Frank Laidlaw against George T. Marye. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Reinstein & Eisner, for appellant. A. E. Shaw and R. B. McClellan, for respondent.

HENSHAW, J. Plaintiff's complaint charged in two counts. By the first he sued in quantum meruit et valebat for the reasonable value of materials furnished and labor performed by his assignor, which he alleged to be \$2,049. Of this sum there remained unpaid \$572.25, for which he demanded judgment. By the second he pleaded an express contract with defendant under which his assignor was to refloor and repair the floor of the second story of the Nevada Stables for the agreed price of \$2,049, of which defendant had only paid the sum of \$1,536.75. For the remainder, judgment was sought. Defendant denied all the material allegations of the complaint, excepting the execution of the contract for the work. Judgment passed for plaintiff as prayed for, and from the order denying his motion for a new trial the defendant appeals.

The uncontested facts are that defendant was the owner of the building known as the "Nevada Stables." It was occupied by his lessee, and used as a livery stable. The second floor contained stalls for stabling horses. The tenant complained of the dilapidated and leaky condition of this floor, by reason of which the horses' urine dripped upon and injured the carriages and other vehicles kept on the floor beneath. It was represented to defendant that a new, water-proof floor for the second story was a necessity. In conversations with Fletcher, plaintiff's assignor, the need of an entire new floor was frequently discussed. Defendant finally decided to have the work done. Fletcher himself drew the contract, with its specifications. Bids were called for, and Fletcher was the successful bidder. He entered upon the performance of the work, and carried it to completion. The contract was never recorded, and was therefore "wholly void." As work progressed, payments upon account of it were made. When Fletcher announced its completion, payment of the remainder (the amount here in suit) was refused upon the ground that the work had not been done in substantial compliance with the contract. To this point the facts are without conflict. The finding that the contract was void for lack of recordation

¹ Rehearing denied June 28, 1901.

was followed by an additional finding to the effect that the contract had been substantially fulfilled by Fletcher, and that the reasonable value of his labor and material equaled, and, indeed, exceeded, the amount sued for. The court also found that since the date of completion the defendant had been in the full use and enjoyment of the construction.

Appellant contends that the work was not performed according to the terms of the contract, and that in substantial particulars there was a failure in this regard. Consequently he urges that no recovery should have been allowed. Respondent meets this with the counter declaration that, for failure of recordation, the contract was "wholly void and no recovery shall be had thereon by either party thereto" (Code Civ. Proc. § 1183), and, supporting his position by adjudications upon this language of the Code, asserts with boldness the following: "If, as frequently decided, the void contract is as nothing, with no existence, past or present, how can it be said that the contractor could be guilty of a breach of it? The omission to record a contract does something more than deprive a contractor of his right to a lien. It deprives him of his right to recover the price specified therein, unless it is the reasonable value of the work and materials furnished. It deprives the owner of his right to insist on the work being done in accordance with such contract, or to recover in damages for breach of the contract if it is not; and it deprives him of his right to compel the contractor to accept the contract price in full satisfaction of his claim, if the reasonable value of his work and materials furnished is greater than that price." If this be the logical result of our past interpretation of the law, then must it be said that, if that interpretation is necessary under the law as written, naught remains but to adhere to it, leaving it to the legislature to afford relief. If, however, this interpretation is an erroneous one, then no considerations of adjudicated cases, no rule of stare decisis, should prevent a court from correcting mistaken views which lead to such extraordinarily harsh and unjust consequences.

The first question then to be resolved is, do the decisions support the argument and conclusions of respondent's attorney? It must be admitted that they do. The first of them is *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588. The action was brought by material men, laborers, and subcontractors to enforce their lien for material furnished and labor done. The contract was void for lack of recordation, and it was said that a contract wholly void is void as to everybody whose rights would be affected by it if valid; and it was decided that the plaintiffs were entitled to recover for the reasonable value of their labor and materials, regardless of the contract price, or the amount of the contract price which might still remain in the hands of the owner. Following this was the case of *Willamette Steam Mills*

Lumbering & Mfg. Co. v. Los Angeles College Co., 94 Cal., where it is said at page 236, 29 Pac. 631: "The finding of the court that there had not been filed in the recorder's office a contract * * * was therefore correct, and the effect of such finding, under the provisions of section 1183 of the Code of Civil Procedure, was to render the contract wholly void for all purposes. It cannot be the basis of a recovery by the contractor against the owner, nor can it be looked to for the purpose of determining the amount for which the owner is liable, or when any payment is to be made." Again, at page 237, 94 Cal., and page 632, 29 Pac., it is said: "If the contract is wholly void, there is neither a contract nor an original contractor." And at page 240, 94 Cal., and page 633, 29 Pac., it is further said: "Inasmuch as, by a failure to file the contract in the recorder's office, it became wholly void, it was not available as a defense for any purpose,—either to determine the amount of the contract price, or to limit the liability of the appellant, or as the foundation of a right to complete the building according to its terms." The *Willamette Case*, like the case of *Kellogg v. Howes*, was an action by subcontractors, material men, and laborers against the owner; the contract being void for want of recordation. Following this case was decided the case of *Rebman v. Water Co.*, 95 Cal. 390, 30 Pac. 564, which was an action by an original contractor under a void contract. It is there laid down that the original contractor may maintain his suit in implied assumpsit, and it is said: "The finding that the alleged contract—the only contract relied upon by defendant—never had been recorded, and was therefore wholly void, is equivalent to a finding that there was no written contract. * * *

This conclusion is not affected by the facts that a writing corresponding in form to the alleged contract had been signed and delivered by the parties, and that the labor may have been done and materials furnished in accordance with the terms of that paper." As has been said, these decisions lend support to respondent's position. But it is to be noted that in *Kellogg v. Howes* and in the *Willamette Case* the court was dealing solely with the rights of subcontractors, material men, etc., under the void contract, and that the language employed had applicability to the situation of those litigating parties alone. Only in the *Rebman Case* was this language first drawn from its context, and made applicable to an action by the original contractor under such a void contract. Yet the situation of the parties is essentially different. Section 1183 of the mechanic's lien law affects the rights of three distinct classes of persons: First, the owner; second, the original contractor; and, third, the subcontractors, material men, artisans, and laborers. With the decision as affecting the last class no modification of views is necessary or called for. If, for the remissness of the parties to the contract, it is void, this third

class should be, and is, justly entitled, under the law, to the value of their material or labor. They are not parties to the contract. They have no voice in its execution or recordation. They furnish material as directed, and labor as ordered, and that is all. It is but right, therefore, that the measure of their recovery should be the value given by them, unhampered by the conditions of a void contract. But the situation of the owner and original contractor is totally different. They advisedly agree upon a building contract. The nature of the structure, the character of material, the time of completion, the times and amounts of payments, are all the subject of deliberate consideration. Their minds finally meet, and an agreement is reached. The contractor promises to complete such a structure, with prescribed material, for a fixed price. The owner wants just such a structure, with just such material, and none other, and for it he is willing to pay the price fixed. If it were to cost more, he would not build at all, and there would be no contract. But the law imposes a penalty for nonrecordation of a contract before work is commenced. Thus, in a sense, the duty is imposed upon both contractor and owner to see that this is done. Otherwise, says the law, the contract is wholly void, and no recovery thereon shall be had by either party thereto. But the duty so to record is primarily on the contractor, for the very reason that he can always defeat the law and the owner's interest by commencing work before recordation. The owner is helpless in the matter. But to hold that, notwithstanding his failure in this respect, the contractor, because the contract is void, may build what he pleases, of any material he pleases, in any way that suits him, and recover, where the contract has not been performed, not only the contract price, but 40 times the contract price, is not to punish the contractor for his dereliction, but to put a premium upon a failure to comply with the law, and invite dishonesty and trickery in this matter, and in the matter of the contract itself. What matters it to the contractor if he loses his lien? An attachment will serve his purpose. And why should he care at what figure he agrees to build a house, when he may recover any amount he is capable of proving, whether he has performed the work in whole or in part, whether it be in accordance with the contract or not? While the contractor may thus be reaping an untoward advantage from his failure to comply with the law, the owner, on the other hand, will be compelled to accept a barn where he expected a house, and to pay, for a structure which he never wanted or contracted for, more than he agreed to pay for the desired edifice. Indeed, he may be compelled to pay full value for an uncompleted building. Is such a conclusion necessary under the law? We think not, and we think, further, that the error arose in the Rebman

Case by misapplication to original contractors of language directed solely to the case of subcontractors, material men, artisans, and laborers. Heretofore, as will subsequently be pointed out, the court, by the logic of necessity, if from no other consideration, has felt compelled to modify the force of the Rebman decision; but it is certainly preferable that it should at once be overruled, if it be untenable, rather than it should be undermined and eaten away after a long course of vexatious and expensive litigation, filling the books with discriminated cases, all receding further and further from, and growing more and more dissimilar to, the parent case. When the statute declares that the contract shall be wholly void, it means, as the Willamette Case decided, that it is wholly void as to the third class above designated, who thereupon shall be entitled to liens for the full value of their material and service, and shall be deemed to have furnished them to the owner at his special request. By thus allowing full compensation to this class, the owner is sufficiently punished for any remissness on his part, while with like measure the original contractor is penalized by losing his lien. But the law never meant to reward the contractor for his disobedience by conferring upon him for its violation greater rights than would have been his had he obeyed it. Therefore, as between him and the owner, the contract must remain not the basis of his recovery, but the measure and test of his right to recover. He must still show a substantial compliance with its terms, to warrant any recovery at all; and the measure of his recovery, even under implied assumpsit, must be limited as to him by the contract price. Thus only is the law given a just and harmonious operation. In *Barker v. Doherty*, 97 Cal. 10, 31 Pac. 1117, the cases of *Kellogg v. Howes* and *Willamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co.* were the subject of review, and it is said: "Those cases decided that the contract was void as forming the basis of a recovery, and no legal liability could be created by any of its provisions. This would seem to be apparent from a cursory reading of the provision itself. It was never intended to hold in those cases that the writing could not be used as evidence to determine the character of the building to be erected, and thereby to furnish the test by which it could be known when the building was completed. Such is evident from the fact that in those cases the test of completion of the buildings was furnished by an inspection of the very contracts, which were held to be 'wholly void.' Any other interpretation of this provision of the statute would lead to inextricable confusion, and practically nullify the entire section." *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840, was an action brought by an original contractor against the owner to recover in assumpsit. The owner pleaded a contract

which had never been performed. Upon the trial it was shown that the contract was void for failure to record. The court further found that the labor bestowed and material furnished by the original contractor were supplied under the terms of the contract, and it awarded the original contractor judgment for the value of such services and material. But in reversing that judgment this court said: "The omission to file the contract in the office of the county recorder deprived the contractor of any lien for the labor and materials (Code Civ. Proc. § 1183), but he did not by such omission acquire any greater right to a recovery for his labor and material than he would have had if he had brought an action therefor irrespective of his right to a lien. Under the finding of the court that Hayes was never employed to construct the building, except by virtue of the contract of June 18th, and that all the labor performed and all the materials furnished by him were performed and furnished under and by virtue of this special contract, he had no right of recovery unless he should show that he had completed the contract on his part, or that its completion had been in some way waived or excused." This declaration of the law we think is eminently just and sound. It is, as was before said, a recession from the earlier views of the court, and a declaration of the true principle. It is applicable to every case where the contract fails for lack of recordation; for in all of them it is still the understanding of the parties that such work, and only such work, as is called for by the terms of the contract shall be performed.

In the case at bar no question arises as to the character of the work done by the contractor. It is not in dispute that the contractor did not wholly refloor the second story. The controversy arises over the interpretation of the contract. If the contract called for the laying of a new floor of 3 by 6, clear kiln-dried pine flooring, put down in deck style, and filled with boiling-hot bitumen, then, unquestionably, the contractor did not comply with his contract; for, admittedly, in the passageways, comprising an area of at least a fourth of the whole floor, he merely nailed a surface flooring upon the old flooring which was there. The provisions of the contract are as follows: "First, the contractor agrees * * * to furnish the necessary labor and materials, including tools, implements, and appliances required, and perform and complete in a workmanlike manner all the work of laying a new floor on the second story of the Nevada Stable." The floor was to be laid in conformity with the specifications. The specifications provided: "The entire stall floor will be laid with 3 by 3 clear kiln-dried pine flooring, put down in deck style, filled with boiling-hot bitumen; floor driven up tight and bored for the spikes, and then filled up with the hot bitumen. The entire stall floors coated with hot bitu-

men. Then a two-inch surface floor laid over the entire stalls under the horses a space of $\frac{3}{8} \times \frac{5}{8}$ to be laid 2x4-inch surface open joints $\frac{5}{8}$. The 3x6 floor will be laid lengthwise of the building, and furred up, to give the stalls 2½ inch fall in the length of the stalls. Passageway furred up to the level with stall grating." We think no one, in reading this contract, could entertain any doubt that its meaning was that the entire flooring of the second story, designated the "stall floor," should be removed, and a new flooring of 3x6, laid lengthwise of the building, should be put in its place, and made water-proof with bitumen. The contract calls for "all the work of laying a new floor on the second story," not for the laying of a new floor where necessary. In connection with the contract, the opening paragraph of the specifications declares that the entire stall floor shall be so relaid; and in the next paragraph, as noting a recognized distinction between the stall floor and the floors of the stalls, it is provided that the "stall floors," or floors of the stalls, in addition to the 3x6 flooring, shall have this flooring coated with hot bitumen, and an additional two-inch surface floor laid on top. There does not seem in this contract to be enough of ambiguity to call for construction; but, if it be conceded that such ambiguity exists, remembering that the contractor himself drew this contract, and that it is indisputably shown that the owner had discussed with the contractor the necessity for a complete new flooring, and that the contractor had told him that it was necessary, and that the owner certainly understood the contract to mean that the entire second story was to be refloored, the provisions of sections 1649 and 1654 of the Civil Code at once become applicable. By section 1649 it is declared: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it." Section 1654 declares: "In case of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party." In furtherance of this presumption, it is here positively shown that the promisor himself drew the contract. Moreover, it is in evidence that the two contractors who likewise bid upon the work both understood the contract as calling for an entire new floor. The variance between the work called for and the work done was substantial, and plaintiff was not entitled to recover. *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Marchant v. Hayes*, supra. The finding of the court in this regard was therefore unsupported, and the order denying a new trial is therefore reversed.

We concur: TEMPLE, J.; McFARLAND, J.

(133 Cal. 196)

BRADLEY v. CLARKE. (Sac. 823.)

(Supreme Court of California. June 7, 1901.)

PURITY OF ELECTION ACT—VALIDITY—CONSTITUTIONAL LAW—OFFICERS—QUALIFICATION—OATH—CONTEST OF RIGHT TO OFFICE—PLEADING—CROSS-EXAMINATION—WITNESSES—PRIVILEGE FROM TESTIFYING—SELF-CRIMINATION—OBJECTION BY WITNESS—SUFFICIENCY—WHO MAY DETERMINE—APPEAL—REVIEW—CONCESSION AS TO LAW.

1. So much of Purity of Election Act, § 4, as requires a successful candidate to swear to the statement of his expenses, etc., as a qualification to taking office, is void, as a violation of Const. art. 20, § 3, prescribing the oath which shall be taken, and providing that no other shall be required.

2. Where, in an action to contest a successful candidate's right to an office for illegal and excessive expenditures, and for his failure to file a true statement thereof, as required by the purity of election act, defendant testified as to his expense account, he could not be cross-examined as to expenditures not referred to in his testimony in chief.

3. As Purity of Election Act, § 32, expressly provides that a person offending against specified sections thereof may testify against other offenders, and thereupon be protected from subsequent prosecution therefor, he cannot claim immunity from testifying as to violations of the sections specified on the ground that his testimony would tend to criminate him.

4. In an action under such act, a witness was asked if he was present between specified dates, when a conversation occurred with defendant with reference to the payment of any money for campaign expenses. *Held*, that no conceivable reply thereto which the witness might properly give would or could tend to criminate him or degrade his character, and a refusal to answer on that ground should not have been sustained.

5. In an action under such act, involving a charge as to defendant's violation of section 11, in expending more than the maximum amount allowed by law, a recipient of money from defendant could not claim immunity from testifying as to whether he had received money from defendant, or by his direction, for the purpose of aiding or securing his election, on the ground that it would tend to criminate himself, since there is no violation of the law by the recipients of excessive expenditures, no duty being imposed on them to inquire how much a candidate has expended or purposes to expend.

6. It is for the trial court to pass on the sufficiency of a witness' objection to testifying, and not for him to decline to give relevant and pertinent testimony, which may be harmless to himself, on his mere declaration that his answer may tend to criminate or degrade him.

7. A complaint under such act, charging defendant with a promise of patronage to a person named, "with intent to promote his own [defendant's] election," charges an offense within subdivision 3 of section 19, which expressly makes it unlawful to promise any office, place, or employment to any person "in order to induce such person to procure or endeavor to procure the election of any person."

8. The court, on appeal, is not bound by a concession as to the law made by appellant's attorney. It is its duty to declare the law as it is, and not as either party may assume it to be.

Garoutte and McFarland, JJ., dissenting.

In bank. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by William H. Bradley against George H. Clarke, contesting defendant's

right to an office. From a judgment for defendant, contestant appeals. Reversed.

A. L. Shinn and Wm. Hanley, for appellant. C. T. Jones, Peter J. Shields, and Hiram W. Johnson, for respondent.

HENSHAW, J. This is an action instituted by an elector of the city of Sacramento, under the provisions of the purity of election act (St. 1893, p. 12), contesting the right of the defendant, mayor-elect of the city, to his office. After trial judgment passed for the defendant, and from that judgment contestant appeals, the evidence being brought up for review by bill of exceptions.

It is charged by contestant that, in violation of the purity of election act, the defendant was guilty of certain improper practices, in that (1) he did not file a statement of his election expenses, supported by his affidavit, as required by law; (2) that the statement filed was false in fact; (3) that money was illegally expended by him in aid of his election; (4) that he expended a sum of money, to secure his election, in excess of the maximum amount allowed by law; (5) that, to secure his election, he promised to bestow upon an elector of the city of Sacramento one-ninth of the official patronage of the office of mayor of the city, in the event of his election.

Section 3 of the purity of election act provides that "every candidate who is voted for at any public election held within the state shall, within fifteen days after the day of holding such election, file, as hereinafter provided, an itemized statement, showing in detail all moneys paid, loaned," etc. "There shall be attached to such statement an affidavit, subscribed and sworn to by such candidate, which must be substantially in the following form: 'State of California, County of —, ss. I (name), having been a candidate for the office of —, at the election held in the county, city and county, city, or other division, state of California, on the — day of —, 18—, do solemnly swear that I have paid the sum of \$— for my expenses at the said election, and no more, and that, except as aforesaid, I have not, nor to the best of my knowledge and belief, has any person, club, society, or association on my behalf, directly or indirectly, made any payment, or given, promised or offered any reward, office, employment, or valuable consideration, or incurred any liability on account of or in respect of the conduct or management of the said election, and except such moneys as may have been paid to or expended by the committee selected as prescribed by the act of the legislature of this state, approved (date of this act). And I further solemnly swear that except as aforesaid, no money, security or equivalent for money, has to my knowledge or belief been paid, advanced, given, or deposited by any one, to or in the hands of myself, or any other person, for the purpose of defraying

any expenses incurred on my behalf, or in aid of my election, or on account of or in respect of the conduct or management of the said election. And I further solemnly swear that I will not at any future time make, or be a party to the making or giving of any payment, reward, office, employment, or valuable consideration for the purpose of defraying any such expenses as last mentioned, or provide or be a party to the providing of any money, security, or equivalent for money, for the purpose of defraying any such expenses.'” By section 4 of the act it is provided: “Any candidate for a public office who shall refuse or neglect to file, or who makes a false statement of moneys received or expended, as prescribed by section 3 of this act, shall, in addition to the punishment for such offense prescribed by the laws of this state, forfeit any office to which he may have been elected at the election with reference to which the statement is required to be made. If a candidate elected to a public office refuses or neglects to file the statement prescribed by section 3 of this act, no certificate of election shall be issued to him, neither shall any official bond presented or offered by him be approved, and the incumbent of the office, unless he is himself a defaulting candidate, must not surrender or deliver up said office, but shall continue to discharge the duties and shall receive the emoluments thereof.”

Respondent contends that these provisions, or at least so much of them as requires a successful candidate to support his statement by his oath, as a prerequisite to his right to take office, are violative of the constitution of the state, and therefore void. From this conclusion we think there can be no escape. Article 20, § 3, of our state constitution, declares: “Members of the legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath, or affirmation: ‘I do solemnly swear (or affirm as the case may be) that I will support the constitution of the United States, and the constitution of the state of California, and that I will faithfully discharge the duties of the office of —, according to the best of my ability,’ and no other oath, declaration or test shall be required as a qualification for any office or public trust.” The constitution itself speaks of this prescribed oath as a “qualification” for an office. Equally is the oath required to be taken by the successful candidate a qualification for office, for the very provision of the act is that for his refusal or neglect in this regard, or for the making of a false statement, he shall be deprived of his office, and shall forfeit any office to which he may have been elected. In *State v. Bemenderfer*, 96 Ind. 376, it is said: “The term ‘qualify,’ as used in the statute, does not mean possessed of the necessary political, mental, and

moral endowments, but means the acts performed after election, as taking the official oath and executing an official bond. * * * ‘Eligible’ means capable of being chosen, while ‘qualify’ means the performance of the acts which the person chosen is required to perform, before he can enter into office. * * * Abbott, in defining the word ‘qualify,’ says it means to take the oath and give the bond required by law from an administrator, executor, public officer, or the like, before he may enter into the discharge of his duties.” Had our constitution merely declared, as some do, that no other “test” than the one prescribed should be exacted of an officer elect, it might then be argued with some force that it had reference to such tests, in their nature religious, as those required by the act of Charles II., directed against Roman Catholics and dissenters, and which remained a blot upon the English statute books until 1828. But the constitution has designedly said, not alone that no other test should be required, but that no other “oath or declaration” should be exacted. This language leaves, as the only matter for determination, the single question whether this act does impose an oath or test substantially differing from that prescribed by the constitution. *Cohen v. Wright*, 22 Cal. 294. That it does prescribe a substantially different oath in addition to that made exclusive by the language of the constitution the very reading of the section makes manifest. But, in holding that the legislature may not prescribe this additional oath upon a successful candidate, as a prerequisite to his right to take office, and as an additional qualification to those enunciated by the constitution, we do not mean to be understood as saying that the legislature may not with propriety provide that a candidate shall forfeit his office for the doing of any of the inhibited acts, or for the failure to do any of the required acts set forth in the purity of election law. The legislature would have the undoubted power to require an officer elect to file just such a statement as the law now prescribes, and to provide that for a failure so to do he should forfeit his office or his right to office; but, under the strict mandate of the constitution, it has no right to exact this different and additional oath or affirmation before the taking of office, as a prerequisite thereto. So much, therefore, of the act as requires the candidate to support his statement by the above-quoted oath, as a prerequisite to the right to take office, is void.

The findings of the court negative the contention of appellant that the expenditures made for carriages and for banners by Booth, a friend of defendant, were made by him as the agent of Clarke, and consequently chargeable against Clarke under the law. These findings receive substantial support from the evidence, and need not further be considered.

The defendant called upon to testify to an

item of \$22.65, designated as "incidentals and sundries," stated: "The way that item happened to be put in the statement was that in filling my account I consulted with Mr. M. J. Desmond, the city clerk, and I had at that time vouchers for every dollar I spent during the campaign, and when we got down to amounts less than \$5.00 he advised me to put them in under the head of 'sundries,' which I did, and destroyed the vouchers. They were all for sums less than \$5.00. I did not pay any money for hacks on election day, and did not pay any money to Mr. Carragher for signs." Upon cross-examination contestant's attorney questioned the witness about other alleged illegal expenditures, for example: "Q. Did you pay to the Sacramento Publishing Company, for publication and printing work that they did for you in the campaign, the sum of \$75.00?" Objection was made to these questions upon the ground that they were not cross-examination, and the objection was properly sustained. The testimony in chief was directed merely to the candidate's failure to segregate the item of \$22, and to produce vouchers for the different amounts composing it. This, and his declaration that he had paid for no carriages or banners, makes the sum of his evidence. It was not within the scope of cross-examination upon these matters to seek to show what other or different amounts he might have expended. Upon that branch of inquiry the contestant could have called the defendant himself to the stand, when, if the witness was protected in the questions asked by the provisions of the law, he could have been compelled to answer.

Certain rulings upon questions propounded to the witness Cavanaugh, and his claim of privilege thereunder, merit more than passing notice. The complaint charged as follows: "That said purported statement of moneys received and expended, made and filed by defendant, is willfully false in the following particulars: * * * Third. That while defendant was a candidate as aforesaid, and for the purpose of aiding his election to said office of mayor, contestant is informed and believes, and upon such information and belief states the fact to be, that defendant paid to Wm. M. Sims the sum of one thousand nine hundred dollars, and that said Wm. M. Sims, with the knowledge and consent of defendant, and for the purpose of aiding the election of defendant to said office, paid to B. W. Cavanaugh the sum of three hundred dollars of said sum, and to Frank Daroux four hundred dollars of said sum, and to B. W. Cavanaugh, for Frank Farrar, \$150, which sum was paid to said Frank Farrar by said B. W. Cavanaugh, and that said Wm. M. Sims paid to divers and sundry persons, unknown to contestants, the balance of said sum of \$1,900; that said sums are not set forth in said statement." The complaint also charges "that while defendant was a candidate for election to said

office of mayor, of said city of Sacramento, as aforesaid, defendant committed offenses against the elective franchise defined in title 4, pt. 1, of the Penal Code of the state of California, in the following particulars: * * * That the defendant, with intent to promote the election of himself to the office of mayor of said city of Sacramento, as aforesaid, as contestant is informed and believes, and upon such information and belief states the fact to be, did willfully offer a reward to an elector of said city of Sacramento, for the purpose of procuring the election of defendant, in this: That the defendant did, for the purpose of procuring his election as aforesaid, offer to one B. W. Cavanaugh, an elector of said city of Sacramento, one-ninth of the official patronage of said office of mayor of said city,—that is to say, that, in case defendant should be elected to said office, said B. W. Cavanaugh should name the persons who should be appointed by said mayor to fill one-ninth of the appointive offices in said city; that there are many such offices which are filled by appointment by the mayor of said city." The record shows the following proceedings touching the examination of Cavanaugh: "Counsel for contestant then asked the witness the following question: '(1) Were you present at any time between the 2d day of October and the 7th day of November, 1899, when a conversation occurred with the defendant with reference to the payment of any money for campaign expenses?' The witness replied: 'I decline to answer, on my constitutional rights, that I cannot be made a witness against myself, and I decline to criminate myself or degrade my character, and that to answer said question would tend to convict me of a felony.' Mr. Shinn, counsel for contestant, asked the court to make an order requiring the witness to answer the question. Mr. Shinn: 'We expect to show by this witness that at a certain time the defendant gave to one William M. Sims \$1,900.00, to be used for his election purposes, and that William M. Sims gave to this witness \$300.00 of that money, to be used on behalf of the defendant for his election purposes, and that he gave to another party another sum of money.' The court denied the request, and contestant excepted. Counsel for contestant asked the witness the following question: '(2) Mr. Cavanaugh, between the 2d day of October, 1899, and the 7th day of November, 1899, did you receive any money from defendant, George H. Clarke, or by his direction, for the purpose of aiding or securing his election?' The witness declined to answer, on the ground that his answer would tend to criminate himself, and would have a tendency to subject him to punishment for a felony. Counsel for contestant made an application to the court for an order requiring the witness to answer the question. The application was denied, and contestant excepted. Counsel for contestant asked the witness the

following question: '(3) Did the defendant, George H. Clarke, at any time promise you one-ninth or any portion of the official patronage of the office of mayor of the city of Sacramento, in case he was elected,—that is, any time between the 2d day of October and the 7th day of November, 1899?' The witness refused to answer the question on the ground that his answer would tend to criminate him, and that his answer would have a tendency to subject him to punishment for a felony. Counsel for contestant made an application to the court for an order requiring the witness to answer the question. The application was denied, and the contestant excepted. * * * Counsel for contestant, by leave of the court, and for the purpose of making the record clear by pointing his exception to the ruling of the court, stated that he desired to prove by the witnesses the facts set forth in the question asked, and asked the witness the following question: '(4) Did yourself and the defendant, Clarke, Frank Daroux, James L. Gillis, Wm. M. Sims, or any of the parties named, meet in the Oschner Building, on or about the 6th day of November, 1899, and at such meeting did George H. Clarke offer or promise to put up or advance any money for election purposes to any of the parties present, and did he say, in substance, that Mr. Sims would go with him; that Mr. Wm. M. Sims would bring the money back, and make the disposition of it that he had mentioned; and did he and Mr. Sims leave, and subsequently Mr. Sims returned with this money; and did he pay to you the sum of \$300.00, or any other sum, and to Frank Daroux the sum of \$400.00, or any other sum, and to any other person any sum of money, out of the money that he brought back?' The witness declined to answer the question upon the grounds hereinbefore stated, and that the answer would have a tendency to subject him to punishment for a felony. The court ruled that he was not required to answer, and the counsel for contestant excepted. The counsel for contestant asked the witness the following question: '(5) You claim, Mr. Cavanaugh, that to answer that question would have a tendency to convict you of a felony?' A. 'Yes, sir.'

It is shown that the salary of the mayor of Sacramento is \$3,000 per annum. Under the purity of election act, the candidate for this office is permitted to spend 10 per cent. of one year's salary, or \$300. The candidate's sworn statement showed an expenditure of \$289.15. Section 32 of the act provides: "A person offending against any provision of sections 19, 20, 21, 22, 25, 26, 27, 28, 30, and 31, of this act is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding or lawful investigation or judicial proceeding in the same manner as any other person." Subdivisions 2 and 3 of section 19 are as follows: "Sec.

19. It shall be unlawful for any person directly or indirectly, by himself or through any other person, * * * (2) to give, offer or promise any office, place or employment, or to promise to procure, or endeavor to procure, any office, place or employment to or for any voter, or to or for any other person in order to induce such voter to vote, or refrain from voting at any election, or to induce any voter to vote or refrain from voting at such election for any particular person or persons; (3) to make any gift, loan, promise, offer, procurement or agreement as aforesaid, to, for or with any person in order to induce such person to procure or endeavor to procure the election of any person, or the vote of any voter at any election." Section 30 is as follows: "Sec. 30. Every person who being * * * a candidate for a public office at an election, makes and files any false statement of moneys received and expended on account of or in respect of the conduct and management of the election in reference to which such statement is filed, is guilty of perjury, and is punishable by imprisonment in the state prison for not less than one year nor more than seven years." Section 11 of the act (which section is without the purview and exemption of section 32), is as follows: "Sec. 11. Whenever any candidate for a public office pays, lends, or contributes, or offers or agrees to pay, to lend or contribute any money or other valuable consideration to or for any person, either for: (1) The doing or procuring to be done of any act forbidden to be done by the laws of this state relating to public elections; * * * (7) for any purpose in contravention of the provisions of this act, or (8) for any purpose whatever in excess of the maximum amount which such candidate may lawfully expend under the provisions of this act, * * * such candidate shall in addition to the punishment prescribed by the laws of this state or by this act, forfeit any office to which he may have been elected at the election in reference to which such crime or offense was committed, and, if the candidate so offending is the incumbent of an office of profit or trust under the laws of this state, he shall thereby forfeit this office."

With these provisions of the law before us, was the court justified in sustaining the refusal of the witness Cavanaugh to answer these questions upon the ground that his answer would tend to criminate or degrade him? And in answer to this the legal consideration may be thus stated: If the matter sought to be elicited by the questions was matter embraced within the purview of any of the sections 19, 20, 21, 22, 25, 26, 27, 28, 30, or 31, and if with the defendant as a "person offending" the witness himself was also a "person offending," then by the express provisions of section 32, and by the authority of this court in *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364, 26 L. R. A. 423,

the witness could not claim immunity, and should have been compelled to testify. But, upon the other hand, if the defendant was a person offending, within the meaning of these sections, and the witness Cavanaugh was an innocent and nonoffending person, within the meaning of these sections, then the witness' claim of privilege was untenable, because his answers could not tend to criminate him or convict him of an offense. The design of section 32 is to compel evidence from an offending person which, but for the protection afforded by the section, he could justifiably refuse to give, but an innocent person, having no need of such protection and exemption, cannot claim such privilege.

Coming now to the questions propounded to the witness, and taking them up seriatim, the question marked "1" is manifestly but a preliminary question, answerable by "Yes" or "No." No conceivable answer which the witness might properly give would or could tend to criminate him or degrade his character. The question marked "2," touching the reception of money from Clarke for the purpose of aiding or securing his election, presents a threefold aspect: First, if it has to do with the illegal giving of money by defendant, received and used by the witness for improper purposes, then the offense is one contemplated by the sections above quoted, and particularly by section 19, subd. 1, and the witness in his answer would be fully protected by the immunity afforded him by section 32; but, second, if it be said that there was nothing illegal in the candidate giving to Cavanaugh money to be used in aid of his election, because the gift, expenditure, and use of such money is recognized by the act, then Cavanaugh, at least, had not offended in accepting the money for the indicated purposes, and therefore had no right to claim his privilege; third, the charge in the complaint is that the defendant expended moneys in excess of the maximum amount which he could lawfully expend. Section 11, subd. 8. A candidate might unlawfully do this, and yet the recipients of the money in no way violate the law. No law imposes upon the recipient of a candidate's gift or money the duty of inquiring how much he (the candidate) has expended or proposes to expend to secure his election. Cavanaugh would have been guiltless of any offense, therefore, in receiving the money, and could not refuse to answer the question as to whether or not he had received it, and the amount that he had so received, because the inquiry was strictly pertinent to the case, and strictly within the charges preferred against the defendant, to wit, that he had expended more than the maximum amount permitted by law. He had filed his statement of the amount that he had expended. If the prosecution was not permitted to bring in witnesses, and show one by one that the candidate had given to them moneys for election purposes, for which he had not

accounted in his statement, how could a contestant ever prove such a violation, and such a flagrant violation of the election law?

Question 3 deals with the alleged promise by the defendant to Cavanaugh of office, and the patronage of his office of mayor,—an offense clearly embraced within section 19, subd. 2, of the act. This, however, is made by the act an offense against the promising party, not against the person to whom the promise is made, even though he may act upon it. We have read the act with some care to discover whether one who accepts such a promise, and upon the consideration of it votes, or induces others to vote, is guilty of an offense, but no such provision has come under our observation, and our attention has been directed to none such. But, even if such a provision exists and has been overlooked, it merely makes the promisee an offending person with the promisor, and still the promisee cannot refuse to testify, because he is protected by section 32. If, however, the promisee be not an offending person, while clearly the promisor is, then, as has been before said, the promisee has committed no offense, needs no immunity, and has no privilege upon which to stand in his refusal to answer the question. All that has been said applies with equal force to the fourth question.

But if it be said that respondent's counsel have had no opportunity to show that the answers to the questions would have tended to criminate Cavanaugh, it may be answered—First, that, if they would have tended to criminate him, then, as above set forth, he would have had immunity; and, second, that this showing is not to be made in this court for the first time, but is to be made to the satisfaction of the trial judge in the first instance, before the witness can justify his refusal to testify. As was said by this court in *Re Rogers*, 129 Cal. 468, 62 Pac. 47: "It is for the court to pass upon the sufficiency of the objection which the witness urges to answering, and not for the witness to decline to give relevant and pertinent testimony which may be harmless to himself, upon his mere declaration that his answer may tend to criminate or degrade him." The trial court accepted the naked declaration of the witness, and, as has been pointed out, if he was a co-offender he was protected, if not, he could not claim immunity, and in either case the ruling was erroneous.

But it is said that the complaint charges a promise of patronage to Cavanaugh, "with the intent to promote his own [Clarke's] election"; and that this is not an offense, within section 19, subd. 2, because there it is stated that the promise must be made for the purpose of inducing a voter to refrain from voting or to vote for some particular person. Upon this it is perhaps enough to say that we are not considering the sufficiency of the allegation of the complaint against a special demurrer, and certainly, when a man makes

a promise of patronage to secure his election, it is pretty well understood that the consideration is that the promisee will not only vote himself for the promisor, but induce as many of his friends as possible to do the same; but, aside from this, subdivision 3 of section 19 (which seems to have been overlooked) expressly makes it unlawful to promise any office, place, or employment to any person "in order to induce such person to procure or endeavor to procure the election of any person." Surely this offense is charged in the complaint.

Finally, it is urged that it is conceded by appellant that the defendant's answers would tend to criminate him, and that our inquiry need go no further than this concession; or, in other words, that we are bound to accept as matter of law, and as a rule of evidence, a concession as to the law made by appellant's attorney, no matter how faulty that concession may be. The answer to this, I think, is plain: First, that we are not bound by such concession, our duty being to declare the law as it is, and not as either appellant or respondent may assume it to be; and, second, that, if we are to regard ourselves bound by this so-called concession or admission, we must be bound by all of it,—we have no right to accept a part and reject a part. It is like a stipulation,—either all of its terms are to be given effect, or none of them. The admission of appellant, as will be seen from his brief, is not a general admission that Cavanaugh's answers would tend to criminate him. It was no more than a declaration and argument that the question came within the purview of section 19, and therefore, if his answers tended to criminate him, still he would be protected by the provisions of section 32. But, in fact, the declaration of appellant's attorneys is not a concession or admission at all. What they say upon this point is the following: "The court erred in denying contestant's application for an order requiring witness B. W. Cavanaugh to answer the questions propounded to him. The statement or complaint alleged that defendant had expended and paid to W. M. Sims \$1,900 for the purpose of aiding his election, which sum was distributed to B. W. Cavanaugh, Frank Darroux, Frank Farrar, and other persons. The payment was a violation of section 19, subd. 3, Act 1893. The questions which the witness refused to answer pointed directly to the alleged payment of \$1,900, and to the offer to give Cavanaugh one-ninth of the official patronage of the office. Section 11, subds. 7, 9, provide that a candidate shall forfeit his office for making any payment in contravention of the provisions of the act. The charge was directed to a violation of section 19, and charged a payment which is prohibited by subdivision 3 of that section. Section 32 of the act provides that a witness may testify against any one offending against any of the provisions of section 19, and that he shall not thereafter be prosecuted for any offense

with reference to which his testimony was given." We are unable to perceive in this any concession or admission justifying this court in saying that the determination of this important question is or thus can be eliminated from its consideration. For these reasons, the judgment is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; TEMPLE, J.; VAN DYKE, J.; HARRISON, J.

GAROUTTE and McFARLAND, JJ. (dissenting). We dissent from the judgment of reversal, and think the judgment of the superior court should be affirmed. We concur in the opinion of Mr. Justice HENSHAW, except so far as it deals with the questions asked of the witness Cavanaugh, but we cannot agree to the conclusion reached on that subject.

(133 Cal. 228)

BALFOUR-GUTHRIE INV. CO. v. SAWDAY et al. (L. A. 852.)¹

(Supreme Court of California. June 12, 1901.)
EJECTMENT — PLEADINGS — DESCRIPTION OF LAND — DISCLAIMER — PARTICIPATION IN TRIAL — REFUSAL — EFFECT — JUDGMENT — CHANGING DESCRIPTION.

1. Defendant having disclaimed any interest in lands sued for, as described in the complaint, his default was entered. Just before trial, on learning that his interest in adjoining land was imperiled, he hired counsel, and asked leave to participate in the trial and to amend his answer, which was denied; and thereafter judgment was rendered describing the land by metes and bounds, so as to include land belonging to defendant. *Held* that, defendant having used due diligence on learning that his property rights might be affected, it was error to refuse to allow him to defend.

2. A judgment rendered in ejectment, describing other land than that described in the complaint, was erroneous, as not within the issues made.

Department 2. Appeal from superior court, San Diego county; J. W. Hughes, Judge.

Action by the Balfour-Guthrie Investment Company against F. R. Sawday and others. From a judgment in favor of plaintiff, defendant Sawday appeals. Reversed.

W. T. McNealy and Andrews & O'Farrell, for appellant. G. H. P. Shaw and Mills & Higar, for respondent.

HENSHAW, J. Plaintiff sued appellant, Sawday, and others, by a complaint containing allegations appropriate both in an action in ejectment and in an action to quiet title. The land was described by government subdivision as "the southwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter," etc. For answer, appellant, Sawday, disclaimed "all right, title, and interest in the lands herein sued for, and as set forth in the plaintiff's complaint." His default was subsequently entered by the clerk. The cause was set for trial upon the 26th day of June, but no notice of the trial

¹ Rehearing denied July 12, 1901.

was served upon him. Hearing at a late day that the cause was set for trial, and might affect his lands, he hastened to the county seat, employed counsel, and, upon the case coming up for hearing, asked leave to participate, which was denied. He also asked leave to amend his answer, which application was also denied, and he was denied the right to participate in any manner at the trial. Thereafter, upon July 28th, he moved the court to set aside his default, and this was denied. On August 1st, findings of fact and conclusions of law and the judgment were filed. In the complaint the land and premises were described by government subdivisions alone. In the judgment, in addition to such description, the land was described by metes and bounds, natural boundaries and monuments were designated and located, and reference, for the purpose of delimiting the land, was made to a map or diagram which forms part of the judgment roll in another and independent action. Promptly after the entry of this judgment, upon August 11, 1899, the appellant moved the court to vacate it and set it aside, which motion was denied. He then moved to strike out that part of the description in the findings and judgment not contained in the complaint, and to limit the description of the land to the language of the complaint. This also was denied. He further moved to set aside the judgment so far as it affected him, and this motion was denied. From the judgment and from the orders denying his several motions he prosecutes these appeals.

To an understanding of the matter, it is necessary to clothe the foregoing naked statement with other established facts. The defendant Sawday never did, and does not now, make claim to any of the lands in the complaint described, as described in the complaint. His lands are adjoining, contiguous government subdivisions. Therefore, when served with the complaint, and knowing that he had not, and did not claim to have, any right or title or interest to the government subdivisions described in the complaint, he promptly and properly disclaimed. By the findings, and by the judgment entered upon this complaint, the lands are described and located so as to embrace lands held and claimed by Sawday. In short, under the guise of an action in ejectment, or an action to quiet title, describing by government subdivisions lands to which the defendant never made claim, the action is, in effect, converted into an action to demarkate boundaries; and those boundaries, it is contended, shift the location of the land in controversy some half a mile north and the same distance east of the land described in the complaint. Appellant, learning at the eleventh hour that his interests might be involved in this suit, drove through the night to the town of San Diego, arrived there in the morning, promptly employed counsel, appeared at the time set for trial, and by his numerous motions, showing

his earnestness and good faith, sought leave to participate in the trial. Had the judgment which was finally rendered in the case conformed to the complaint, it might be said that, as no harm resulted to this appellant from the judgment, the refusal of the court to allow him to participate in the trial was not an abuse of discretion; but, in contemplation of the judgment which was actually rendered, it is clear that it was. It is the policy of the law that every case should be litigated upon its merits, and, however negligent it may be said that Sawday was in the first instance, he certainly showed due diligence when his attention was called to the fact that his property rights might be in jeopardy. Even if his participation in the trial might have occasioned some embarrassment or delay to plaintiff, this could easily have been met by an order of the court allowing him so to participate upon terms.

But, aside from the court's ruling upon the motions, the judgment itself cannot stand. As against a defaulting or disclaiming defendant, the relief must be consistent with the case made upon the complaint and embraced within the issues. Section 580, Code Civ. Proc. The case of *Holman v. Vallejo*, 19 Cal. 499, is here directly in point, and almost parallel in its facts. The action was to enforce a verbal contract for the sale of lands. Defendant's demurrer to the complaint was overruled, and, defendant failing to answer, plaintiff took judgment by default. Defendant appealed, and urged upon his appeal that the land described in the judgment was other and different from that set forth in the complaint. This court said: "On the latter point the plaintiff insists that the lands are the same, and appeals to the evidence in the case to prove the correctness of his assertion. This evidence was taken *ex parte*, and we think that upon so important a matter as the establishment of the actual boundaries of the property the defendant has a right to be heard. * * * Upon the return of the cause the plaintiff can either take judgment in accordance with the allegations of the complaint, or amend by inserting a more specific description of the property." See, also, *Gregory v. Nelson*, 41 Cal. 278, and *Ellis v. Rademacher*, 125 Cal. 556, 58 Pac. 178. The judgment and orders appealed from are therefore reversed.

We concur: MCFARLAND, J.; TEMPLE, J.

BASSETT et al. v. FAIRCHILD et al.
(S. F. 1,366.)

(Supreme Court of California. June 8, 1901.)

In bank. On rehearing. Petition denied.
For former opinion, see 64 Pac. 1082.

PER CURIAM. The petition for a rehearing is denied, but the opinion herein is modified by striking out of the last clause thereof all after the words "and the cause is remanded for a new trial."

132 Cal. 589

SONOMA COUNTY v. HALL et al.
(S. F. 1,529, 1,688.)

(Supreme Court of California. June 4, 1901.)

In bank. On rehearing. Judgment modified.

For former opinion, see 65 Pac. 12.

PER CURIAM. The judgment heretofore entered herein is modified so as to read as follows: "The judgments and orders are therefore reversed, and the causes remanded, with directions to the court below to sustain the demurrers to the amended complaints as to all causes of action arising more than three years before the commencement of the action."

135 Cal. 522

ROCHE v. BALDWIN. (S. F. 1,863.)

(Supreme Court of California. June 14, 1901.)

APPEAL AND ERROR—FINDING OF FACT—REVIEW—ATTORNEY—SERVICES—VALUE—EVIDENCE—ADMISSIBILITY—HARMLESS ERROR—GOOD CHARACTER—PROOF.

1. Where the finding of the jury as to the value of an attorney's services was within the evidence, the verdict will not be disturbed as excessive.

2. Where the fact that plaintiff's assignor was employed as attorney in a certain case was admitted by the pleadings, and there was no claim that he was employed at a fixed compensation, evidence as to how he came to be employed was not admissible to show whether there was an agreement as to the amount of his compensation.

3. Where an excluded question was subsequently received in a different form, and the witness was fully interrogated as to the excluded matter, the exclusion was harmless.

4. Where the attorney who opposed plaintiff's assignor in the trial of a case stated to the jury all the facts on which he based the value of the assignor's legal services, but testified that he could not state their value without looking into his mind, an answer, after consideration, fixing the value, was not objectionable as based on what was in the witness' mind, and not on the evidence.

5. Where an attorney testified to the value of certain legal services, the question what annual income such a valuation would enable a man to make was properly excluded.

6. The striking out of answers to hypothetical questions after they had been received cured error committed in receiving them.

7. Where, in an action for the reasonable value of an attorney's services, the defendant pleaded as a special defense that the value of the services was to be fixed by defendant and

a third party, and that the amount had not been determined, it was proper to charge that if defendant, before the commencement of the suit, denied any indebtedness to plaintiff, and if it was not also agreed that no suit should be brought until after the amount due had been fixed by defendant and the third party, then the agreement was not a bar to the action, and plaintiff was entitled to a verdict.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Albert T. Roche against E. J. Baldwin. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Lloyd & Wood and Byron Waters, for appellant. Theodore J. Roche and Linforth & Whitaker, for respondent.

HENSHAW, J. This action was to recover for the value of the services rendered to defendant by plaintiff's assignor, Henry E. Highton, as attorney and counselor at law. The jury returned a verdict for plaintiff for the sum of \$8,755.60, and from the judgment which followed, and from the order denying defendant's motion for a new trial, he prosecutes this appeal.

It is urged with much earnestness that the evidence is insufficient to justify the verdict, in that the services of Mr. Highton were of far less value than the jury found. But this is only another form of saying that the value placed upon the services by the jury was excessive. That value, however, was within the evidence, and the finding cannot be disturbed.

The remaining points presented on this appeal go to alleged errors of the court in its ruling upon offered evidence. Upon cross-examination the witness Highton was asked several questions touching his employment in the Ashley case. Objection was interposed to these questions, and the objection sustained. The fact of Mr. Highton's employment in this case was admitted by the pleading. The plaintiff charged for the value under quantum meruit. There was no pretense on behalf of plaintiff that the compensation in this litigation was fixed in any specific sum. The questions, therefore, were irrelevant to any issues made in the case. The employment of Mr. Highton in the Ashley case having been admitted, the court said, "Then what concern is it to the jury how he came to be employed?" Appellant's counsel replied, "It has a relevancy to the question as to whether there was any agreement as to the amount of his compensation." This is the only reason for propounding the question, but, as has been said, there was no claim whatsoever that the amount of his compensation had been fixed. Moreover, the same question was subsequently asked in different form, the witness fully interrogated upon the matter, and his answers received. Mr. Crittenden had been an attorney against Mr. Highton in the trial of the Ashley case.

Asked as to the value which he put upon the services of Mr. Highton in that litigation which came under his (Mr. Crittenden's) observation, and concerning the nature of which he had already testified, the witness answered: "I could not answer that question unless I looked into my mind, and then reviewed the study of matters that came under my observation; otherwise, I cannot answer it. Q. Taking that into consideration, what would you say as to the reasonable value of those services?" The witness then answered, fixing the value at \$12,000. The objection to this is that the witness was allowed to fix value by looking into his mind, and testifying in regard to facts not in evidence; but the witness had already presented to the jury the facts upon which he based the valuation, and there was no error in the admission of the evidence. Again, the same witness is asked: "According to your basis, and according to the way practice ordinarily runs, what annual income would that make to a man?" The court properly sustained an objection to this question, saying: "That would depend upon the number of cases. The witness could not possibly answer the question." The hypothetical question asked of the witnesses Paterson, Campbell, and Jordan were answered, and subsequently the court reconsidered its ruling and the answers were stricken out, upon motion of defendant's attorney. If there was error in the reception of this evidence it was cured by striking it out, and nothing was left for the defendant to complain of. *People v. Willson*, 109 N. Y. 352, 16 N. E. 540; *People v. Shaver*, 120 Cal. 354, 52 Pac. 661. The court instructed the jury as follows: "If you believe from the evidence that Mr. Highton agreed with Mr. Baldwin and Mr. Unruh, at the time of his employment in the case of Ashley against Baldwin, that Mr. Unruh and Mr. Baldwin should fix the amount of compensation for the services to be by him rendered in that case, and that he was to receive and accept the sum they saw fit to name, yet, if defendant, before the commencement of this suit, denied any liability or indebtedness to Highton, and if it was not also agreed between them that no suit should be brought against Mr. Baldwin to recover the value of the services until after such sum or amount had been by Mr. Baldwin and Mr. Unruh so fixed, then, in that event, I charge you that such an agreement, if any, is not a bar or a defense to this action, and plaintiff is entitled to a verdict at your hands for the reasonable value of the services by him rendered, if any, after deducting therefrom any sum or amount due from Mr. Highton to defendant, if any." It is asserted that this was error, in taking away from the consideration of the jury the special defense pleaded in the answer, to the effect that the value of the services of Mr. Highton rendered in the Ashley case should be determined by defendant and one H. A. Unruh, and that defend-

ant should not be required to pay Mr. Highton for his services in the Ashley case any sum whatever until the amount thereof had been fixed and determined by defendant and Unruh. But, as was said by this court in *Remy v. Olds*, 88 Cal. 542, 26 Pac. 355: "The law does not require the performance of a useless act, and, when it is made to appear by the defendant's own act that the demand would have been refused, then they cannot be heard to object that no demand was made." Here the defendant had persistently denied that he owed his attorney anything on account of the services in the Ashley case. Moreover, there was no provision in the agreement pleaded in the answer that no action should be brought until after defendant and Unruh had fixed the amount of Mr. Highton's compensation. In *Hamilton v. Insurance Co.*, 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, a like question came under consideration. The action was upon an insurance policy, which contained the following clause: "In case differences shall arise touching any loss or damage, * * * the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of this company under this policy." The supreme court of the United States held that this clause could not be availed of as a plea in bar to the action, in the absence of a further provision, which it did not contain, that no action should be brought until after the award. But, if it be conceded that there was any error in the instruction, it was certainly harmless to appellant, since throughout the case he denied any indebtedness to Mr. Highton upon account of his services in the Ashley litigation. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

133 Cal. 231

CHASE v. CAMERON et al. (L. A. 845.)
(Supreme Court of California. June 12, 1901.)
CONTRACTS—SALE OF LAND—PERFORMANCE—
ACTION TO QUIET TITLE.

1. Defendant contracted to convey land on being paid therefor at the times stated in the contract. The purchaser took possession, and his interest was sold to plaintiff under execution, but before plaintiff obtained possession the purchaser surrendered to defendant. *Held*, that plaintiff was not entitled to any relief against defendant without showing performance or tender of performance of the contract.

2. A purchaser of land under an executory contract cannot maintain an action to quiet title thereto against his grantor.

Commissioners' decision. Department 2. Appeal from superior court, Orange county; J. W. Ballard, Judge.

Action by M. C. Chase against John Cameron and others. From a judgment for

plaintiff, and an order denying a new trial, defendants appeal. Reversed.

M. W. Conkling, for appellants. J. H. Ardis and Kendrick & Knott, for respondent.

HAYNES, C. Judgment was entered for the plaintiff upon the findings, and the defendants appeal therefrom, and from an order denying a new trial.

Defendant John Cameron, being the owner of certain real estate, on September 21, 1895, entered into a contract with one G. A. Clark, whereby he agreed to sell the same to Clark for the sum of \$3,550; \$2,000 to be paid December 1, 1897, and \$1,550 to be paid December 1, 1898. As to interest upon the purchase money, the contract provided as follows: "It is hereby agreed that the second party hereto pays to the first parties \$240 each and every year as interest upon the aforesaid \$2,000.00, and \$112 as interest upon the said \$1,550.00." The contract was silent as to when the purchaser should have possession, but Clark went into possession, without objection, in January, 1896; and afterwards the plaintiff, M. C. Chase, sunk a well on the land described in the complaint, under a contract with Clark, for the sum of \$300, and obtained judgment therefor, and sold the right, title, and interest of Clark in said land under execution, and on June 19, 1897, obtained the sheriff's deed therefor. Chase thereupon presented his deed to Clark and demanded possession, which Clark refused. Chase afterwards obtained a writ of possession, but before it was served Clark surrendered possession to Cameron's agent; and on August 18, 1897, Chase brought this action against Cameron and his wife, and made John Doe and Richard Roe co-defendants. The suit, as originally brought, was in form of an action to quiet title, alleging that the plaintiff was the owner and entitled to the possession; that defendants claimed some interest, but that such claim was without right. The cause came on for trial on June 2, 1899; and on that day, by leave of the court, and against the objection of defendants that it did not state facts sufficient to constitute a cause of action, plaintiff filed an amendment to his complaint as "a further and separate cause of action." This amendment alleged the facts hereinbefore stated, charged that defendant Cameron and Clark fraudulently conspired to defeat plaintiff's writ of possession, and, to that end, that Clark surrendered possession and placed Cameron in possession for a valuable consideration. It also alleged "that at the time this action was commenced" there was nothing due to Cameron upon said agreement; that all of the terms and conditions thereof "due at that time" on the part of Clark had been performed; that plaintiff is the owner of all the right, title, and interest of said Clark; that defendant Cameron had notice of the commence-

ment of his said action against Clark; that Cameron has refused, and "will continue to refuse, to allow plaintiff to exercise the right guarantied to him by the said contract as the successor in interest of said Clark, and will continue to appropriate to his own use the crops from the said ranch, unless restrained by the court from so doing"; that, unless plaintiff's right and interest is established by record, Cameron will sell said property without giving notice to the vendee of plaintiff's rights. A copy of said contract of sale is attached to the complaint. The prayer of the original complaint was, in substance, that defendants be decreed to have no interest or estate in the land or premises, and be forever debarred from asserting any claim adverse to the plaintiff. The amended complaint added to the prayer that said contract "be declared to be a fact; that plaintiff be decreed to be the owner of all the rights and privileges under and pursuant to said agreement," and entitled to the possession of the property. The answers of defendants put in issue all the material allegations of each of the causes of action,—especially the right of plaintiff to possession of the land, the alleged fraudulent conspiracy with Clark, and the allegation that nothing was due to Cameron upon the contract at the time the action was commenced.

The court found: (1) That plaintiff at the time the action was commenced was, and now is, the equitable owner, and as such is entitled to the possession, of the land; that Cameron holds the legal title, and claims an interest adversely to the plaintiff. (2) The making of the contract to convey to Clark; that Clark went into possession under said agreement, and made improvements thereon, with the knowledge and consent of Cameron, of the value of \$540. (3) That plaintiff obtained judgment against Clark on October 26, 1896, foreclosing Clark's interest and title; the sale thereunder to plaintiff; the deed of the sheriff, whereby he became the owner of all the right, title, and interest of Clark; and that defendants had notice of the commencement of said action against Clark. (4) That on the — day of June, 1897, plaintiff exhibited his said deed to Clark and demanded possession, which was refused; that a writ of possession was issued to plaintiff; that, before it was served, defendant Cameron and Clark fraudulently conspired to defeat said writ, and to that end Clark surrendered possession to Cameron. (5) That the contract between Cameron and Clark was not recorded, and that, unless plaintiff's right be established of record, Cameron would dispose of the property without notice to the vendee of plaintiff's equitable right,—and, as conclusions of law, that plaintiff is the equitable owner of the land, and is now entitled to the possession of the whole thereof; that Cameron holds the legal title, subject to the rights and interests of the plaintiff; and that plaintiff

be put in possession; and judgment was entered accordingly.

The plaintiff succeeded to the rights of Clark under the contract of the latter with Cameron, and acquired no other or different right. The allegations of the complaint and the findings concede that plaintiff has nothing more than an equitable title, and that defendant Cameron holds the legal title. An action to quiet title cannot be maintained by the owner of an equitable interest as against the holder of the legal title. *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Harrigan v. Mowry*, 84 Cal. 467, 22 Pac. 658, 24 Pac. 48; *Tuffree v. Polhemus*, 108 Cal. 676, 41 Pac. 806; *Burris v. Adams*, 96 Cal. 667, 31 Pac. 565; *McDonald v. McCoy*, 121 Cal. 71, 53 Pac. 421. This proposition is elementary. The action, as originally brought, was, beyond question, an action to quiet title. The new cause of action stated in the amendment to the complaint, I think, was nothing more. If, however, it could be considered an action upon the contract to recover possession, it is fatally defective, and defendant's objection to its being filed should have been sustained. To entitle the plaintiff to any relief, it was essential that he should allege and prove that he, or Clark, to whose rights he had succeeded, had performed the contract upon his part. This amendment was filed on June 2, 1899, and the final payment was due December 1, 1898. It was neither alleged nor found that any payment had ever been made upon the contract either by Clark or the plaintiff. It was alleged, however, that at the time the action was commenced there was nothing due to Cameron upon said contract. There was no finding upon that allegation. But the contrary appears from the amendment to the complaint. It set out a copy of the contract, which shows that it was made September 21, 1895; that the principal sum for which the land was sold was divided into two payments, the first due December 1, 1897, and the second December 1, 1898, and as to interest it was provided as follows: "It is hereby agreed that the second party hereto pays to the first parties \$240 each and every year as interest upon the aforesaid \$2,000.00, and \$112 as interest upon said \$1,550.00." The purchaser was to have the option of paying the principal at any time in advance of the dates fixed, and upon such payment the interest should cease. Respondent contends that the provision relating to interest, being in the present tense, "he pays each and every year," is ambiguous, and that a condition involving a forfeiture must be strictly interpreted. There is no ambiguity in the clause relating to interest. The purchaser was to pay interest in a specified amount "each and every year," and more than a year had elapsed, and a year's interest, at the least, was due and unpaid when this suit was commenced. It is, however, alleged, and the court found, that Clark

had made improvements on the land of the value of \$540. The allegation and the finding are wholly immaterial. There was no provision in the contract that Clark should make any improvements. They were made voluntarily for his own benefit. It would be a novel proposition that if he had made in the first year improvements of the value of \$3,550, that being the whole of the purchase price, the property would be paid for, and that he could maintain a bill in equity to compel Cameron to convey the legal title. At the time the new cause of action was pleaded, the whole of the purchase money was due and unpaid. The plaintiff stood in no better position than if he had purchased Clark's interest and had taken an assignment of his contract, and has no remedy that he would not have had if he had been such assignee, and none that Clark would not have had if his interest under said contract had not been sold by the sheriff. The plaintiff never complied, nor offered to comply, with the terms of said contract, nor with the offer of Cameron, in his answer, to convey to him upon payment of the principal and interest due upon the contract according to its terms. There is no evidence to support the finding that defendants had notice of the action of Chase against Clark, nor the further finding that Cameron and Clark fraudulently conspired to defeat the writ of possession obtained by the plaintiff. Cameron was entitled to possession under his contract (Clark having defaulted), and was not a party to the action in which the writ was issued; nor do the findings or evidence support the conclusion of law that plaintiff is entitled to possession of the land, nor the judgment awarding him possession. The judgment and order appealed from should be reversed.

We concur: SMITH, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

133 Cal. 257

HOWARD v. BRYAN et al. (Sac. 634.)
(Supreme Court of California. June 21, 1901.)
GUARDIAN AND WARD—MORTGAGE OF WARD'S PROPERTY—PURPOSE.

1. Under Code Civ. Proc. § 1578, providing that the court may authorize a guardian of a minor to mortgage the property of his ward to pay or renew some lien thereon, an order authorizing a mortgage of the ward's property wholly or in part to discharge a lien on the property of the guardian is invalid.

2. Under Code Civ. Proc. § 1578, providing that the property of a minor may be mortgaged to pay or renew a lien thereon, where there are several minors owning undivided interests in the same property, each subject to a lien, the interest of each minor cannot be mortgaged to secure the aggregate of all their debts, but each must be bound only for his part thereof.

Garoutte and McFarland, JJ., dissenting.

In bank. On rehearing. Affirmed.
For former opinion, see 62 Pac. 459.

Arthur E. Miller and Albert M. Johnson,
for appellant. R. Platnauer and White &
Seymour, for respondents.

BEATTY, C. J. The plaintiff in this action seeks to foreclose two mortgages alleged to have been given as security for the same debt. The first mortgage was executed by the adult owners of certain undivided interests in a tract of land, and as to that there is no controversy. The second mortgage purports to have been executed by the guardian of five minor children, who were owners of the remaining undivided interests in the same tract. By the decree of the superior court the first mortgage was foreclosed, but as to the second the plaintiff was nonsuited upon the ground that the order of court purporting to authorize it was void. From this portion of the decree the plaintiff has appealed, and the principal question to be determined is the correctness of the ruling of the superior court sustaining the objection of the respondents to the admission in evidence of the so-called "guardian's mortgage,"—an objection which was based upon the sole ground that the order of court purporting to authorize said mortgage was void for want of jurisdiction. The law which empowers executors, administrators, and guardians, when duly authorized by order of court, to mortgage the estates of decedents, minors, and incompetents, is embraced in sections 1577, 1578, of the Code of Civil Procedure, as originally enacted in 1887, and as since amended. The proceedings involved in this inquiry, having been commenced subsequent to March 3, 1893, are governed by the law as amended at that date (St. 1893, p. 72), and the question is whether, upon the face of the record, it appears that the substantial requirements of the statute were complied with in procuring the order empowering the guardian to execute this mortgage. The steps to be taken by a guardian to obtain such an order are prescribed by section 1578 of the Code of Civil Procedure, the first of which is that he must file a petition showing: (1) "The particular purpose or purposes for which it is proposed to make the note or notes and mortgage, which shall be either to pay the debts, legacies or charges of administration, or to pay, reduce, extend or renew some lien or mortgage already subsisting in said realty, or some part thereof"; (2) "a statement of the debts, legacies, charges of administration, liens, or mortgages to be paid, reduced, extended or renewed, as the case may be"; (3) "the advantage that may accrue to the estate from raising the required money by note or notes and mortgage, or providing for the payment, reduction, extension, or renewal of the subsisting liens or mortgages, as the case may be"; (4) "the amount to be raised, with a

general description of the property proposed to be mortgaged"; and (5) "the names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, as the case may be, so far as known to the petitioner." The filing of such petition is to be followed by an order of the court directing all persons interested to appear, and show cause, if any they can, why authority to mortgage should not be granted, and by a hearing at the time designated. If, upon a full hearing, the court is satisfied that it will be for the advantage of the estate, an order empowering and directing the guardian to execute the mortgage is made. From this it appears that the foundation of jurisdiction in cases of this sort is the petition filed by the guardian for leave to mortgage, and therefore the first thing to be considered is the sufficiency of the petition for the order here in question. It was filed April 3, 1893, by the mother of the respondents, and showed that her husband, Isaac Bryan, had died in October, 1885, leaving a will, by which she was appointed executrix, and guardian of the minor children; that she had administered the estate, but had never legally qualified as guardian until March 27, 1893, at which time she became the duly-qualified guardian of the five youngest children (the respondents here); that the estate of her husband, which consisted exclusively of the land described in these mortgages, was community property, and had been distributed, one half to her in fee, as her community share, and the other half, in accordance with the provisions of the will, to her for life, with remainder to the children in equal shares,—that is to say, each of the 10 children took one undivided twentieth of the land, subject to her life estate; that from the death of her husband she continued to reside on the land with her children, and supported and educated the minors. The petition further showed that at the time of his death Isaac Bryan owed \$2,500, secured by a mortgage on said tract of land; that the petitioner had been without any means of support for herself or children except the income from the land; that the rents had not exceeded \$600 per annum,—a sum wholly insufficient for the support of herself and her minor children; that, to pay off the said debt of \$2,500 secured as aforesaid, and to pay debts incurred for the support of herself and children, she had borrowed \$4,500 from M. A. Howard (the plaintiff herein), as security for which she had mortgaged her interest in said land; that she had subsequently borrowed from Howard \$600 more, which had been advanced without security, and had been used for the support of herself and these minors; that said sums, together with interest, amounting in all to more than \$6,000, were due and unpaid; and that her wards were indebted to her in the sum of \$5,000, which she had expended between November, 1885, and March, 1893, for their support and

education. The petition further alleged that the future expenses of administration, including support of the minors, costs, commissions, and counsel fees, would amount to \$4,750. It was further shown that the interest of the petitioner and one of her adult children in the land had been sold under execution, and a sheriff's deed delivered to one Rider; that he was threatening to and would oust her from possession, and claim a partition of the land, if she failed to pay him \$2,150, for which sum he had agreed to reconvey; that Howard was also threatening to foreclose; that one Dalton had agreed to lend her \$10,000 with which to satisfy Howard's and Rider's claims, provided she obtained authority to mortgage the interest of the minors, in conjunction with a new mortgage to be given by herself and her adult children upon their interest in the land; that, unless this agreement could be carried out, costly and expensive litigation would ensue, disastrous to the interests of the minors and herself. Upon these allegations, and others not requiring particular statement, leave was asked to include the interest of the minors in a new mortgage for \$10,000. Upon the filing of this petition, and upon proper orders and notice to all parties concerned, a hearing was had, and, upon a finding that all the allegations of the petition were true, an order was made, empowering the guardian to execute a mortgage of the interest of the minors, in conjunction with a similar mortgage of the interests of the guardian and adult children, for \$9,500. Both mortgages were accordingly executed to Dalton, who afterwards assigned them to the plaintiff, Howard.

The judgment of nonsuit as to the guardian's mortgage followed inevitably from the ruling of the superior court sustaining the objection of the respondents to the admission of that mortgage when it was offered in evidence. If it was properly excluded, there was no evidence in the case upon which to base any judgment against the minors, or their interest in the land. The points made by the appellant, to the effect that, irrespective of the validity of the mortgage, the judgment is erroneous, because, first, the respondents were estopped to deny its validity; because, second, it was good as an equitable mortgage; and because, third, plaintiff was, in any event, entitled to a judgment for the money loaned,—have nothing to sustain them in the record. There was neither allegation, nor proof, nor offer of proof of any of the facts constituting the supposed estoppel. It is true that the complaint contains a general averment that Ellen Bryan, as guardian of said minors, borrowed from plaintiff's assignor \$9,500 for their benefit, but it is not alleged that she expended any portion of it for their benefit, and the allegation actually made is denied in the answer. The finding of the court that all the allegations of the complaint are true was made after the

order of nonsuit had been granted, when the respondents were out of the case, and cannot bind them. At the time the nonsuit was granted, no evidence had been offered which would have sustained a finding of the facts relied upon as an estoppel, or as constituting an equitable mortgage of the minors' interest in the land. As to the contention that the plaintiff was entitled to a judgment for the full amount of his loan, it is only necessary to say that he got such a judgment against the only party upon whom a personal liability rests, viz. Mrs. Baker, formerly Bryan. The full amount due plaintiff is ascertained by the judgment foreclosing the first mortgage, and, if that is not realized by a sale of the interests of the adult mortgagors, he is to have a personal judgment against Mrs. Baker for the deficiency. If there were any grounds upon which he might have claimed a personal judgment against the respondents, there was no proof of such grounds, or offer of proof, except by the guardian's mortgage; and, if that was properly excluded upon the objection of the respondents, there could be no judgment against them any more than there could be a foreclosure of the mortgage.

These questions being disposed of, there remains but one: Was the guardian's mortgage valid? or, more specifically, was there a valid order authorizing the mortgage? This being a collateral attack upon the order, only those facts and matters appearing upon the face of the record are to be considered, and, if they show no excess or defect of jurisdiction, no mere error of the court in the exercise of its jurisdiction or irregularity in the proceeding will invalidate the order. And in examining the record the same presumptions are indulged in favor of the regularity and validity of the proceeding as those which govern the construction of the record in an ordinary action. *Burris v. Kennedy*, 108 Cal. 338, 41 Pac. 458. Keeping this proposition in view, the first question is, did the petition comply with the substantial requirements of the statute? The essential fact to be found by the court as the basis of its order is that it will be for the advantage of the estate to raise money by a loan, and the statute prescribes the matters which must be set forth in the petition as a basis for the judgment of the court. The first requisite of the petition is that it must disclose the particular purpose for which the money is to be used, and in case of a minor's estate that purpose must be either to pay debts or charges of administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting on the realty which it is proposed to mortgage. The petition in this case does not show the existence of any lien or mortgage on the interest of either of these minors. It shows that there had at one time existed a lien on the entire property for \$2,500, but, of course, a very small proportion of this ever attached to the five-twentieths own-

ed by these minors subject to the life estate of their mother; and, whatever it may have amounted to in the beginning, it had been fully discharged. The voluntary assumption and payment of this debt by their mother put an end to their obligation. The petition did contain an estimate of future charges of administration, but it clearly showed that there was no purpose to apply the money borrowed to the payment of such charges, except as to the surplus that might remain after satisfying the claims of Howard and Rider, amounting to over \$8,200. This sum was, at all events, to be laid out, in the first place, for the discharge of obligations in which the minors were in no manner concerned. It is true that an indebtedness of \$5,000 from the minors to their mother for expenses incurred by her for their support and education prior to her qualification as legal guardian is alleged in the petition, but, waiving the various objections to this item insisted upon by respondents, it is, after all, more than \$3,000 less than the amount to be paid to Rider and Howard. It appears, therefore, conclusively from the petition, and is apparent on the face of the record, that the particular purpose of this proceeding was to enable the guardian to borrow money, not for the exclusive use and benefit of her wards, but largely for her own benefit,—to pay her debts, and to discharge liens resting exclusively upon her estate. All that the petition alleges the order affirms, and what the petition prays the order grants. Whatever infirmity, therefore, appears in the petition attaches to the order, and the question is whether, under this statute, a court may empower a guardian to mortgage his ward's estate to raise money for his own purposes. If the case was plainly and simply of this aspect; if, in other words, the petition had shown in plain terms that the estate of the ward was to be mortgaged to pay a debt of the guardian,—no court could have hesitated to say that the order to mortgage was void. But the case is different. The petition alleges an indebtedness of the minors amounting to \$5,000, and, although the amount of the loan was \$9,500, it was to be secured by a mortgage not only of the one-fourth interest of the minors in the remainder, but also by a mortgage of the guardian's life estate and of the remaining three-fourths of the fee; the minors, that is to say, who were to have more than one-half of the benefit of the loan, were to furnish less than one-fourth of the security. This, it may justly be claimed, made the transaction perfectly fair, and even generous, to the minors; but we think it was nevertheless an excess of the powers of the court. The law cannot be construed to authorize the mortgage of a minor's estate to pay any debt but his own. It must be such a mortgage as he can discharge by paying what he is individually bound for, and such as will admit of a redemption by the payment of that which is due from him

on his own account. In this case the power of the court was exceeded not only in attempting to mortgage the interest of the five minors to secure a sum in excess of their aggregate indebtedness, but also in the attempt to mortgage their separate interests for their aggregate debt. However advantageous it may have seemed in this instance to pursue that course, the proceeding cannot be sustained without establishing a dangerous precedent, from which serious abuses would be certain to flow.

One proposition maintained by appellant remains to be noticed. He contends that no petition whatever was necessary in order to invest the court with jurisdiction to authorize the mortgage,—a contention based upon the following language, found in subdivision 6 of section 1578 of the Code of Civil Procedure: "Jurisdiction of the court to administer the estate of such decedent, minor or incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the note or notes and mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagees," etc. It is a little difficult, certainly, to give a reasonable construction to this language; but we think it would be most unreasonable to hold that it was intended to dispense with the verified petition which the first clause of the same section says shall be filed. The two provisions must be harmonized, if possible, so that both may have effect; and this may be done by supposing that the clause quoted was inserted out of abundant caution for the purpose of designating the particular superior court to which the petition to mortgage must be addressed, irrespective of situs of the land to be mortgaged. We are satisfied, at all events, that a verified petition in substantial conformity to the statute must be filed in order to give the court jurisdiction to proceed. The omission to file it would be more than an irregularity.

It has been suggested, in support of the view that the court has power to authorize a mortgage without a petition or any of the proceedings prescribed by the statute, that no harm can result to the minor, however unnecessarily or excessively his estate is incumbered, because, it is said, the guardian will be chargeable with the whole sum borrowed, and for any misappropriation will be liable on his bond. We think this would be a very inadequate protection to the minor, even if there were a bond with sureties sufficient to answer his demand. But no bond is required as a condition to the making of the mortgage, and the bond given by a guardian in qualifying as such does not necessarily or usually cover the value of the ward's real property. It would be an accident if, in any case, there was a sufficient bond to indemnify the ward for a misappropriation of money borrowed upon the security of his real property. In this case there

is no evidence of the existence of such a bond. The judgment of the superior court is affirmed.

We concur: TEMPLE, J.; VAN DYKE, J.

I dissent: McFARLAND, J.

HENSHAW, J. I concur in the judgment, but I have reached the same conclusion for reasons somewhat different. They are the following: Upon this collateral attack all intendments are to be indulged in favor of jurisdiction and the validity of the court's order. That order authorizes the execution of a mortgage upon the real property of the minors under an express finding that the allegations of the verified petition are true, and that it would be to the advantage of the estates of the minors, and each of them, to mortgage their property in the manner prescribed. Referring to the petition, then, to support this order, there will be found a great mass of recitals and averments touching the necessity and desirability of a mortgage, which are entirely without the purview of the statute. For example, it is shown that there stood a mortgage of \$4,500 against the undivided one-half interest of the mother. By the new mortgage affecting the property of the minors it is proposed to pay off this mortgage; or, in other words, a lien is to be imposed upon the property of the minors to pay the debt of the mother. But, indulging all reasonable intendments in favor of the validity of the order, if there still remain in the petition sufficient averments to uphold the order actually made,—in other words, if, with these insufficient and illegal reasons for mortgaging the minors' property, there should be shown other legal and sufficient reasons,—it will be concluded that the order of the court directing the mortgage was to raise funds to be devoted to these legal purposes. In this regard the petition further shows two items,—one of \$5,000, for costs and expenses already incurred in caring for, maintaining, supporting, and educating the minors; the other, an item of \$4,570, for prospective charges of administration, and for future cost of maintenance. To the legality of these items many objections of weight and consequence are raised. As to the \$5,000 item, it is said that it was for the moneys expended for the care and maintenance of the minors by their mother before she obtained letters of guardianship upon their estate. They were expenditures, then, made by their natural guardian, upon whom in law the duty of their support was cast, and therefore they form no proper charge against the estate of the minors. Passing this objection, it is next insisted—and this objection is certainly well taken—that it is the duty of the guardian to keep separate accounts of the disbursements made by her upon account of each of her wards, because the property of each ward is liable

only for the amount of such expenses actually incurred in his behalf; and that it is not permissible, therefore, to charge the lump sum of \$5,000 against wards A., B., C., and D., when of that sum \$100 only may be chargeable against ward A., \$200 against ward B., \$300 against ward C., and the remainder against ward D. Against the second item of \$4,570 for prospective charges of administration it may be said, assuming the legality of each item composing the charge, that it stands in a somewhat different position from the item of \$5,000, because it may be assumed that the charges of administration will be equally borne by each of the wards. But, if all these difficulties were removed, and if it could be said that the court was justified under the petition and the showing made upon it in authorizing a mortgage for \$9,500, there still remains what is, to my mind, an insuperable objection to the particular mortgage here in question. It will not be doubted, as has been said in the opinion of the Chief Justice, that no court is authorized to impose a mortgage upon the property of a minor, or to expend the moneys of a minor, for any other purpose than to benefit the minor's property or to discharge the minor's obligation. The property of one minor may not be incumbered with a lien in aid of his fellow ward, nor in aid of anybody else. At all times and under all circumstances that property is to be wisely and economically administered for the benefit of the minor alone. The proceedings of a court and of a guardian with a ward's property are not, and can never be, adversary in their nature. There are well-defined constitutional limitations to the power of the court in dealing with the property of the ward. It may change its form by sale; it may impose a lien upon it as by mortgage; it may authorize the expenditure of parts of it when necessary; but, when it acts, it acts only for the benefit of the ward, and not for the benefit of any third person. In this case the mortgage authorized by the court was a blanket mortgage for the full amount of \$9,500; in other words, there was, by the mortgage, a lien imposed upon the real property of each minor for the full amount of \$9,500, notwithstanding the fact that the amount chargeable against the property of minor A. might have been \$100, against minor B. \$500, and so on. The legal consequences which follow such a mortgage are material. No minor could release or redeem his own property from the mortgage debt without paying the full amount of it. Each minor's property, therefore, is held, not alone for the undetermined amount of his own obligation, but for the aggregate amount of the obligations of all the others. Such a mortgage, I think, is void. The court, in authorizing a mortgage upon the property of a ward, can only authorize it and impose a lien upon the ward's property for the amount of money to be raised for the benefit of that ward; and, if

there be more than one ward, as here, owning undivided interests in a tract of land in common, either separate mortgages must be ordered, or the mortgage must specify the amount of the lien and charge against the interest of each minor, and provide for the discharge of the lien as to each particular ward's property upon the payment of that amount. Under the conviction that for the reasons above set forth the mortgage which the court directed to be made, and which in fact was made, is void, as not authorized by the statute, I hold the ruling of the court in refusing it admission in evidence was justified.

GAROUTTE, J. I dissent both from the views and the conclusion declared by the majority of the court in the above-entitled cause, and adhere to the views and conclusion heretofore declared in the opinion found in 62 Pac. 459. I cannot agree to the construction given by the court to that portion of section 1578 of the Code of Civil Procedure which provides: "Jurisdiction of the court to administer the estate of such decedent, minor or incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the note or notes and mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns." To my mind it is plainly evident that the legislature attempted by this provision of the statute to place the order of the court allowing the borrowing of money and giving of a mortgage beyond collateral attack upon the ground of lack of jurisdiction in the court to make it. I see nothing in the provision which in any way indicates an intention upon the part of the legislature to enact it for the purpose declared in the main opinion of the court. If that were the intention, then certainly the clause of the provision which reads, "such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns," is mere surplusage, and means nothing. Neither can I agree with that portion of the opinion which holds the order of the court giving the guardian authority to make the mortgage is void, after the concession made therein that \$5,000 of the amount for which the mortgage was given was a debt against the minors, and a debt for which the court could have made an order for the mortgaging of their estate. If the court in this proceeding had jurisdiction to make an order for a mortgage of \$5,000, I know of no principle of law which would declare an order for a mortgage of \$9,500 void in its entirety. I believe, in such a case, according to every principle of law, the mortgage should be held valid to the extent of \$5,000. The law is settled in this state that, where a defendant has been convicted, and sentenced to state prison for a period, for example, of 10 years, when the greatest penalty which could

be inflicted under the statute for the offense of which he has been convicted was 5 years, that a judgment of that character is not void in its entirety, but simply void for the excess; and this court has repeatedly held that a defendant under those circumstances is not entitled to his discharge until the expiration of the term of imprisonment fixed by the statute. If this be the rule in criminal cases as to the jurisdiction of courts to render judgments, I see no reason why the same principle should not apply to judgments in civil cases.

Aside from the foregoing conclusions, I am firmly convinced that this order granting the right to mortgage the minors' property for \$9,500 is valid in its entirety. In the petition for the order it is set forth that "the costs and expenses of caring for, maintaining, supporting, and educating the said children from the 1st day of November, 1885, to the 1st day of April, 1893, is \$5,000." Again, under the head of "Charges of Administration" we find items amounting to \$4,570. These items include a family allowance for said minors, attorneys' fees, guardian's commissions, and other expenses. Expenses of administration and debts created by the minors are items expressly mentioned in the statute for which an order to mortgage may be given. This proceeding being essentially a collateral attack upon the order of the probate court, it must be assumed that the \$5,000 item for the care, support, and education of these minors is a valid item, and that the expenses of administration in the amount of \$4,570 is also a valid item. We thus have upon the face of the petition valid items of expenses set forth justifying an order for a mortgage to the full amount covered by the order made in this case. It is apparent, for these reasons, that the court had jurisdiction to make the order here involved. It may be conceded, for present purposes, the court had no power to make an order to mortgage the minors' property for the payment of the security given by Mrs. Bryan to Howard, nor that it had any authority to make the order for the mortgage to secure money to pay the Rider lien. Yet, even after this concession, there are still upon the face of the petition sufficient facts to justify the court in making an order to mortgage the minors' interest for the sum of \$9,500. This being so, it will not be presumed upon this collateral attack, in order to defeat and invalidate the mortgage given in this case, that the court made the order for purposes not recognized by the statute. If any presumptions are to be indulged in as to this order, it will be presumed that it was made for valid purposes.

It may be further suggested that no harm can possibly come to minors by reason of the construction here given to orders of the character of the one involved in this proceeding. Upon the other hand, any other

construction, and the construction given by the majority of the court, does the gravest injustice to the mortgagee in this case. It will often be a close question whether or not a certain particular item of charge will come within the designation of debts or expenses of administration, and it would be a gross injustice if a mortgagee is required to decide this question at his peril. Indeed, it would seem, if this be so, that few mortgages would ever be given under the section of the Code here involved. As before suggested, there is no hardship upon a minor in a case of this character. He secures the money. The guardian is responsible to him for it. It can only be expended, upon the order of the court, for his benefit. If the guardian appropriates it to any other purpose, he will be liable upon his bond; and here, as an illustration of that principle, if the money secured by this mortgage has not been expended for the benefit of the wards, it still is in the possession of the guardian, or the guardian is liable for its misappropriation. The order allowing the mortgage to be given is in no sense *res adjudicata* as to what claims are valid claims against the estate of the minors. For the foregoing reasons, the judgment and order should be reversed, and the cause remanded.

(133 Cal. 245)

KNOWLES v. THOMPSON, County Clerk.
(S. F. 2,772.)¹

(Supreme Court of California. June 14, 1901.)
NEW TRIAL—TIME OF GRANTING—EFFECT ON
APPEAL—MANDAMUS—APPLICATION
TO SUPREME COURT.

1. Code Civ. Proc. § 946, providing that an appeal shall stay all proceedings in the lower court on the judgment appealed from, but that the court may proceed on any other matter embraced in the action not affected thereby, does not prohibit the granting of a new trial after an appeal has been taken from the judgment.

2. An order granting a new trial vacates the judgment, and an appeal cannot thereafter be taken or prosecuted therefrom.

3. Code Civ. Proc. § 939, authorizing an appeal from a judgment denying a writ of mandamus, gives an adequate remedy at law which will prevent the renewal of the original application before the supreme court.

In bank. Original application for mandamus by Frank S. Knowles against H. M. Thompson, county clerk, to compel the issuance of an execution. Writ denied.

B. B. Newman, for petitioner. Morrison & Cope and Geo. C. Ross, for respondent.

VAN DYKE, J. Mandamus to compel the respondent, clerk of the county of San Mateo, to issue an execution in a case in which the petitioner is plaintiff, and the Crocker Estate Company, a corporation, and Ernest A. Leigh, are defendants. The petition shows that on the trial of said cause, which was an action of forcible entry and detainer, a verdict was rendered in favor of the plain-

tiff therein January 5, 1900, and on the 6th day of January judgment was rendered on said verdict in favor of the plaintiff and against said defendants; that thereupon the defendants in said action perfected an appeal from said judgment to this court, February 9, 1900, staying all proceedings upon said judgment so appealed from; that on November 5, 1900, upon motion of the respondent in such appeal, plaintiff in said action, after due notice given, this court dismissed the appeal on the ground that the appellants therein, the defendants in said action, had failed to file a transcript of the record therein. It also appears from said petition that, after the appeal had been taken in said action as stated, to wit, on the 7th day of May, 1900, the superior court in which said action was pending duly made and entered an order granting a new trial therein, which order has not been vacated nor set aside, and no appeal taken therefrom. On March 26, 1901, the remittitur on the dismissal of the appeal from the judgment in said cause having theretofore been filed, and the clerk of said court having refused to issue an execution on said judgment, the petitioner applied to said superior court for a writ of mandamus to compel said clerk, the respondent herein, to issue said execution. But the court below refused to issue said writ on the ground, stated in the petition herein, that a new trial in said action had been granted. Respondent demurs to the petition filed herein, and also answers the same. The main grounds in support of the demurrer are: First, that the judgment in the case on which it is sought to have an execution issued has been vacated and set aside by the order granting a new trial in said action; second, that the petitioner has a plain, speedy, and adequate remedy in due course of law by an appeal from the order of the superior court denying his application for mandamus therein.

1. It is contended by the petitioner that upon perfecting the appeal from the judgment rendered in the lower court by the filing of a supersedeas or stay bond, all further proceedings, including any action on the motion for a new trial, were suspended. This, however, is not so. Only such matters as are embraced within the judgment or order appealed from are stayed. Code Civ. Proc. § 946. Proceedings on motion for a new trial are not in direct line of the judgment, but are independent and collateral thereto. The judgment may be at once entered, and even executed, while a motion for a new trial is pending. The motion may be heard and decided and an appeal taken on its own independent record while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that line. *Spanagel v. Dellinger*, 38 Cal. 284; 1 Hayne, New Trial & App. p. 27. An appeal from the judgment does not depend upon the motion

¹ Rehearing denied July 13 1901.

for a new trial. The latter is subsequent to the judgment, and the appeal from the judgment may be taken without waiting for the determination of the motion for a new trial, and such appeal from the judgment may go on after the appeal from the order has been dismissed. *Towdy v. Ellis*, 22 Cal. 659. And an affirmance of the judgment on a direct appeal therefrom does not prevent the court below from setting aside the verdict or finding and judgment based thereon, and granting a new trial. *McDonald v. McConkey*, 57 Cal. 326; *Naglee v. Spencer*, 60 Cal. 10. And the dismissal of an appeal from the judgment is no bar to an appeal by the same party from an order denying his motion for a new trial. *Fulton v. Cox*, 40 Cal. 105. But an order granting a new trial has the effect of vacating the judgment, and the party cannot thereafter proceed on said judgment by appeal therefrom or otherwise. *Kower v. Gluck*, 33 Cal. 407; *Bronner v. Wetzlar*, 55 Cal. 420; *Thompson v. Smith*, 28 Cal. 534; *Rayner v. Jones*, 90 Cal. 78, 27 Pac. 24.

2. An appeal lies from the judgment of the superior court denying the writ of mandate. Code Civ. Proc. § 939; *Palache v. Hunt*, 64 Cal. 474, 2 Pac. 245; *People v. Perry*, 79 Cal. 109, 21 Pac. 423; *Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. 366. This furnishes a plain, speedy, and adequate remedy to the petitioner in the ordinary course of law. *Santa Cruz Gap Turnpike Joint Co. v. Board of Sup'rs of Santa Clara Co.*, 62 Cal. 40. The demurrer to the petition must be sustained, and the writ denied, and it is so ordered.

We concur: GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

(6 Cal. Unrep. 699)

DURKEE v. MOULTON. (L. A. 890.)

(Supreme Court of California. June 25, 1901.)

TRESPASS—DAMAGES—SUFFICIENCY OF EVIDENCE.

The evidence of plaintiff in trespass as to the extent of damages resulting therefrom is sufficient to support a finding of a less sum as the damages sustained.

Commissioners' decision. Department 1. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Daniel Durkee against Lewis F. Moulton. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

E. W. Freeman, for appellant. S. O. Houghton, for respondent.

SMITH, C. Action for trespass on plaintiff's lands by defendant's sheep. The plaintiff recovered \$350 damages, with costs. It is claimed there was no evidence of trespass by any sheep of defendant, or that plaintiff was damaged in the sum of \$350, or in any

sum. The evidence seems to establish the trespasses complained of, beyond doubt, and plaintiff testified as to the nature and amount of the damage thereby caused. His estimate may have been excessive, and it was in fact cut down by the court, but it cannot be said there was no evidence to support the finding. I advise that the judgment and order denying a new trial be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

(133 Cal. 254)

ORANGE GROWERS' BANK et al. v. DUNCAN et al. (L. A. 847.)¹

(Supreme Court of California. June 15, 1901.)

MORTGAGE—FORECLOSURE—ASSIGNMENT—PARTIES—APPEAL—ORDER STRIKING OUT DEMURRER—SUBSTITUTION OF PARTIES—ATTORNEY'S FEES.

1. Where it was urged on appeal that the court erred in striking a demurrer, but the appeal was merely from the judgment, with no bill of exceptions or other record of the affidavit and motion on which the order striking out the demurrer was made, it did not appear that the demurrer was well taken, and hence there was no showing that appellant sustained injury entitling him to reversal.

2. Where a husband and wife were joint owners of a second mortgage, and after the commencement of foreclosure proceedings, to which they were made parties defendant, by the first mortgagee, the husband bought the first mortgage, and continued the proceedings, the wife remaining a party defendant, but claiming the same relief as to the joint mortgage in a cross complaint to which she would have been entitled as a co-complainant with her husband, the fact that the wife, though possibly a proper party plaintiff, claimed relief as a defendant, could not injure defendant mortgagor, and hence was not reversible error.

3. Where, during the pendency of foreclosure proceedings, the mortgage was assigned, and the assignee was substituted as plaintiff by order of court, but the original mortgagee was retained as a party plaintiff, the decree of foreclosure providing that the original mortgagee take nothing, but that amount recovered was due the assignee, the retention of the original mortgagee as a party plaintiff, though erroneous, was harmless, and not cause for reversal.

4. Where, pending foreclosure, the mortgage was purchased by the holder of a second mortgage, which was not yet due, but which became due before the case was tried and the decree entered, the decree was not erroneous because ordering a sale of the premises to satisfy the second mortgage.

5. Where a mortgage provided that attorney's fees should be taxed on foreclosure, such provision need not be pleaded to entitle the mortgagee to a decree for attorney's fees.

6. Where a mortgage provided that attorney's fees should be taxed on foreclosure, but not that such fees should be a lien on the land, a decree allowing attorney's fees should not make them a lien on the land.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by the Orange Growers' Bank and another against Thomassen Duncan and oth-

¹ Rehearing denied July 15, 1901.

ers. From a judgment in favor of plaintiffs, defendants J. A. Wilbur and another appeal. Affirmed.

E. B. Stanton, for appellants. G. B. Skinner, for respondents.

COOPER, C. Action to foreclose certain mortgages. Findings were filed and judgment entered against appellants. The appeal is from the judgment on the judgment roll.

1. It is claimed that the court erred in striking out the demurrer of appellants to the amended complaint. It is not shown that the demurrer was well taken, or that it should have been sustained, if it had not been stricken out. The appellants were allowed to answer and present their defense fully upon the merits. There is no bill of exceptions, and the notice, affidavit, and motion upon which the order striking out the demurrer was made are no part of the judgment roll. Code Civ. Proc. § 670; Dimick v. Campbell, 31 Cal. 240; Catazich v. Hayes, 52 Cal. 338. It therefore does not appear that any injury was done to appellants by the order, and we must presume that it was based upon valid reasons, as all presumptions are in favor of the judgment. The demurrer to the answer and cross complaint of defendant Duncan was properly overruled. Conceding that Thomassen A. Duncan, the wife of plaintiff Archibald Duncan, should have been made a plaintiff for the reason that she was a joint owner of the second note and mortgage, no injury appears to have been done to appellants. She claimed the same relief in her cross complaint as to the joint mortgage as was claimed by her husband in the amended complaint. She therefore was claiming all that she could have claimed if a co-plaintiff with her husband. That she claimed the relief as defendant, instead of claiming it as plaintiff, could not have damaged or misled appellants.

2. The plaintiff corporation commenced the action to foreclose its mortgage upon the premises described in the findings and decree. It appears that at the time of the commencement of the action Archibald Duncan and Thomassen Duncan, his wife, held a second mortgage upon the same premises, which was subsequent to and subject to the mortgage of the corporation. The Duncans were, therefore, made defendants in the suit as originally commenced. Subsequent to the commencement of the suit, the corporation sold and assigned its mortgage to plaintiff Archibald Duncan, and after said assignment an order of court was made substituting said Archibald Duncan as plaintiff. He then filed an amended complaint setting up the facts, but retained the name of the corporation as joint plaintiff. It is claimed that it was prejudicial error to allow the corporation to remain plaintiff under the objection of appellant. It is provided in Code Civ. Proc. § 385: "In case of any other transfer of interest,

the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." After the transfer by the corporation to Archibald Duncan, it was not necessary to retain the name of the corporation as co-plaintiff, and it was improper to do so. But the error was without injury, because the decree and judgment expressly state that the corporation plaintiff take nothing, and that the amount recovered is due and owing to plaintiff Archibald Duncan.

3. At the time the action was commenced by plaintiff corporation, the mortgage then held by Archibald Duncan and Thomassen Duncan for \$2,500 was not due, and they were evidently made parties because they held a second and subsequent mortgage upon the same premises. This mortgage was not due when the amended complaint was filed, and it is claimed that it was error to include it in the decree of foreclosure. It was due at the time the case was tried and the decree entered. It was, therefore, correct to have the decree provide for the sale of the premises to satisfy this second mortgage. Code Civ. Proc. § 728; Hawkins v. Hill, 15 Cal. 500, 76 Am. Dec. 499; Bostwick v. McEvoy, 62 Cal. 502.

4. It is finally claimed that the court erred in allowing the attorney's fee of \$200, for the reason that there is no allegation in the pleading as to attorney's fees, and that the attorney's fees, if allowed, should have been made a lien upon the lands by the terms of the decree. It was not necessary to allege that the mortgage provided for attorney's fees. White v. Allatt, 87 Cal. 248, 25 Pac. 420. The mortgage provided for reasonable attorney's fees, to be taxed by the court, and included in the bill of costs, but did not provide that such attorney's fees should be a lien upon the lands mortgaged. In such case it would have been error for the court to have decreed the attorney's fees to be a lien upon the mortgaged premises. Russell v. Findley, 122 Cal. 478, 55 Pac. 143.

There are no other points argued worthy of discussion. The judgment should be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

6 Cal. Unrep. 700

BASSETT v. LOS ANGELES TRACTION CO. (L. A. 875.)

(Supreme Court of California. June 26, 1901.)
CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—RES IPSA LOQUITUR—PROXIMATE CAUSE—HARMLESS ERROR.

1. Where it is shown that an injury to a passenger was caused by the act of the carrier in operating the instrumentalities employed in

his business, there is a presumption of negligence, which throws on the carrier the burden of showing that the injury was sustained without any negligence on his part; and hence a verdict for plaintiff for injuries against a street railroad will not be reversed because the evidence fails to show that the rate of speed of the car at the time of the accident was excessive, or that the excessive rate of speed or other negligence of defendant was the proximate cause of the injury, since it is sufficient that it fails to show that it was not so.

2. The admission of evidence that defendant's cars had been running slower at the place where the accident occurred since it happened was harmless, if erroneous.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Kate Bassett against the Los Angeles Traction Company. From a judgment in favor of plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

E. H. Lamme and E. E. Millikin, for appellant. Byron L. Oliver and John W. Kemp, for respondent.

SMITH, C. The plaintiff recovered damages against the defendant in the sum of \$750 for personal injuries suffered by her while a passenger on one of the defendant's street-railway cars. The car in which she was riding ran off the track at a point on Eighth street in the city of Los Angeles, and she was thereby thrown to the floor of the car and suffered the injuries complained of. The derailment, which took place in the daytime, was caused by a small stone or pebble on the outer rail of the track, which at this point was slightly curved. The principal question considered by the court, as appears from the opinion appended to the appellant's brief, was as to the rate of speed at which the car was running at the time of the accident. It appeared from the evidence that the general rate of speed used by the defendant was in excess of the statutory limit (Civ. Code, § 501); being over the whole route, including stoppages, in excess of 10 miles, and over the section (of 9,216 feet) where the accident occurred in excess of 13 miles, per hour; and, on the particular day in question, from the terminus to the place of the accident, it was about or in excess of 12 miles an hour. From these facts, taking in consideration stoppages, and reduction of speed in passing curves, the court arrived at the conclusion that the rate of speed at the time of the accident was largely in excess of the statutory limit, and that this constituted negligence in law, and, irrespective of other evidence on the point, rendered the defendant responsible. There was also evidence of opinion pro and con by witnesses as to the actual speed of the car at the time of the accident. But this evidence, being conflicting, and being in fact of little intrinsic value, may, in view of the finding of the court, be disregarded. The conclusion of the court is contested by the appellant's

counsel; and it is argued, in effect, that the evidence was insufficient to show that the rate of speed at the time of the accident was excessive. But whether they are right in this need not be considered. It is sufficient that the evidence fails to show the contrary. The rule as established in this state is that, "when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence, which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part." *McCurrie v. Southern Pac. Co.*, 122 Cal. 561, 55 Pac. 324, and authorities there cited. These authorities also dispose of the contention of the appellant that the evidence was insufficient to show that the excessive rate of speed or other negligence of defendant was the proximate cause of the plaintiff's injury. It is sufficient that it did not show the contrary.

Another point made by the appellant is that the court erred in admitting the testimony of a witness "to the effect that the defendant's cars had been running slower at the point where the derailment occurred since the accident." This evidence was perhaps inadmissible for the purpose of showing an excessive rate of speed at the time of the accident; but it does not seem to have been introduced for that purpose, but, rather, as a standard of comparison to enable the witness to render more definite her testimony as to the speed of the car at the time of the accident. It failed in its purpose and probably, on motion, would have been stricken out; but in view of the more definite evidence in the case, and the view of it taken by the court, it could not in any way have injured the defendant, and, if erroneous, must be regarded as immaterial. I advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(133 Cal. 215)

SAN ANTONIO WATER CO. v. BODENHAMER & SIERRA WATER & POWER CO. (L. A. 828.)¹

(Supreme Court of California. June 15, 1901.)

EX PARTE INJUNCTION—TITLE TO REALTY—RIGHT OF POSSESSION UNDER CONTRACT.

Where a complaint in an application for an injunction stated that plaintiff was the owner of a right to pump water from a certain well, and that defendants had prevented, and threatened to continue to prevent, plaintiff from so pumping water, but there was no allegation that plaintiff was, or defendant was not, in possession of the property, plaintiff was not entitled to an ex parte injunction enforcing its alleged right to the property, since it would

operate to change the possession of property, which is not the proper function of a preliminary injunction.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; Frank F. Foster, Judge.

Action by San Antonio Water Company against W. J. Bodenhamer and another. From an order denying a motion to dissolve a preliminary injunction, defendants appeal. Reversed.

E. R. Annable, for appellants. Otis & Gregg, for respondent.

SMITH, C. Appeal from an order refusing to dissolve an injunction. The plaintiff is a corporation formed for the purpose of supplying the owners of land on the Ontario Colony tract with water, and in fact supplies with water for domestic use some 2,500 people, and with water for irrigation some 6,000 acres of land, planted in fruit trees and vineyard, and dependent for water on the plaintiff. The defendant Bodenhamer was the predecessor in title and interest of the defendant corporation, and is now a contractor and agent of the latter. These parties, for a period of something over four years, have been operating for the development of water on land north of and above the lands of the plaintiff under the contract and modifications thereof referred to in the answer and affidavits as contracts Nos. 1, 2, 3, and 4,—the first, of date October 19, 1894, between the plaintiff and the defendant Bodenhamer and one Oakley; the others, of date, respectively, May 2, 1895, June 15, 1896, and May 14, 1898, between the plaintiff and the defendant corporation. The business thus carried on is referred to in some of the contracts as the "Bodenhamer development," and it will be convenient to make use of this expression. The general effect of these contracts was that the defendants—that is to say, first, Bodenhamer and Oakley, and afterwards their assignee, the defendant corporation—were to do the work of development, the plaintiff supplying the means, and that the water developed was to be divided between the parties according to the terms agreed upon, which were that the plaintiff was to take all the water, at the valuation agreed on, until reimbursed for its outlay, and the balance to be divided equally between the parties. The property affected by the injunction and described in the complaint was acquired and has been continuously used in connection with the work of development, and may be described as appurtenant, or belonging, to the business. When the suit was brought, it was in the possession of the defendants, who claimed to be using it under and in pursuance of the terms of the contract. The allegations of the complaint material to be considered are "that plaintiff is, and for several years last past has been, the owner of the right to pump water from that certain shaft or well situate upon lot 15 of

the Canyon Ridge tract, etc., * * * commonly known as the "Twenty-First Street Well," * * * [and] now has, and for several years last past has had, an engine and machinery adapted for and used in pumping water situate at the mouth of said well or shaft, and upon the lot hereinbefore mentioned"; and that defendants have wrongfully and by force prevented, and threaten to continue to prevent the plaintiff from pumping water from said well, etc. The injunction was issued on the complaint without notice to the defendants. The motion to dissolve was made on the answer, which sets out at length the several contracts, and on affidavits. Counter affidavits were filed by the plaintiff.

There is no allegation in the complaint that the plaintiff is or that the defendants are not in possession of the property in question; nor is there any reference to the contract between the parties, or other allegations explaining the nature of plaintiff's alleged right, or the status of the defendants with reference to the property affected by the suit, or regarding the possession of the property; and it is claimed by the appellants that the actual allegations "are pregnant with admission that defendants are in the actual possession of both under claim of right," and that this was in fact the case. The injunction therefore, it is claimed, operated, in effect, "as a writ of restitution * * * against a defendant in possession," and was improvidently issued. This contention, we think, must be allowed; for, in the absence of all allegations on the subject, the case on the complaint is the same as though it affirmatively appeared that the defendants were in possession; and, "as a general rule, courts of equity will not interfere by preliminary injunctions to change the possession of real property, the title being in dispute," nor is it a proper remedy for recovering possession of personal property. 1 High, Inj. § 355; Williams v. Long, 129 Cal. 229, 61 Pac. 1087; Arnold v. Bright, 41 Mich. 210, 2 N. W. 17; Toledo, A. A. & N. M. Ry. Co. v. Detroit, L. & N. R. Co., 61 Mich. 9, 27 N. W. 715. "The court of chancery," it is said in the former of the Michigan cases cited, "has no more power than any other to condemn a man unheard, and to dispossess him of property prima facie his, and hand over its enjoyment to another on an ex parte claim to it." And in the latter it is said: "It needs no discussion to show that an injunction against a party's holding his own possession is the same thing as turning him out of possession, and is utterly illegal before final decree. * * * A court of equity cannot change the possession of lands in conflict from one party to another until the merits have been finally passed upon." See, also, numerous decisions cited in the latter case, and Toledo, A. A. & N. M. Ry. Co. v. Detroit, L. & N. R. Co., 63 Mich. 647, 30 N. W. 595, and Richter v. Kabat, 114 Mich. 579,

72 N. W. 600, where the rule is affirmed. The order granting an injunction, therefore, had an appeal been taken, would probably have been reversed.

But the appeal now is from the order refusing to dissolve the injunction, and whether this be erroneous or not is to be determined, not from the complaint alone, but from the answer and the affidavits also; and from these it appears that the parties have been carrying on together a common enterprise under a contract specifically determining their mutual rights. To such cases the rule invoked by the appellants does not necessarily apply, for the court may, in proper cases, interfere "by way of interlocutory injunction to restrain the violation of contracts," when necessary for the protection of the legal right and the prevention of irreparable mischief; and this, in some cases, may involve a change of the actual possession. 2 High, Inj. § 1106. It remains, therefore, to inquire whether there is anything in the case as now presented to remove it from the operation of the rule. In considering this question it is to be observed there is no allegation in the complaint as to the ownership or possession of lot 15 of the Canyon Ridge tract, the locus in quo. This lot—though it was otherwise supposed by the court—was in fact the property of the defendant, and the plaintiff had no interest in it except such as he derived under the contracts between him and the defendants to be used in connection with the Bodenhamer development. With regard to the pump and machinery, there is an allegation of ownership; but this, it appears, was purchased under the provisions of the first contract, to be used by the defendant Bodenhamer and his successors in the proposed operations. It is to be regarded, therefore, as belonging to the Bodenhamer development, and as subject to the contract. The right asserted in the complaint—to pump water, etc.—is to be understood, therefore, as derived from and resting upon the contract, and is to be determined exclusively by its provisions. These are very extensively discussed in the briefs, but, under the view we take of the case, it will be unnecessary to enter on so extended an investigation. Under the third contract, of date June 15, 1896, the plaintiff was given the right to prosecute the work; but it was provided that on its failure to avail itself of the privilege, or on its cessation of work for 60 days, the defendant corporation might elect to take up the work, and, after 10 days' notice, proceed therewith; in which case it was to have "the use of all tools, machinery, and appliances already purchased for the prosecution of the work." Under these provisions the plaintiff took up the work, but abandoned it on or about September 1, 1896. The defendant corporation then, after due notice, took up the work, and thereupon—it is alleged in the answer, and not denied—the plaintiff "surrendered to it

possession of all the works of said tunnels, wells, shafts, and developments, together with the tools, machinery, appliances of every name and nature which had been purchased for the prosecution of the work of development, and from that time to the commencement of this suit, and until served with the writ of injunction issued by this court herein, it has been by itself, and W. J. Bodenhamer as its contractor, in possession thereof, carrying on the work of such development with all reasonable diligence and dispatch." On these facts we cannot perceive in the case any grounds for an injunction, and we are therefore of the opinion that the case comes within the application of the rule invoked and the authorities cited by the appellant's counsel. What the rights of the parties may be on the completion or other termination of the contract is immaterial to the questions presented on this appeal, which must be determined by the provisions of the existing contract. Nor can we consider the question whether the use of the well and pumping machinery was necessary to the work of development. It is sufficient that the defendant was in possession, under the terms of the contract, for the purpose of the development, and asserting in good faith the right to the possession of them as necessary for that purpose. We advise that the order appealed from be reversed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

6 Cal. Unrep. 691

FRESNO CANAL & IRRIGATION CO. v. MCKENZIE et al. (S. F. 1,773.)*

(Supreme Court of California. June 15, 1901.)

CITY TREASURER—PAYMENT OF CLAIM—OFFICIAL MISCONDUCT—EFFECT OF JUDGMENT—DEFENSE—EVIDENCE.

1. Where a decree of a court having jurisdiction directed a city treasurer to pay a certain claim against the city, such decree was a complete defense to an action to charge him with official misconduct in having paid the claim.

2. Where judgment had been rendered for plaintiff in an action against a city treasurer and board of trustees to compel payment of a claim against the city, such judgment was sufficient to justify the treasurer in paying the claim, though the trustees refused to approve it, or issue a warrant thereon.

3. Where a city treasurer, acting under a judgment, paid a claim against the city, such judgment was admissible in evidence as justification in an action charging him with official misconduct in having paid the claim.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by the Fresno Canal & Irrigation Company against W. H. McKenzie and another. From a judgment in favor of defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

*Reversed in banc. See 67 Pac. 960, 135 Cal. 497.

Frank H. Short, for appellant. E. D. Edwards and W. C. Graves, for respondents.

McFARLAND, J. This is an action to recover \$1,200 damages for alleged official misconduct by defendant McKenzie, as treasurer of the city of Fresno. The defendant James is sued as a surety on McKenzie's official bond. Judgment went for defendants in the court below, and plaintiff appeals from the judgment and from an order denying a new trial.

The alleged misconduct consists in the refusal by McKenzie to pay a certain warrant for \$1,200 drawn on him by the city clerk, and payable out of the sewer fund of said city, and in paying to another person money of said fund, which, as plaintiff claims, should have been paid to plaintiff on said warrant. There is not much difference between the parties as to the facts. Plaintiff's grantor, McMurtry, during the years 1893 and 1894, had a contract with the city of Fresno for furnishing water for flushing the sewers of the city, for which he was to be paid \$400 per month out of the sewer fund. He filed with the clerk of the city his demand under this contract for \$1,200, alleged to have been due and unpaid for the months of October, November, and December, 1893; and afterwards, and prior to January 22, 1897, he assigned the contract and the said demand to plaintiff. On said January 22, 1897, the board of trustees of the city allowed and approved said demand, and directed the clerk to draw a warrant on McKenzie against the sewer fund in plaintiff's favor for the amount of said demand. Such warrant was drawn on said 22d day of January, and on the same day was presented to the defendant McKenzie, who refused to pay it. However, one McBean had a contract with the city for taking care of its sewage for \$4,900 per annum, payable quarterly, which contract also covered the years 1893 and 1894. The city had refused to pay him for the fiscal year 1893-94, upon the ground that the contract was illegal; and on the 25th day of June, 1894, he had commenced an action in the superior court against the city and the present defendant McKenzie to enforce payment of the amount due on the contract. At the commencement of his action he obtained an injunction restraining McKenzie from paying out the money in the sewer fund. McBean was defeated in the lower court, but on appeal to this court the judgment was reversed, and it was declared here that his contract was not illegal, and that he was entitled to recover the amount due thereon. *McBean v. City of Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191. After the remittitur went down, and on August 13, 1896, the superior court rendered and entered judgment in favor of McBean against the city for \$4,900, and decreed that it should be paid "out of any moneys now in the sewer fund of the city of Fresno for the year end-

ing June 30, 1894"; and that "the treasurer of said defendant city of Fresno pay over to the said plaintiff any money now in his hands or subject to his control as such treasurer, or that may hereafter come into his hands or under his control as such treasurer, belonging to the sewer fund, for the fiscal year ending June 30, 1894, or out of any other money that may come into his hands or under his control of the sewer fund of said year as such treasurer, available therefor, and not otherwise appropriated." McBean, prior to the allowance of plaintiff's demand as hereinbefore stated, presented a certified copy of his judgment to the board of trustees, and demanded that it should be audited and allowed; but the board denied the demand, and afterwards, notwithstanding said judgment, and disregarding the same, allowed plaintiff's demand as aforesaid. At the time of the entry of the judgment there was in the sewer fund for the fiscal year 1893-94 \$2,603.75, and no more, and, upon the presentation of the said judgment in favor of McBean, McKenzie paid to him the said sum of money. The judgment was presented to McKenzie prior to the presentation to him of the said warrant in favor of plaintiff.

The judgment appealed from is right. Where there are several holders of claims against a municipal corporation, each claim being payable only out of the municipal revenues of a certain year, and those revenues being insufficient to satisfy all the claims, no doubt, under our law on the subject as it now stands, creditors may be somewhat embarrassed, as was noted in *Weaver v. City and County of San Francisco*, 111 Cal. 319, 43 Pac. 972; but in the case at bar the question is whether or not McKenzie, as treasurer, was guilty of such official misconduct or malfeasance as made him liable to plaintiff in damages. The general rule undoubtedly is that the mandate of a court having jurisdiction in the premises protects the officer who obeys it, and we see nothing in the case at bar which takes it out of that rule. The force of the judgment is sought to be lessened by the suggestion that it refers only to moneys in the sewer fund "not otherwise appropriated"; but, even if that expression can be construed as qualifying all preceding clauses, and as embracing "any money now in his hands," still there is no ground for contending that the money decreed in the judgment to be paid by the treasurer to McBean had been theretofore "otherwise appropriated." There is nothing in the proposition that, although the trustees and the treasurer had defended the action brought by McBean, and judgment had been rendered in his favor, still such judgment was worthless unless the trustees should afterwards "approve" it, and order a warrant to issue for its payment. All the opposition which the defendants in that action could make to McBean's demand was ended by the judgment,

which was a judicial adjudication that the treasurer should pay that demand. The final arbiter was the court, not the trustees. Indeed, the ordinance itself, which provides for the auditing of demands and their payment on warrants, contains the clause, "except as otherwise by law provided." The contention of appellant that the court erred in allowing the introduction in evidence of the judgment roll in the McBean case is, of course, under the above views, not maintainable. It could not have been rightfully excluded on the ground that appellant was not a party to that action. The respondent had the right to introduce the judgment under which he justified his action, and the question is whether he was guilty of official misconduct in obeying it. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

6 Cal. Unrep. 695

in re LAKEMEYER'S ESTATE. (S. F. 2,655.)

BLIZARD v. DRINKHOUSE.

(Supreme Court of California. June 18, 1901.)
APPEAL—FAILURE TO FILE POINTS—DISMISSAL.

Where appellant did not file his points and authorities in time, but they were on file at the time of hearing, a motion to dismiss the appeal will not be granted, no delay being caused.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Judicial statement of the estate of Eugene Edwin Lakemeyer, deceased. Motion by Lillie R. Blizard, as contestant, to dismiss the appeal of John A. Drinkhouse, proponent of the last will of deceased. Motion denied.

A. Ruef and Geo. B. Keane, for appellant.
Carl Westerfeld, for respondent.

PER CURIAM. A motion by respondent to dismiss the appeal has been submitted. The ground of the motion is that appellant did not file his points and authorities in time. While the excuse given by one of appellant's attorneys under oath is not entirely satisfactory, still we think it sufficient to save his client from the penalty of a refusal to hear his appeal on its merits, particularly as the points were on file at the time of the hearing, and no delay was caused by the delinquency, which was only for a very short period. The motion is denied.

133 Cal. 271

In re WINCHESTER'S ESTATE. (L. A. 954.)

(Supreme Court of California. June 25, 1901.)
WILLS—TRUSTS—CHARITABLE BEQUESTS—CAPACITY OF BENEFICIARIES.

1. A regularly organized unincorporated educational society, governed by a constitution and regularly elected officers, can take a bequest by will.

2. The fact that an unincorporated educational society receives a charitable devise, and thereafter becomes incorporated, does not defeat its right to the devise.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. S. Day, Judge.

Petition by the Natural History Society of Santa Barbara, Cal., for the partial distribution of the estate of Henry K. Winchester, deceased. From a decree in favor of the petitioner, the executor appeals. Affirmed.

Richards & Carrier, for appellant. Wm. G. Griffith, for respondent.

CHIPMAN, C. Henry K. Winchester died testate February 21, 1895. In his will he provided as follows: "I give to the Santa Barbara Natural History Society of Santa Barbara, California, the sum of two thousand dollars." At the time of his death, and until June 28, 1898, this society was an unincorporated organization, on which latter date the members of the society duly incorporated under the laws of this state. The incorporated society petitioned the court for a decree of partial distribution, which was granted by the court, and from this decree the executors appeal on the judgment roll alone.

The court found the following facts: That the petitioner "was organized as a society in the year 1876, and ever since continued to be, up to the time of its incorporation as hereinafter mentioned, a regularly organized, unincorporated society, governed by a constitution and by-laws adopted by the members thereof, having regularly elected officers, and holding regular meetings, and having for its object to advance the study and promote knowledge of the various branches of natural history by holding meetings, providing for lectures, and establishing a museum of natural history specimens, and was known as and called the 'Santa Barbara Natural History Society';" that "on June 28, 1898, the members of said society formed a corporation under the laws of this state, the petitioner herein, and said society has ever since continued to be, and now is, a duly-organized corporation, known as and called the 'Santa Barbara Society of Natural History,'" the purposes were declared to be similar to those for which the original society was formed, although stated in different terms; and, among other things, it was provided that the society "shall hold in possession real estate, and funds contributed as annual dues and by voluntary subscriptions." It was also found that all of the devises and bequests to charitable or benevolent societies, taken collectively, do not exceed one-third of the estate; that distribution to various legatees has heretofore been made, amounting in all to \$9.38 per cent. of the amount to which said legatees were entitled, but no part of said legacy of \$2,000 has been paid; that petitioner rented a building from the executors at the monthly rental of \$12.50, no part of

which has been paid; that said legacy is subject to an inheritance tax. As conclusions of law, the court found that the bequest is a valid bequest to charitable uses, binding upon the estate of deceased; that petitioner was, as it existed at the time said will was executed and at the date of the decease of the testator, and has ever since continued to be, and now is, capable of taking said legacy; and it was decreed that the executors pay to petitioner 89.38 per cent. of said legacy of \$2,000, after deducting \$325, the amount due as inheritance tax and interest. The rental due from petitioner to said executors was decreed to be \$325.

Appellants present two questions: First. Can an unincorporated society, other than a mutual benefit association, take a bequest by will in this state? Second. If it cannot, can it, upon incorporating subsequently to the death of the testator, claim the legacy which while unincorporated it could not take?

Appellants concede that the promotion of the knowledge of natural history is a charitable object, and it is also conceded that in the courts of last resort in several states bequests directly to unincorporated societies having charitable objects in view are upheld, but it is contended that the better reason is with the decisions in those states denying the power of such societies to take charitable bequests. Appellants say: "We do not claim that unincorporated societies are incapable of taking because of the indefiniteness of the beneficiaries." "This," as respondent says, "is an essential element of a charity. The public at large was to have been benefited by the promotion of the knowledge of natural history. But the trustee must be such that he can be held accountable." It is also conceded that where no trustee is named the court may appoint one. "But in this case," it is claimed, "the testator has designated a trustee. And this trustee, being an unincorporated society, cannot be held to a performance of the trust. And yet to take the bequest from the trustee named, and to give the fund to others, would be to exercise that prerogative power under the rule of *cy pres*, * * * which is denied to our courts,"—citing *In re Hinckley's Estate*, 58 Cal. 497. I have given the position of appellants thus fully, as it narrows the inquiry very much. Appellants err in assuming that the unincorporated society, being named as the grantee, thus becoming in a certain sense the trustee, cannot be held to a performance of the trust. Mr. Perry says: "These bodies or quasi corporations [referring to churches, societies, conferences, yearly meetings of Friends, and families of Shakers, and other organizations] have been considered so far under the control of a court of equity that they would be compelled to execute the duties of the trust imposed upon them, and could be dealt with for a breach." 2 Perry, Trusts, § 730.

Appellants also err in assuming that the case involves the necessity of invoking the rule of *cy pres* to the full extent as applied in England, in order to uphold the bequest. The legatee at the testator's death, and long prior thereto, was an existing organization, composed of certain known members, governed by a constitution and by-laws, and having officers chosen to conduct the business affairs of the society and to carry out its objects. The society had a name by which it was known, and under which its purposes were effectuated, and the bequest was made to the society by this name. Of the intention of the testator there can be no question. He intended to aid the study of natural history through this particular society, by giving to it the amount of money named in his will. The use being charitable, the purpose and the donee certain and definite, equity will not allow the trust to fail for want of a trustee to enforce it, should such interposition of the court become necessary. In *Re Upham's Estate*, 127 Cal. 90, 59 Pac. 315, the testator bequeathed the residue of his estate "to the legally qualified and constituted trustees or managers of the Good Templars Orphans' Home of Vallejo, * * * in trust for the use and benefit of the orphan children of said institution." It was contended that, because the home was unincorporated, there were no trustees named capable of taking. The court said: "These trustees seem to be appropriate persons to take charge of this charitable fund, and manage it for the purposes of the trust; but even if it should be held that, in a strict legal sense, they are not capable of taking, yet the charity would not fail for that reason. A court will not allow a charitable trust to fail for want of a legal trustee." *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397, and *Schmidt v. Hess*, 60 Mo. 591, are cited approvingly. In the first of these cases it was said: "If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead." In the Missouri case the grantor deeded certain land to the Lutheran Church for purposes of a burial ground, and delivered the deed to his son-in-law. The trustees of the Evangelical Lutheran Trinity Church brought the action to have vested in themselves, as such trustees, the title to the property. Evidence was admitted to identify the claimants with the church to which the grantor was attached, and which it was his intention to aid. It was said in the opinion: "Although, in consequence of the nonincorporation of the church for whose benefit the grant was made, there was no one in esse at the time of making the donation capable of being the recipient of the trust, yet, the use being a char-

table one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation." *Society v. Atwater*, 30 Ohio St. 77, 27 Am. Rep. 422, is an instructive case. A bequest in trust for the benefit of the parents of the testator was created. He directed that upon the death of his parents the trust should cease, and that his trustee should distribute certain remaining funds as follows: "To apply the same so that it may be used for the interests of religion, and for the advancement of the Kingdom of Christ in the world, as follows, to wit: He shall pay to the treasurer of the American Tract Society the sum of one thousand dollars." Similar directions were made as to three other societies. The court points out that the testator conceived a scheme for advancing Christ's Kingdom in the world, and carried it out by directing the money to be paid to the various societies, and that as soon as the money arrived at their treasuries the scheme was accomplished and the will fulfilled. The court said: "It is not as though he bequeathed to a trustee for the purpose of advancing the Kingdom of Christ. He bequeaths to these societies, because they are advancing the Kingdom, which is the precise object he wants to accomplish. He first states the object he wishes to effect, and then states how he proposes to effect it. He is willing to pay the money direct to them. To them he trusts that they will forward his cherished idea. As said, the societies themselves are the direct beneficiaries of the trust, although, if they should attempt to use their money for purposes foreign to those for which they exist, doubtless they might be restrained to those purposes,—not by reason of anything in the will, but because they should be restrained to the purposes for which they were created." Again it was said: "The testator has created these societies an agency to carry out his scheme. He has given them power over the application of his bounty, and the exercise of that power relieves the bequest of all objections made on account of vagueness or uncertainty." Again: "Although the testator uses the names of the treasurers, this is only his mode of designating the societies to which he desires his money to go." In *Carter v. Balfour's Adm'r*, 19 Ala. 814, the will read: "I give one thousand dollars, to be paid at my wife's death, and to be divided in equal proportions betwixt the following benevolent societies, viz.: The Baptist Societies for Foreign Missions and the American and Foreign Bible Societies. And at my sister's death, if the boy Mike, given to her during her lifetime, be alive, he shall be sold to the best advantage, and the proceeds of the sale equally divided between the societies above named." It was insisted that these bequests must fail because the societies were merely voluntary associations, unincorporated and incapable by law of taking bequests, and that there is no trustee to take for them, and,

further, that the object was too vague. The opinion proceeds: "I think these descriptions sufficiently specific, and, if societies can be found which were organized and known by those named at the time of the testator's death, they should be considered the societies referred to by the will, and capable of taking the bequests, whether incorporated or not. In making the gifts to the societies by their names, I think it clearly and necessarily inferable that the gifts were intended to be made to them in their aggregate capacity, and for the purposes for which they were organized, and that the testator could not have intended the gifts for the individual members of the societies, or he would have made the bequest to them in their individual names in the ordinary way. It must be presumed that the testator knew for what object the societies were formed, and that he intended to have the funds applied to that object." The opinion then shows that these bequests would be sustained independently of the statute of Elizabeth, and, after an examination of the authorities, concludes: "But I think the weight of American authority is decidedly in favor of such bequests." The learned justice who wrote the opinion reviews the cases pro and con, and devotes especial attention to the leading case holding adversely, namely, *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1, 4 L. Ed. 499, and his conclusion was that the same court has partially, if not altogether, overruled the *Baptist Ass'n Case*. It was expressly held in the Alabama case that there was no occasion for invoking the doctrine of *cy pres*, and it was said: "The bequests should be paid only to the society specified in the will, or their authorized agents. If the societies, or either of them, did not exist at the time of the testator's death, or cannot now be found, organized and known as above stated, then the bequest to such society or societies should be considered and disposed of as lapsed legacies." We do not deem it necessary to refer further to the cases, of which there are many, holding similar views. See 5 Am. & Eng. Enc. Law (2d Ed.) p. 918. We are satisfied with the reasoning that has led to the upholding of bequests such as the one before us. Indeed, we think the decision may rest alone on the conclusion reached in *Re Upham's estate*, *supra*. The fact that in that case the bequest was to the trustees of the orphans' home, and not directly to the orphans' home, makes no difference. In either case the intention would be the same, and the capacity to take would be the same.

We do not decide, nor is it necessary to so hold, that the subsequent incorporation of the society would add anything to its capacity to take at the death of the testator. The bequest would have been binding on the estate had there been no incorporation. But as the society now has a corporate existence, and the present members are the same as

the members of the unincorporated society, and the objects are the same, there can be no objection to its receiving the gift. *Society v. Rich*, 45 Me. 552. We discover nothing in *Grand Grove U. A. O. D. of California v. Garibaldi Grove*, No. 71, 130 Cal. 116, 62 Pac. 486, necessarily in conflict with the views herein expressed. We advise that the judgment be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(6 Cal. Unrep. 696)

TRABING v. CALIFORNIA NAV. & IMP.
CO. (Sac. 752.)¹

(Supreme Court of California. June 25, 1901.)

MASTER AND SERVANT—SERVANT'S ACTS—
MASTER'S LIABILITY—PASSENGER—EJECT-
MENT—EXEMPLARY DAMAGES—EXCESSIVE-
NESS.

1. Plaintiff was arrested by the captain of defendant's steamboat, and chained to a post on the lower deck, and ejected before he reached his destination. The court charged that plaintiff could recover only the actual damages suffered by him, unless defendant authorized the acts complained of, or participated therein or ratified them; and that the jury should not allow anything by way of punishing the defendant, unless it authorized the captain's acts or ratified them; and that, unless defendant participated in or authorized the captain's acts or ratified them, the measure of damages would be the amount which would compensate the plaintiff for all detriment proximately caused by the wrongful acts. *Held*, that the instructions were not erroneous as contradictory and too general.

2. Where the matter included in requested instructions was covered by the charge of the court, it was not error to refuse them.

3. An instruction that plaintiff was entitled to recover only the actual damages proven, as distinguished from mere imaginary or exemplary damages, was properly refused, as tending to mislead the jury as to the character of proof necessary.

4. A charge that plaintiff could not recover for his injured feelings and mental anguish was properly refused.

5. Where plaintiff, a boy of 14, was arrested by the captain of defendant's vessel, and chained to a post, and was ejected at midnight, before reaching his destination, and was obliged to walk 30 miles to reach home, a verdict of \$1,500 was not excessive.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Action by Charles Trabing against the California Navigation & Improvement Company. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Plaintiff, a boy of 14 years, was arrested by the captain of defendant's vessel, and chained to a post on the lower deck, and was ejected from the boat at midnight, before arriving at plaintiff's destination, and 30 miles from his home.

Woods & Levinsky, for appellant. Nicol, Orr & Nutter, for respondent.

SMITH, C. This is an action for damages for maltreatment of the plaintiff on one of the defendant's steamers. The jury returned a verdict for \$1,500, and judgment was entered accordingly. The defendant appeals from the judgment, and from an order denying a new trial. The case was before this court on a former appeal, and is reported 121 Cal. 137, 53 Pac. 644, where the facts are more fully stated. The grounds urged for reversal are error of the court in giving or refusing instructions, and excessive damages.

1. On the former trial the court, at the instance of the plaintiff, instructed the jury, if they found certain facts therein enumerated, as follows: "I charge you your verdict will be in favor of plaintiff for such damages as, under all the circumstances of the case disclosed by the evidence, appear to be just, not exceeding the sum of \$5,000," the sum demanded in the complaint. Also it refused the following instruction asked by the defendant: "I charge you that in cases of this kind the plaintiff can recover only the actual damages suffered by him, unless the master authorized the commission of the act complained of, or participated therein, or ratified it after its commission." And with reference to these instructions this court on appeal said: "As an abstract proposition of law, the instruction given is correct, but it is too general to properly guide a jury to a correct conclusion under the facts of this case. The instruction would apply to almost any conceivable case, whether the action were against the principal, or against the agent who actually committed the tort, and whether the facts did or did not justify exemplary damages. It left the question of exemplary damages entirely to the jury. The instruction refused should have been given. It would have informed the jury that they could not give exemplary damages. The jury were not restricted to compensatory damages, either by the instruction asked, or any other instruction of similar import."

On the new trial the former of the two instructions commented on was again given, but with the following addition: "But in estimating such damages you must not allow or award anything for the sake of example, or by way of punishing defendant, unless it shall further appear to you from the evidence that the defendant authorized the commission of said acts of the captain, or ratified them after the commission." The court then, of its own motion, gave to the jury the following instruction: "(a) Unless you find from the evidence that the defendant corporation authorized, participated in, or ratified the act or acts of its servant or servants of which complaint is made, the measure of damages, if any you find, is that amount of money which will compensate the plaintiff for all detriment to him proximately caused by such

¹ Rehearing denied July 26, 1901.

act or acts of the defendant's servant or servants,—his actual damage as distinguished from exemplary or punitive damages,—which amount, under the rule just stated, must be determined, in view of all the evidence, by the sound judgment of the jury." The court refused to give the instruction refused on the first trial, and referred to in the former decision. It also refused to give various instructions that plaintiff could recover "actual damages proven," or "such damages as the plaintiff can actually prove, and has in fact sustained, as contradistinguished from mere imaginary, exemplary, or what is known as 'punitive damages'"; and also the instruction that the jury could not allow the plaintiff "any damages for injured feelings or mental anguish." It is claimed by the appellant that the court erred in the instructions given and in the refusal of those denied.

First. Specifically, the objection to the instructions given is to the part of the instructions given on the former appeal, and referred to in the decision, which it is claimed is erroneous and contradictory to the other instructions. But, as said in the former decision, "as an abstract proposition of law the instruction given is correct," and, though too general of itself to guide the jury, it was fully and satisfactorily explained and qualified in the other instructions.

Second. All of the instructions, in so far as they are correct, were in effect given in other parts of the opinion. The instructions asked as to "actual damages proven" were, in their literal expression, correct, but as used they were calculated to mislead the jury as to the character of the proof necessary. Proof of the damages claimed was necessary, but proof of the amount of detriment, expressed in dollars and cents, was unnecessary. Such proof, in cases of this kind, is in its nature generally impracticable, and hence the amount of damages must be left, in large degree, to the jury. Sedg. Meas. Dam. § 356. The law on the subject was fully explained, and the term "actual damages" correctly defined in other parts of the instructions. The instructions that "damages for injured feelings or mental anguish" could not be allowed was rightly refused. *Sloane v. Railway Co.*, 111 Cal. 668, 44 Pac. 320; 3 Suth. Dam. § 1245.

2. We cannot say that the damages allowed by the jury (\$1,500) were excessive. In the former decision, referring to the verdict, which was for \$2,500, the court said: "We cannot determine from the amount awarded whether it includes exemplary damages or not. If the jury were properly instructed on that subject, an excess in the amount given should be very clear to justify this court in disturbing their conclusion. The question, therefore, turns on the instructions given and refused." On the whole, I think the case was fairly tried on the principles established by the former deci-

sion. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

133 Cal. 237

SAN JOSE FRUIT-PACKING CO. v. CUTTING. (S. F. 1,760.)

(Supreme Court of California. June 14, 1901.)

INJUNCTION—ACTION ON BOND—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—MEASURE OF DAMAGES.

1. Where, in action on injunction bond, damages are claimed for injury suffered both because of a written contract and an oral contract, evidence of conversations, which clearly appeared to relate only to the written contract, was improperly admitted to show the oral contract.

2. Plaintiff, in an action on an injunction bond, is only entitled to such proximate damages as he can establish with reasonable certainty.

3. The damages caused by a wrongful injunction, restraining the defendant from using a machine for the manufacture of cans used by defendant, is computed by taking the difference in the cost of the cans manufactured with and without the machine, and multiplying the number of cans actually manufactured without it by such difference.

4. Evidence of the damages caused by an injunction restraining the use of a certain machine in making cans, which is uncertain as to the decrease in number of cans manufactured and the increased cost thereof, is insufficient to support a verdict in an action on the injunction bond, when such facts could have been specifically shown by plaintiff by the introduction of his books.

Department 2. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action on an injunction bond by the San Jose Fruit-Packing Company against Francis Cutting. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Olney & Olney, for appellant. Chicker-
ing, Thomas & Gregory, for respondent.

PER CURIAM. The plaintiff, before and after September 19, 1893, was engaged in the business of canning fruit, and of manufacturing metal cans for its own use and for sale, and owned and operated in its business a machine known as the "Wheaton Header," used for putting heads on cans. At the date named, in a suit against plaintiff then pending, an injunction was issued, restraining plaintiff from using this machine,

which injunction continued in force until April 17, 1896, when it was dissolved. The defendant here was surety on the injunction bond, and the suit was brought against him for damages suffered by plaintiff by reason of the injunction. The plaintiff recovered a verdict of \$15,000, for which amount and costs judgment was entered. The appeal is from the judgment and from an order denying a new trial.

All claims for damages against the defendant were waived by plaintiff's counsel, "except (1) for the increased cost of manufacturing tin cans, caused, as it was claimed, by the issuance of the injunction; and (2) for the loss of profits incurred by the plaintiff in its contract with the Sacramento Packing & Drying Co." The latter item refers apparently to a single contract with the Sacramento Company; but there seems to have been two contracts relied on by plaintiff,—the one in writing, evidenced by the written correspondence between Wright, the plaintiff's manager, and Bentley, the manager of the Sacramento Company; the other resting on the testimony of Wright. The former was for the current season only. The latter, it is claimed, was for an indefinite term of years. The terms of this last alleged contract rest upon certain testimony given by Wright on the witness stand as to conversations between him and Bentley, the manager of the Sacramento Company. The claim of plaintiff is that it was entitled to damages for disability, caused by the injunction, to perform the written contract for the current season (1893), and also for its continued disability in the following year while the injunction was pending. The claim of defendant is that there was no evidence to support either contention, and that the court, with reference to each, erred in its instruction and other rulings.

As to the supposed oral contract, we think the court erred in admitting, and not refusing to strike out, the testimony of Wright with regard thereto. The letters of the Sacramento Company of March 3 and March 7, 1893, show affirmatively that the conversations between Wright and Bentley, and the arrangement resulting, related exclusively to the current season; and without this it is clear that, as stated by Wright, the arrangement was a mere offer, to be accepted or rejected by the other party. But, independently of this, the conversations must be construed with reference to the previous letter of Wright, and regarded as relating only to the current season. The instruction of the court on this point was therefore erroneous. The instruction should have been limited in its application to damages accruing from plaintiff's inability to comply with its written contract.

These errors would necessitate a reversal, but there are others that must be touched on as bearing on the future proceedings of the case:

1. We find no evidence in the record showing, or tending to show, that plaintiff was unable to supply, or that it did not supply, the Sacramento Company with cans for the season of 1893, as required by its contract, and the case, in fact, seems to have been tried on the opposite theory. The season of 1893, as appears from the testimony of Wright, ended with the latter part of September; that is, about the time of the issuance of the injunction. Prior to that time the plaintiff had furnished to the Sacramento Company "nearly two million" cans, or nearly the whole amount used by it. After the injunction was served, "forty or fifty or sixty thousand" cans were furnished which were purchased from others to carry out the contract. With regard, indeed, to the actual number of cans delivered before the injunction was served, the witness corrects his testimony, saying that by reference to the books of the concern he found that something less than 1,000,000 cans had been delivered. But this refers merely to the time of delivery, and is not inconsistent with the fact before stated by him that nearly 2,000,000 cans, presumably of his own manufacture, were delivered either before or after the service of the injunction, before the delivery of the purchased cans. But, giving this statement all the credit claimed for it by the plaintiff, there is no evidence that more cans were required of plaintiff than were actually delivered, or that it had in fact failed of full performance. The contract does not definitely determine the quantity required, and in the later correspondence, or in the testimony, there is no complaint or reference to default. Nor can any inference adverse to the defendant be drawn from Bentley's testimony to the effect that the Sacramento Company used 2,000,000 cans in the year 1893. From the context the most natural construction of his testimony would be that it got these from the plaintiff. But, assuming the contrary, it cannot be inferred from what he says that it demanded that amount from the plaintiff. It may, by preference, have purchased from others.

2. As to whether or not the evidence would have justified a verdict on account of the increased cost of manufacturing tin cans used by the plaintiff itself, and caused by the issuance of the injunction, it is proper to make some observations. The defendant does not make any objection to the validity of the bond, or to his liability thereon, for whatever damages plaintiff can legally show it suffered by reason of the injunction. It is undoubtedly the law that in an action of this character a plaintiff can recover only such direct proximate damages as he can establish with reasonable certainty and accuracy, and the court so instructed the jury. The defendant contends, and we think correctly, that the evidence in the case failed to fulfill the requirements of this instruction. On this point, the sole question was as

to the increase in cost of heading occasioned by the disuse of the Wheaton header, and the number of cans actually manufactured which were of the class of $2\frac{1}{2}$ pound cans; for the header was used only in the manufacture of these, and there is no evidence that, if the injunction had not been issued, it would have been used for any others. The data required for this calculation were the cost of making cans with the header, the cost without it, and the number of cans manufactured without it. It appears from the evidence of plaintiff's main witness that all these items could have been shown accurately by an itemized statement from the books of plaintiff. It is not necessary to determine whether or not the failure of plaintiff to introduce its books raised that suspicion against the plaintiff's case which is indicated by subdivisions 5 and 6 of section 1963 of the Code of Civil Procedure; but it may be considered as emphasizing the uncertain, even contradictory, character of the oral testimony given by plaintiff's main witness as to this matter. Thus, for example, the number of $2\frac{1}{2}$ pound cans—of which an exact account could have been given from the books—is given only as being “about three-fourths of the total amount used”; and, with reference to the total, in one place it is said that the number of cans used before the injunction was “from five to seven million” per year, that “in 1894 * * * it dropped about three million cans,”—this making the amount used from two to four millions,—and in another part of his testimony the witness says that “in 1894 we ran off about ten thousand cases less”; and, with reference to the increased cost of manufacture, in one place it is said, in effect, that this was “about a dollar a thousand,” and elsewhere it is said “three dollars per thousand.” This evidence, we think, was entirely too vague and uncertain to justify a verdict under the rule as above stated. The judgment and order appealed from are reversed.

6 Cal. Unrep. 703

READ v. SAN DIEGO UNION CO. et al.
(L. A. 884.)

(Supreme Court of California. June 26, 1901.)

VENUE — CHANGE — RESIDENCE OF DEFENDANTS — PARTIES PROPERLY PLAINTIFFS.

Where, in an action against three defendants, two of whom are residents of the county, and the third a resident of another county, it appears the residents, if interested, are proper parties plaintiff, and there is no allegation that they refused to join, the nonresident defendant is entitled to a change of venue to the county of its residence.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by T. J. Read against the San Diego Union Company and others. From an order denying a motion for a change of venue

from Los Angeles to San Diego county, defendant San Diego Union Company appeals. Reversed.

Titus & Shaw, for appellant. W. H. Shinn and Byron L. Oliver, for respondents.

HAYNES, C. This action was brought in the county of Los Angeles, in which defendants Bowker and Chandler reside. The defendant the San Diego Union Company, a corporation, has its legal residence and place of business in the county of San Diego, and in due time moved the court for an order changing the place of trial to that county. Said motion was denied, and said corporation appeals from the order denying said motion.

Said corporation, in 1891, and ever since, has been the publisher of a daily newspaper, and in said year entered into a contract with one Whitehouse, whereby it sold the entire city circulation of said newspaper to him upon terms therein specified. In 1892, Whitehouse sold and assigned said contract to defendants Bowker and Chandler, and they afterwards sold and assigned to the plaintiff, T. J. Read, an undivided one-half interest therein. Each of these transfers was formally approved and accepted by the corporation. On July 29, 1899, said corporation served notice upon said Read, Bowker, and Chandler that it rescinded said contract, and would not, after July 31, 1899, furnish them any newspapers for distribution, claiming the right to do so under the terms of said contract, the particulars of which need not be stated, and Read thereupon brought suit against said corporation to recover damages for breach of said contract, and made his co-contractors, Bowker and Chandler, parties defendant with said corporation. Said contract is set out in the complaint, and the various transfers thereof are alleged, clearly showing that Bowker and Chandler are co-contractors with the plaintiff in the contract alleged to have been wrongfully canceled or rescinded by the plaintiff, and, for aught that appears, equally interested with him in the recovery of damages from the corporation for the alleged breach thereof. It is not alleged that they refused to be joined as co-plaintiffs with Read, or that their interests were adverse, nor were any facts alleged showing a right of recovery against them, unless it can be inferred from the general allegation that he, the plaintiff, has been prevented from carrying out his contract by the “defendants herein” in that defendants have “declined and refused to furnish and supply the plaintiff or his agents any newspapers for distribution.” There is no allegation that Bowker and Chandler, his co-contractors, were in any manner interested with said corporation, or were under any obligation to furnish newspapers to the plaintiff for distribution; and the contract set out in the complaint shows conclusively that

they were not. The defendants Bowker and Chandler answered, denying that they, or either of them, had at any time refused to permit plaintiff to carry out or perform said contract. The motion of the corporation to change the place of trial was based upon the pleadings and the affidavit of its president, to which were attached certain exhibits, and made part thereof, one of which was a communication signed by Read, Bowker, and Chandler, uniting, as parties to said contract, in a demand upon said corporation to continue to furnish to them and their authorized agents a sufficient number of copies of its paper to supply their subscribers, and notifying it that upon its refusal to do so they would hold the corporation and its stockholders liable for all loss. Affidavits were filed in opposition to the motion, but these were confined to the question of residence, and contained no statement tending to show any reason why Bowker and Chandler were not joined as plaintiffs. We think it clear that Bowker and Chandler were made defendants for the sole purpose of preventing a change of the place of trial to the county of San Diego, in which the corporation had its legal residence. The joinder of resident parties as defendants against whom no cause of action is stated does not deprive the real defendant of his right to have the cause transferred to the county of his residence for trial. *Sayward v. Houghton*, 82 Cal. 628, 23 Pac. 120; *Machine Co. v. Cole*, 62 Cal. 318. The order appealed from should be reversed, with directions to the court below to grant appellant's said motion.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, with directions to the court below to grant appellant's said motion.

6 Cal. Unrep. 706

NORRIS et al. v. CRANDALL et al.
(L. A. 895.)

(Supreme Court of California. June 26, 1901.)

FRAUD—EXCHANGE OF PROPERTY—RESCISSION—EVIDENCE—FINDINGS—IMPLEMENTS—VALUE.

1. Where, in an action to rescind an exchange, the court found that defendant represented his property as worth \$4,000, and believed it worth that, while it was worth only \$2,000, the exchange should not be rescinded when the representation was made and relied on as an opinion, and not as a statement of fact.

2. Where plaintiff sought to rescind an exchange of property on the ground of fraud, and the court finds there was no fraud, a failure to find as to all the facts alleged in the complaint is not error.

3. Where, in an action to rescind an exchange of property, the parties treated the value of the properties exchanged as material, and evidence thereof is admitted over plaintiff's objection, the judgment should not be reversed,

since, if immaterial, it could not prejudice plaintiff.

4. Where, on cross-examination, a witness was asked numerous questions as to whether he had not made certain statements to another, but no time, place, or circumstances were specified, it was not error to refuse to permit such others to testify as to such statements for the purpose of impeaching such witness.

5. Where a lawyer engaged for 20 years as an examiner of titles and as attorney for leading loaning companies in a city testifies that he is acquainted with the value of certain lots therein, he should be permitted to testify as to such value.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; J. W. Hughes, Judge.

Action by Adolphus G. Norris and another against Isadore A. Crandall and others. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

L. E. Dadmun and H. A. Jerauld, for appellants. Parrish & Mossholder, for respondents.

CHIPMAN, C. Plaintiffs were the owners of certain land situated in San Diego county, and defendants, or some of them, were owners of certain improved lots in the city of Lincoln, Neb. An exchange, after much negotiation, was finally agreed upon between the parties, and deeds made September 10, 1897. Defendants had formerly resided in Lincoln, but had removed to San Diego in 1895. Plaintiffs resided in San Diego county, and had, up to 1897, never been in Lincoln. Upon the exchange of deeds, plaintiffs and defendants went into the possession of their several lots and tracts of land, plaintiffs removing to Lincoln, where they arrived and went into possession October 5, 1897. The complaint alleged that the San Diego land and improvements were of the value of \$3,600, and the personal property included in the trade (being farm implements and other ranch belongings) was of the value of \$600, making in all \$4,200; that defendants, through defendant G. H. Crandall, acting in their behalf, represented their Lincoln property to be worth \$6,000, and that it was incumbered to the extent of \$1,100, and no more; "that said property was worth and of the market value of four thousand dollars, at least, over and above said mortgages." Certain alleged false representations as to the improvements on the lots are set forth, and that the property was bringing nine dollars per month rent, and "that said real property was level, and in fine shape, and in a fine and first-class condition." It is alleged that plaintiffs had no personal knowledge of the property, and relied wholly on the representations of defendants, which, it is alleged, were entirely false, and fraudulently made to deceive and cheat plaintiffs, and on this ground the rescission is sought. Among other of the alleged false representations, it is alleged that, instead of a mortgage debt of \$4,

100 being on the property, it was incumbered in the further sum of \$1,000.

The court made the following findings of fact: (1) That the San Diego property was of the same value, at the time of the exchange, as the Lincoln property, in excess of all mortgages thereon, to wit, of the value of \$2,000. (2) That while the negotiations for the trade were progressing defendants gave to plaintiffs the name of a party then residing in San Diego, and pointed out his residence, to wit, J. F. Kinney, Esq., who, defendants informed plaintiffs, once owned a portion of the Lincoln property in question, and could give plaintiffs any information they might desire regarding said Lincoln properties. (3) That defendant G. H. Crandall represented the Lincoln properties to be of the value of \$4,000, and that he believed said properties to be worth that amount; that plaintiff A. G. Norris represented and that he believed his San Diego property to be worth \$3,500, "but that neither plaintiffs' said property nor defendants' said property was worth but \$2,000 over and above all mortgages and incumbrances, of which latter there were none on the Lincoln property except in the amount of \$1,100." The finding 3 then states certain specific representations made by defendant G. H. Crandall, and that they were true, and that he did not represent the property "to be in fine shape, level, and in fine and first-class condition," and it is found that the representations made by said Crandall "were not made to deceive or to defraud plaintiffs, or either of them; that plaintiffs believed and relied upon the foregoing statements of said G. H. Crandall." (4) That plaintiffs went upon and took possession of the Lincoln property October 5, 1897, "and took no steps and made no offer to rescind their contract of exchange of said properties," and gave no notice of any dissatisfaction with the trade until in July, 1898. (5) That plaintiffs knew, when the exchange was made, that defendants had not seen the Lincoln property since October, 1895. (6) That the allegations of fraud in plaintiffs' complaint alleged against defendant G. H. Crandall are not sustained by the evidence, (7) That plaintiffs were not induced to exchange their property "by the fraudulent representations or statements of said defendants, or any of them."

1. It is contended that findings 1, 3, and 4 are not supported by the evidence, and that on findings 1 and 3 the judgment should have been for plaintiffs, because the court found that defendants represented their Nebraska property to be worth \$4,000, and that plaintiffs believed and relied upon these representations, whereas the court found the property to be worth only \$2,000 over and above the mortgage of \$1,100, thus making the value \$3,100 instead of \$4,000. There would be force in the latter of the above contentions if the evidence compelled the conclusion that the exchange of properties was

brought about by a false statement of value by defendants made as a substantive fact on which plaintiffs relied as a fact, and not as defendants' opinion as to the fact. We do not, however, think that the evidence would justify any such conclusion. The evidence was that negotiations for the exchange were entered upon in the early part of August, 1897, and continued at intervals until in September, when the deeds passed. Defendant G. H. Crandall testified fully as to the representations made by him (and he is the only defendant charged with having made any). After stating what he told plaintiff Adolphus Norris as to the improvements, the situation of the lots, and also as to the condition of the improvements in 1895, when the defendants last saw the property, the amount of incumbrances on the property, and like matters, as to which the court found with defendants, the witness continued: "I told him in good times the whole property there—the three lots and four houses—ought to be worth \$4,000; but I told him it was like property here,—it was at a standstill; property was not moving much; and that, if he had to sell, I did not think that he could get more than half that amount; I said: 'It is just like it is with your property here. You place your property at \$3,000, and you know the way property is selling here that you could not get half that for it.' We had several conversations, and they were all materially just about the same. I told him, if he wished to know more about the place, he had better write; that he could find any quantity of real-estate men there that could tell him all about the property. 'If you don't want to go to that trouble, there is a man in the city of the name of Judge Kinney, that platted that addition, who could tell you all about it.' I told him that the property when we left, in 1895, was in good condition, but how it was at the time we made the trade I did not know. * * * I told him there was a draw running through the place, or dry creek, called 'Antelope Creek,' and that this two-story house was built into the bank of the creek or draw, and that the chicken house was built into the same bank; and all those representations were true." It appeared that the property was situated in about the center of the city, taken as a whole; that there were fine residences erected near by; that the location was favorably located with reference to street cars and to the business portion of the city, to school houses, churches, and like conveniences. Some of the conversations between plaintiff Adolphus Norris and defendant G. H. Crandall were in the presence and hearing of the latter's father and sister in the store of G. H. Crandall. They were called as witnesses, and corroborated the statements made to Adolphus Norris by G. H. Crandall, as testified to by the latter. The evidence shows that what was stated as to the value of the Lincoln property was but the opinion of Crandall; and other testimony

of other witnesses placed the value at quite as high a figure as Crandall thought the property worth. There was testimony introduced by plaintiffs to the effect that the Nebraska property was not worth the mortgage debt, and defendant's witnesses varied much in their estimate of its value. The same may be said of the value placed by witnesses on the San Diego property, some of whom testified to a value as low as \$250. It is evident that the court concluded from the testimony that Crandall did not make his statements with any intention to mislead Norris, or to gain a fraudulent advantage in the transaction, and that Norris did not make the exchange in reliance on Crandall's statement of the value of the Lincoln property as a substantive fact, but merely as his opinion. In this conclusion of the court support is found in the evidence.

2. There were certain facts alleged in the complaint, paragraphs 6 to 13, inclusive, in failing to find on which it is claimed the court erred. The court did find upon such of these paragraphs as alleged the representations made by Crandall, as to their influence on plaintiffs, as to whether they were fraudulently made, and as to the mortgage indebtedness on the Lincoln property. It is true, the evidence shows that there were mortgages for \$1,000 in excess of the \$1,000 represented by Crandall to be the only liens on the property. But it also appeared that the \$1,000 mortgages had in fact been paid, but were not satisfied on the record, although Crandall supposed they had been. They were, however, subsequently satisfied. The other allegations were found upon either specifically, or were covered fully by the finding against the alleged fraudulent intent, or they were allegations of merely probative facts, not necessary to be found upon. The findings support the judgment. The principal ultimate fact in the case on which plaintiffs relied was whether Crandall falsely and fraudulently, and with intent to deceive plaintiffs, made the representation alleged. The finding being against plaintiffs on this fact, no finding in their favor on the omitted facts would justify a different judgment. *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557.

3. Certain witnesses were allowed, against plaintiffs' objection, to testify to the value of plaintiffs' property, and this is claimed as error, as it appeared that defendants saw the land before they purchased. Plaintiffs alleged that the value of their property at the time of the trade was \$3,600 for the land. Defendants denied that the land was of greater value than \$1,000. The court found that the value of the real property was \$2,000. The parties seem to have treated this as an issue in the case, although, in view of the other issues, we cannot see that it was particularly material. However, the testimony, if immaterial, could have worked no prejudice to plaintiffs.

4. Error is claimed in refusing to allow

the witness W. B. Norris to testify to certain conversations with the witness G. H. Crandall, who, when testifying, denied the conversations. The objection was that no sufficient foundation was laid for the impeachment of the witness Crandall; that the place where, the time when, and the persons present were not given in the questions asked on cross-examination. The record reads as follows: "Plaintiffs recalled W. B. Norris [not plaintiff] in rebuttal, and offered to show that G. H. Crandall, in the months of September and October, 1897, at his store in San Diego, California, stated to W. B. Norris during the conversations that there was a fine two-story house on lots 7 and 8, and that the draw in the lots did not amount to anything; that one could take a plow, and run a furrow alongside of the road in front of the lots, which would keep all the water from running through the lots, and would fill up the draw; that the property was worth \$5,500; and that the lots were not cut up or washed out any, but were good lots, and laid well." When the witness Crandall, whom it was proposed to impeach, was testifying, he was asked a great many questions as to whether he had not made certain and different statements at different times to the witness Norris, some of which were sufficiently definite as to time and circumstances, while others were not thus definite. In none of them was the store of the witness Crandall named as the place, and in none of them was any person named as present, nor did it appear that the two persons only were present. It will be observed that plaintiffs did not formulate any question for the impeaching witness to answer, but stated generally what they proposed to show; and the offer embraced several different statements of conversations claimed to have occurred in two different months, giving no time in the months, and naming no persons as present, but fixing the place in Crandall's store, a place at no time mentioned to Crandall when on the witness stand. The proper method of impeachment is to formulate the question so as to embrace the very statement, at least in substance, which the witness whom it is desired to impeach has denied making, and to ask the impeaching witness for a categorical answer whether the statement was made, giving "the circumstances of times, places, and persons present." Section 2052, Code Civ. Proc. Both parties cite *Plass v. Plass*, 122 Cal. 4, 54 Pac. 372. In that case it appeared that no persons were present at the time and place mentioned except the interlocutors. It was held that, where it appeared that no persons were present except the impeaching witness and the witness sought to be impeached, it was not necessary to state in the impeaching question, "No other persons being present." It was also held that, where it appears that only the two were present, it would be superfluous to require a statement that the person spoken to

was present, as it must be presumed he was present, or he could not have been spoken to. The case here is not brought within the facts of the Plass Case. We think the court made a correct ruling.

5. It is claimed that the court erred in permitting the witness Brown to testify in defendants' behalf as an expert on the value of real estate, and in refusing to strike out his testimony. It is claimed that mere opportunity offered for observation will not constitute one an expert, or render his opinion admissible; that he must have been educated in the business about which he testifies, or has acquired actual skill and scientific knowledge upon the subject,—citing subdivision 9, § 1870, Code Civ. Proc.; *Goldstein v. Black*, 50 Cal. 463; *Reed v. Drais*, 67 Cal. 491, 8 Pac. 20; and other cases. In the present case Brown testified that he was a lawyer, and had been engaged for 20 years as examiner of titles of real estate in Lincoln; that he was acquainted with the value of real estate in that city in the years 1895 and 1897, and was acquainted with the value of the lots in question, and of the real property in that vicinity; that he had acted for 20 years for some one or other of the leading loaning companies doing business in Lincoln, the managers of which kept themselves well informed as to not only the market value, but as to the income value, of improved properties. The witness possessed something more than mere opportunity for observation. His profession, and his particular specialty in that profession, and his employment by those who were loaning money based upon values of real property, gave him the required knowledge, and he testified that he had knowledge of the values of the property in controversy. The witness brought himself within the rule and the reason of the rule as laid down in *Reed v. Drais*, *supra*, and the authorities there cited, and the question there was as to the value of real property.

We discover no error in the record, and therefore advise that the judgment and order be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

133 Cal. 278

PEOPLE v. McMAHON. (Cr. 736.)

(Supreme Court of California. June 26, 1901.)

EMBEZZLEMENT — EVIDENCE—SUFFICIENCY — APPEAL—INSTRUCTIONS—PRESUMPTION.

1. On a prosecution for embezzlement, the evidence showed that the prosecuting witness, before retiring for the night, asked accused to count his money, and keep the same for him, and that accused counted it, asking another to notice how much there was. She then put the purse in a pocket of the owner's trousers, and hung them on a chair. The money disappeared, and subsequently most of it was found secreted

in the roof of the house where accused lived. Held, that the evidence was sufficient to sustain a conviction, under Pen. Code, § 503, defining embezzlement as the fraudulent appropriation of property by one intrusted therewith.

2. Where, on appeal, the instructions to the jury are not contained in the transcript, it will be presumed they were proper.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William P. Lawlor, Judge.

Mary McMahon was convicted of embezzlement, and she appeals. Affirmed.

Charles A. Low, for appellant. Tiley L. Ford, Atty. Gen., for the People.

GRAY, C. The defendant appeals from a judgment convicting her of embezzlement and from an order denying her a new trial. The only point urged by appellant is that the evidence does not show that the crime of embezzlement was committed, for the reason (1) that it fails to show that the property was "intrusted" to the defendant; (2) it fails to show that defendant took the money and converted it to her own use.

The facts of the case pertinent to these questions, so far as necessary to state, are as follows: The defendant and the complaining witness were together in the afternoon in a room in a house of ill fame in the city of San Francisco, and the complainant then gave to said defendant seven dollars, as he says, "for services rendered in that room." They met again in the evening of that day, and with other parties they spent most of the night moving about from saloon to saloon, indulging in intoxicating liquors. At about 4 o'clock in the morning the complaining witness, with a man who had worked for him in his business as a barber, returned with the defendant to her said room. The prosecuting witness was not drunk, as he says, but was very sick, when they reached the room, and his barber friend was sent out after some bromo seltzer, which the prosecuting witness drank, and soon thereafter the two men turned into the defendant's bed and went to sleep. Before turning in, however, the prosecuting witness had produced a purse containing \$265, and asked the defendant to count it and take care of it for him. The defendant counted it, saying to the other man, "Come here, Joe; I want you to see how much money Harry has got, so that he will have every cent in the morning." She then put the purse back in the pocket of the trousers of the prosecuting witness, and hung the trousers on the back of a chair in the room. The prosecuting witness went to sleep, and thereafter, in the presence of defendant and another woman, called Billings, who came into the room before the prosecuting witness went to sleep, the male companion of the prosecuting witness took the purse from the trousers, poured the money out to see if it was all there, restored it to the purse, returned the purse to the trousers, and left the trousers on the

chair. The two women then left the room, the defendant locking the door as she went, but she immediately returned, unlocked the door, secured a cape which she had left, and again went out, locking the door behind her. An hour or two later the occupants of the room were suddenly aroused by defendant, who excitedly announced to the owner of the money that he had been robbed, to which the defendant replied: "You have got the money, and you must give it to me. I gave it to you to take care of it, and you must give me the money." The defendant was soon thereafter arrested, and subsequently most of the money was found by the police, aided by a man who was living with defendant, secreted in the roof of the house where defendant lived. There is other evidence of a circumstantial nature in the case tending to show that the defendant must have either actually removed the money from the room herself, or connived at its removal while the occupants slept.

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. Being properly instructed as to the law of the matter, as we presume the jury were, it was for them to say, from all the evidence before them, whether the money was "intrusted" to the defendant or not. By their verdict of conviction they found that it was so intrusted. Of course, it is possible in this as it is in most cases to take different views of the evidence, but we think the view taken by the jury was a reasonable one. Certain it is that the owner gave up all control of this money to the defendant until he should arise in the morning, and it also appears that she accepted the trust to safely keep the same, counting the money, and assuring him that it would be there in the morning, and apparently she undertook to carry out the trust by locking the door and carrying away the key. The place where she kept the money was not material. If she was given control of it under an agreement to keep it safely while the owner slept, the property was intrusted to her, within the meaning of the statute; and if she violated this agreement, and abused the confidence reposed in her by stealing it away or conniving at its being stolen, with the purpose of depriving the owner of it, and converting it to her own use, she was guilty of embezzlement. All this the jury found she did, and we see no cause to disturb their verdict. The case of *People v. Montaral*, 120 Cal. 691, 53 Pac. 355, differs materially in its facts from the case before us, and is not an authority for a reversal of this case. *People v. Johnson*, 91 Cal. 265, 27 Pac. 663, as to the facts involved, more nearly resembles this case than any we have been able to find; and yet there is a marked distinction between the facts of the two cases. The evidence in this case goes much further than the *Johnson* Case to show an "intrusting" of the property, and thereby

to establish the principal distinguishing element of embezzlement. We quote the language of a concurring opinion in the *Johnson* Case as peculiarly applicable here: "I think that the jury had the right to find that appellant, with the consent of the prosecuting witness, had full actual possession of the money; and whether it was 'intrusted' to him was, I think, under all the circumstances, a question to be determined by the jury, under proper instructions of the court. And I see no error in the instructions on that point." The instructions are not contained in the transcript in the case before us, but it appears that the jury were instructed, and from this it will be presumed that they were properly instructed. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

133 Cal. 295

PEOPLE v. CALLEGO. (Cr. 733.)

(Supreme Court of California. June 26, 1901.)

MURDER—CONVICTION—EVIDENCE—CORPUS DELICTI.

Defendant, the father of a newly-born infant, took it from the mother, who was unmarried. He put the child in a grain sack, and hung it in a tree so near the house that its cries were heard at times until the morning of the fourth day, when defendant's wife took it away. The child was not seen thereafter. The mother and her sister and brother lived in the house. Defendant lived a mile and a half from there, and left a few minutes after taking the child, and did not return. *Held*, that the evidence of these facts did not justify a verdict of murder in the second degree, since it does not appear that the child is dead or was killed, or that defendant killed it.

In bank. Appeal from superior court, San Luis Obispo county; E. P. Unargst, Judge.

Pedro Callego was convicted of murder in the second degree, and from the judgment and order refusing a new trial he appeals. Reversed.

William Graves and Louis Lamy, for appellant. Tirey L. Ford, Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted of murder in the second degree, and appeals from the judgment and from an order refusing a new trial. The only question of importance is whether there was sufficient evidence to warrant the verdict. It is the old case where it is contended that the corpus delicti was not satisfactorily shown. It is a charge of child murder, and it is contended that there was no proof (1) that the child is dead; (2) if dead, that it was killed; and (3) that, if it was killed, it was not shown that the defendant killed it. I think all these contentions are well grounded, and

especially the last. The child was born alive, and soon after was taken by the defendant, who was its father, under circumstances which indicated at least an intention that the mother, who was unmarried, should not have it. It appears that he put the child in a grain sack, and hung it in a tree so near the house that its cries could be heard in the cabin where the mother was, and were heard at times for three days and nights, and was alive on the morning of the fourth day, when it appears the defendant's wife took it away. Since that time it has never been seen. Defendant lived about a mile and one-half from the cabin in which the child was born, and the only proof of death was that the defendant's wife carried it in a closely-tied package attached to her saddle. This is hardly sufficient, but, if it were, the presumption is that the child was alive when she took it. The defendant left the place where the child was born a few minutes after the child was taken by him, and it does not appear that he was on the premises afterwards. He was not living with the mother of the child, but a brother and sister of the mother were there. He may have hung it in a tree with the intent that it should die of starvation, although, if that was his purpose, it was a strange thing to do, since the mother and all in the house could hear its cries. But, however that may be, there is no evidence which tends to prove that it did die of starvation, or without other cause. The judgment is reversed and a new trial ordered.

We concur: McFARLAND, J.; GAROUTTE, J.; VAN DYKE, J.

133 Cal. 292

BUFFALO CYCLE CO. v. TODD & HAWLEY. (L. A. 837.)

(Supreme Court of California. June 26, 1901.)
PLEADING—ANSWER—OPINION OF PLEADER—
FAILURE TO DENY MATERIAL AVERMENTS—AMENDMENT.

1. Plaintiff sued on an accepted order, which directed defendant to pay to plaintiff any sums that might be due the drawer thereafter from it, and the complaint alleged that defendant had refused to pay, pursuant to the order, sums received by them for the drawer, and had paid him a sum in excess of plaintiff's claim. The answer denied that defendant ever received for the use of the drawer any sum payable on the order, or that defendant had any sum which could have been applied on the order; denied it ever had any money out of which it could have paid any claim of plaintiff against the drawer; and denied it had refused to pay any sum applicable to the payment under the terms thereof, or paid anything to the drawer. *Held*, that a judgment on the pleadings for plaintiff was proper, inasmuch as the answer was a mere statement of opinion that the money was not applicable on the order, and the denial as to payment to the drawer a denial of an immaterial averment.

2. A proposed amended answer, which failed to deny the drawing and acceptance of the order or the receipt of money belonging to the drawer, and the denials of which, as to matters

referred to in the original, were substantially the same, was properly disallowed.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the Buffalo Cycle Company against Todd & Hawley, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Hendrick & Wright, for appellant. Withington & Carter, for respondent.

McFARLAND, J. On motion of plaintiffs, a judgment on the pleadings was rendered in their favor, and defendant appeals from the judgment.

It is averred in the complaint, in addition to the averments of the partnership of plaintiffs, the incorporation of defendant, and other formal matters, that on and prior to June 1, 1895, defendant and one Percy Easton were partners under the firm name of the San Diego Cycle Company, and engaged in certain described business; that on said day the partnership was dissolved, and defendant took possession of the assets, contracts, accounts, and other property of the partnership, and proceeded to close out the business. It is further averred that said Easton was indebted to plaintiffs on a certain promissory note and on a certain judgment, the amount due on both being \$604.55, with interest, etc., and that "in settlement of said demands and of the said claims and indebtedness" Easton made and delivered to plaintiffs the following order: "Messrs. Todd and Hawley, Composing the San Diego Cycle Company: Please pay to Withington & Carter, attorneys of the Buffalo Cycle Company, whatever sums may be due and payable to me thereafter from any contract or contracts or transactions had with you or either of you. [Signed] Percy Easton. July 22, 1895. San Diego, California,"—and that at said last-mentioned date the said defendant accepted the said order, in writing, as follows: "Accepted. Todd & Hawley, G. M. Hawley, Treasurer." It is further averred that Withington & Carter had no interest in said order, that it was always the property of plaintiffs, and that they made a formal written assignment of the same to plaintiffs. It is further averred that thereafter defendant received to and for the use of Easton, from the business, contracts, and transactions mentioned in the order, large sums of money in excess of said \$604.55 and interest, and, though often requested to do so, has refused to pay the same, or any part thereof, to plaintiffs. There is also an averment that defendant had paid to Easton a sum of money largely in excess of plaintiffs' claim. Defendant filed an answer, in which there was no denial of the partnership of plaintiffs, or the partnership of defendant and Easton, or the indebtedness of Easton to plaintiffs, or the making of said order, and its acceptance by defendant. The entire an-

swer of the defendant is as follows: "Now comes defendant, and by way of answering plaintiffs' amended complaint herein, denies that at any time or times mentioned in said complaint this defendant ever received to or for the use of the said Percy Easton the sum of \$604.55, or any other sum of money which was due and payable on the order and acceptance sued upon; denies that at any time the defendant had said sum of money or any sum of money belonging to said Easton in his possession, which sum could have been applied in the satisfaction of said order and acceptance; denies that it ever had any property or any money out of which it could have paid any claims of the plaintiffs herein against the said Percy Easton. Defendant denies that it has, since the said 22d day of July, 1895, paid to Percy Easton said sum of money as set out in said plaintiffs' amended complaint, or any sums of money, nor has this defendant ever refused or failed to pay the plaintiffs any sum of money or moneys applicable to said payment under the terms thereof."

The judgment of the court below is right. The answer raises no issue. It denies no material averment of the complaint. It contains merely a statement of the pleader's opinion that, as a matter of law, the money alleged by plaintiffs to be in its hands is not applicable to the payment of the plaintiffs' claim, without stating any facts upon which the opinion is based, and it therefore sets up no defense. The denial that the defendant paid any money to Easton is merely the denial of an immaterial averment.

After the motion for judgment had been argued, and before judgment thereon had been rendered, defendant made a general request to amend, and the court postponed the decision for several days, during which time defendant offered a certain proposed amended answer, a copy of which appears in the record, and asked leave to file it. The court refused to allow the proposed answer to be filed, and in this ruling we see no error. The denials in the proposed answer as to the matters referred to in the original answer are substantially like those in the original. There are some denials as to averments in the complaint above noticed, which were admitted in the original answer, all of which, except one, are made on the ground that defendant had "no information or belief sufficient to enable him to answer." The exception is a mere denial that it was ever associated with Easton as a partner "under the name of the San Diego Cycle Company." There is no denial of the drawing and acceptance of the order, or the receipt of money belonging to Easton. There is an averment that it paid out money to other creditors of Easton without authority from the latter to do so; but this constitutes no defense. Under these circumstances we cannot say that the court abused its discretion

in refusing to allow the amended answer to be filed.

There is nothing in the point that there are two causes of action in the complaint, which are not separately stated. There is only one cause of action, which is on the accepted order. The judgment is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

133 Cal. 282

SANTA CRUZ COUNTY v. McPHERSON
et al. (S. F. 2,225.)

(Supreme Court of California. June 26, 1901.)

COUNTIES—ILLEGAL PAYMENT OF COUNTY FUNDS—FRAUD—JURISDICTION.

1. St. 1893, p. 347, authorizing a county to bring an action to recover money ordered paid by the board of supervisors or paid by any officer without authority of law, does not authorize an action to recover money paid on the order of the board of supervisors for county printing, on the ground that such order was obtained by a fraudulent combination, since the board is authorized to order such payment.

2. Objections that a bill for county printing is exorbitant and the result of an illegal combination by county newspapers can only be raised and determined before the board of supervisors.

Commissioners' decision. Department 1. Appeal from superior court, Santa Cruz county; M. T. Dooling, Judge.

Action by the county of Santa Cruz against Duncan McPherson and another to recover money illegally paid defendants. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Benj. K. Knight and C. E. Lindsay, for appellant. Charles C. Houck (Joseph H. Skirm, of counsel), for respondents.

GRAY, C. This action was brought, under the provisions of section 8 of the county government act of 1893 (St. 1893, p. 347), to recover \$1,035, alleged to have been illegally paid to defendants for county printing. The plaintiff appeals from a judgment following an order sustaining a demurrer to its amended complaint.

The complaint, as amended, so far as necessary to be here stated, alleges, in substance, that the defendants entered into a conspiracy with other printers and publishers of said county of Santa Cruz to defraud the said county; that it was agreed between the conspirators that the said defendants should file with the board of supervisors of said county a false and fictitious proposal in writing to print the delinquent tax list of 1895 for the price of \$1.50 per square for the first insertion, and \$1 per square for each subsequent insertion; that no proposals should be filed to print said list at or for a lower price, and that the amount received from plaintiff by defendants for the printing of said list should be divided among the parties to said conspiracy; that the said proposal

was filed as agreed; that said proposal was not a sealed proposal, within the meaning of section 3766 of the Political Code, then in force; that its contents were before the filing thereof well known to the other persons engaged and participating in said conspiracy, and that by reason thereof, and of said conspiracy, no lower bid or proposal was filed with or presented to said board; that the said board thereafter, without knowledge of said conspiracy, accepted said proposal, and awarded to defendants the contract for the publication of the said delinquent tax list for 1895 at the said price proposed; that thereafter a pretended claim for the amount of \$1,381.50 for the printing of the delinquent tax list of said county for the year 1895, duly verified as required by law, was presented to said board for settlement and allowance; that said claim was based on the aforesaid fraudulent proposal, and, without any knowledge of said conspiracy and intent to defraud, the said board allowed said claim to the extent of \$1,350, and thereupon the county auditor of said county, as directed by said board, drew a warrant on the treasurer of said county in favor of defendants for said last-mentioned sum, and the same was paid in full to said defendants on the 6th day of July, 1895; that the proper legal charge for the printing of said tax list at all the times mentioned was \$315, and no more; that all of said pretended claim in excess of said \$315 was not and is not payable or chargeable by or against plaintiff, and was not and is not a county charge; that plaintiff received no consideration for said claim above said \$315, and it was the duty of said board to allow said claim for said sum of \$315, and for no greater amount; that by reason of the premises the defendants are indebted to plaintiff in the sum of \$1,035, no part of which has been paid. Plaintiff prays judgment for said \$1,035, together with 20 per cent. damages, as provided by law.

Section 8 of the county government act of 1893 (St. 1893, p. 347) is as follows: "Hereafter, whenever any board of supervisors shall, without authority of law, order any money paid as a salary, fees, or for any other purposes, and such money shall have been actually paid; or whenever any other county officer has drawn any warrant or warrants in his own favor, or in favor of any other person, without being authorized thereto by the board of supervisors, or by the law, and the same shall have been paid, the district attorney of such county is hereby empowered, and it is hereby made his duty, to institute suit, in the name of the county, against such person or persons, to recover the money so paid, and twenty per cent. damages for the use thereof; and no order of the board of supervisors therefor shall be necessary to maintain such suit; and provided further, that when the money has not been paid on such order or warrants, it is hereby made the duty of the district attorney

of such county, upon receiving notice thereof, to commence suit, in the name of the county, for restraining the payment of the same; and no order of the board of supervisors shall be necessary in order to maintain such suit." It will be seen that a suit can be maintained under this section only when the order of the board of supervisors or other warrant on which money is to be or has been paid out was made "without authority of law." The action of the board of supervisors in awarding the contract for printing the delinquent tax list, and in subsequently allowing the claim therefor, under the circumstances disclosed by the complaint, is conclusive of the matter, and in the face of such action it cannot be said that the money was paid to defendants "without authority of law." The order of the board duly made constituted the "authority of law." In *Lamberson v. Jefferds*, 118 Cal. 363, 50 Pac. 403, it is said, "The allowance and settlement of the claim by the board of supervisors is an adjudication, by a tribunal having jurisdiction of the matter, that the services have been rendered, and of the correctness of their value, and is conclusive." See, also, *McFarland v. McCowen*, 98 Cal. 329, 33 Pac. 113; *Colusa Co. v. De Jarnett*, 55 Cal. 373; *McConoughy v. Jackson*, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577. Under the authority of these cases, the board of supervisors was the proper tribunal before which to make the objection that the claim for the printing was excessive by reason of a fraudulent conspiracy or for any other reason, and, the board having taken due action in the matter, all defenses that might have been made to the claim before them are precluded. The judgment should be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(6 Cal. Unrep. 713)

WILSON v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRAN-
CISCO. (S. F. 2,618.)¹

(Supreme Court of California. June 28, 1901.)

CRIMINAL LAW—CONVICTION—NEW TRIAL—
REFUSAL—APPEAL—REVERSAL.

1. Where on appeal an order of the police court denying petitioner a new trial was reversed, and a new trial had in the superior court, resulting in a conviction, as to the appeal from the order denying the new trial there was a finality as to petitioner's rights.

2. Defendant, being convicted in police court, appealed to the superior court from an order denying a new trial, which order was reversed, and on new trial in the superior court defendant was convicted. Thereafter the superior court, by mistake, owing to the papers on appeal bearing a different number, rendered a decision reversing the judgment of the police court. On the attention of the court being

¹ For opinion on petition for rehearing, see 65 Pac. 1027.

called thereto, it set aside the order wherein the judgment was reversed. *Held*, that the judgment rendered on appeal reversing the order denying a new trial, and the conviction of appellant on such new trial in the superior court, was final, and there was, therefore, in fact no appeal in the case pending, in which the second judgment was rendered reversing the judgment below.

In bank. Petition by Herbert E. Wilson for a writ of mandamus against the superior court of the city and county of San Francisco. Denied.

George D. Collins, for petitioner. Lewis F. Byington, for respondent.

GAROUTTE, J. The petitioner prays for a writ of mandate against the superior court of the city and county of San Francisco, asking that an order be made directing that court to try him upon a certain criminal charge therein alleged to be pending against him. The petitioner further asks that, if such relief be not granted, then that the court be ordered to hear and determine an alleged pending appeal taken by him from a judgment rendered against him in the police court.

As to the first branch of relief prayed for, we see no merit in the claims of petitioner, for by the record the facts appear to be that he appealed to the superior court from an order made by the police court denying his motion for a new trial, and upon the hearing of that appeal he was granted a new trial in the superior court. That trial has been had, and his conviction resulted. As far as the appeal of petitioner from the order denying his motion for a new trial is concerned, this would seem to be a finality of his rights.

Laying aside any question as to the appeal above considered, and the substantial legal results following therefrom, if there be any, the court will proceed to consider the remaining branch of the case, involving the appeal from the judgment. An appeal was taken by the petitioner from the judgment of the police court. That appeal was heard and submitted, and thereafter decided by the superior court. By that decision the judgment of the police court was affirmed September 7, 1900. The appeal decided upon said day was the only appeal ever taken from the judgment rendered by the police court against petitioner. Thereafter, upon December 21, 1900, the superior court, by mistake, owing to the papers upon appeal at this time bearing a different number from that entered upon them at the time the appeal was decided upon, September 7th, rendered a decision reversing the judgment given by the police court. Upon December 26th, the attention of the superior court being called to its mistake, it set aside the order of December 21st, wherein the judgment was reversed. As before suggested, there was but one appeal taken by petitioner from the judgment of the police court. That appeal

was disposed of by the judgment of the superior court rendered September 7, 1900. At the time the judgment was rendered by the superior court, December 21, 1900, there was no appeal in the case pending before that court, and the whole proceeding relating to the reversal of the judgment at that time was null and void. The mere numbering of the papers with different numbers in no way affects the question before the court. These different numbers upon the papers, in conjunction with the fact that the court in bank at these various times was made up of different departments, undoubtedly led to the complications and mistakes here indicated. That is the only result following therefrom. The court took jurisdiction of the appeal from the judgment when it ordered it submitted upon briefs thereafter to be filed; and by deciding the appeal upon September 7, 1900, it exercised that jurisdiction over it which it had already assumed. We see no sound reason why the judgment rendered at that time may be declared void, even conceding that mandate would run to compel a trial or hearing, when there had already been a hearing which resulted in a void judgment. It follows, from what has been said, that there is no merit in this application. Petitioner is neither entitled to a trial, nor entitled to have the appeal which he took from the judgment of the police court now heard. That appeal has once been heard and determined against him, and his rights thereunder are foreclosed. For the foregoing reasons, the application for the writ is denied.

We concur: VAN DYKE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

133 Cal. 42

NEALE v. HEAD. (S. F. 2,172.)

(Supreme Court of California. June 26, 1901.)

In bank.

On petition for rehearing. Denied.

For former opinion, see 65 Pac. 131.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this case. By the act under which the California Mutual Life Insurance Company was incorporated (St. 1865-66, p. 752), it was forbidden to make any insurance until it had a cash capital of at least \$100,000, fully paid up, and a guaranty fund of \$250,000, composed of the promissory notes of solvent parties, approved by the board of directors and by each other, no note to exceed \$5,000. Such notes were required to be payable absolutely and at all events, at the company's option, and to be negotiable, in order that they might be indorsed and transferred or converted into cash or otherwise dealt with by the company, in its discretion, without reference to any contingency of losses, expenses, or otherwise.

And it was provided that such notes, or the proceeds thereof, should remain with the company as a fund for the better security of its dealers, and should be assets of the company liable for its debts, obligations, and indebtedness next after its assets from premiums and other sources, exclusive of capital stock, until the net earnings of the company, over and above its expenses, losses, and liabilities, should have accumulated in cash, or securities in which the net earnings had been invested, to a sum which, with the capital stock, should be equal to the aggregate of the original amounts of the guaranty fund and of the capital stock, which should thereupon become and remain the fixed capital of the company, not subject to division, etc. And it was further provided that until the fixed capital had been so accumulated, and the fact formally proven and published, no guaranty note should be withdrawn from the fund without the substitution of another note unanimously approved by the directors then in office and by all the other note makers. See sections 8-10 of the act. By these and other provisions of similar tendency, the legislature sought to protect the policy holders and other creditors of such insurance companies by exacting the creation of an inviolable fund out of which their claims should be payable, but according to this decision the whole purpose and policy of the law can be frustrated by the unlawful act of the corporation in surrendering or canceling a single one of the guaranty notes without compliance with the conditions prescribed in the statute. Without any fault on the part of the policy holders or other creditors of the corporation, five-sevenths of the fund which the legislature has been at such pains to create for the satisfaction of their demands is swept out of existence by an act of the directors which is expressly forbidden by law. It would seem that there is some fault in the logic which can achieve so startling a result, and the fault, I think, is not far to seek. It consists in assuming as the basis of the argument that the corporation can surrender or cancel one of the guaranty notes without observing the conditions prescribed by the act. I think, on the contrary, that any such attempt would be clearly *ultra vires*, void, and nugatory. The corporation might cancel and surrender the note, but the act, being forbidden by law, would be of no legal efficacy. The maker of the note would remain liable notwithstanding the attempted release, and notwithstanding the actual surrender of the paper upon which the note was written. In a suit to enforce payment for the benefit of creditors on contribution for the benefit of his co-sureties, no court would listen for a moment to the plea that the note had been canceled or surrendered. The ready answer would be that the corporation had no power to release it or surrender it; that it had never been held by the corporation for its own benefit, but

in trust for the security of others; and that the attempt to withdraw it was an attempted fraud. If these views are correct, the whole basis of the department opinion is swept away. No wrong was done to the defendant in this case by the withdrawal of the notes of other guarantors, because their liability remained just the same as before. And, as to the neglect of the corporation to prefer claims against the estates of deceased note makers, it may be answered that the surviving note makers could themselves have made such claims, and it was their duty to do so if they desired that protection. The opinion of the department seems to assume in reference to this point that if one of several sureties dies solvent the survivors are all discharged if the obligee fails to present a claim against the estate of the decedent. No authority is cited to sustain the proposition, and it is clearly in conflict with the principle decided in *Sichel v. Carrillo*, 42 Cal. 493, and the cases there referred to, and the later cases approving the same doctrine. There is therefore no basis for the conclusion that the failure of the corporation to present claims against the estates of deceased note makers released the survivors, and, unless we are prepared to hold that an act done in defiance of express statutory inhibition is legally effective, there was no release of any surviving note maker by the surrender of their notes.

It is also, in my opinion, a fundamental misconception of the act of 1866 to suppose that the execution of the guaranty notes created the ordinary relation of surety and obligee between the makers and the corporation. They were sureties for the corporation, not to it; and the notes, though payable to the corporation, were held, or if collected the proceeds were held, for the benefit of the policy holders and other creditors. The corporation, as to the notes, was a trustee for the benefit of others, and, even if there had been no express statutory inhibition, the makers of the notes, knowing the fiduciary capacity in which the corporation held them, would have been guilty of a fraud in withdrawing them, and could not thereby have avoided their liability to the beneficiaries.

Another distinction between these guarantors and ordinary sureties is that they were not gratuitous obligors. They were, with respect to the receipts and income of the corporation, far more favored than the ordinary stockholders who contributed the cash capital of a hundred thousand dollars. The stockholders could receive no dividends unless there were profits, but the makers of the guaranty notes, without paying in a dollar, were to have a "commission" of 5 per cent. per annum on the amount of their notes, and if they made any payments on their notes they were to have 12 per cent. on the amounts so paid. Section 10. As the amount of the guaranty fund was \$250,000, the commissions paid to the note makers

during the time the company was in business must have been \$12,500 per annum, or one-eighth of the whole cash capital. It is scarcely a matter of surprise that the company became insolvent, and may be safely assumed that the note makers drew down their commissions as long as it continued to do business. Their liability, therefore, is a meritorious liability,—a liability arising out of a contract under which they were the principal gainers.

As to the right of the plaintiff to maintain the action, there can be no doubt upon that point if the assignee in insolvency could have maintained it. His vendor purchased the note at a sale made by the assignee in pursuance of an order of court, and whatever title and right of action the assignee had passed to the plaintiff. The assignee represented the interest of all creditors of the corporation. It was his right and his duty to collect these notes, or under the order of the court to sell them, and to apply the proceeds to the payment of the company's debts. His vendee stands in his shoes, and in enforcing the obligation is just as much a representative of the creditors as the assignee would have been if instead of selling the note he had sued upon it.

If the foregoing views are correct, the decision in this case is rested upon principles which will constitute a very inconvenient precedent in future controversies, and for that reason it ought to be reconsidered. It may be that upon some of the other grounds urged by counsel for appellant in their briefs a reversal of the judgment and order of the superior court would be necessary, but, as these matters have not been adverted to by the court, it would be idle for me to discuss them.

I concur: TEMPLE, J.

133 Cal. 285

REESE et al. v. BALD MOUNTAIN CONSOL. GOLD-MIN. CO. et al. (Sac. 747.)

(Supreme Court of California. June 26, 1901.)

MASTER AND SERVANT — MINERS' LIENS — MECHANICS' LIENS—EMPLOYMENT BY AGENT —BURDEN OF PROOF—FINDINGS—EVIDENCE —WITNESSES—CROSS-EXAMINATION.

1. A finding that the person employing plaintiff in a mine was in possession of the mine under a contract with the owners, authorizing such person to take possession and make improvements and prosecute development work, does not show an employment by an agent of the owner, within the meaning of Code Civ. Proc. § 1183, giving a miner's lien for work done at the instance of the agent of the owner, and providing that every contractor, subcontractor, architect, builder, or other person having charge of any mining should be held to be the agent of the owner.

2. The pleadings, in an action to establish a miner's lien, were based on the theory that plaintiff was employed by the agent of the owner, and there was no claim, under Code Civ. Proc. § 1192, authorizing a lien against a landowner who knowingly permits building or improvements to be made without giving notice

that he will not be responsible therefor. Held not to authorize a finding that the defendant had knowledge that plaintiff was performing such work.

3. A finding not embraced within the issues will not be considered on appeal.

4. Labor in a mine is not on a building or improvement on land, within the meaning of Code Civ. Proc. § 1192, providing that any building or improvement constructed on land with the knowledge of the owner shall be held to have been constructed at his instance, and will authorize a mechanic's lien thereon, unless he gives notice within three days that he will not be responsible therefor.

5. A miner who knows that his employer is not acting as agent of the mine owner is not entitled to a lien on the mine.

6. The burden of showing that his employer was the agent of the defendant mine owner is on a miner seeking to establish a lien, under Code Civ. Proc. § 1183, authorizing such liens for work done at the instance of an agent of the owner.

7. Where the defendant, in an action to establish a miner's lien, alleges that plaintiff knew that his employer was not the agent of the defendant owner, plaintiff can be cross-examined as to his knowledge of such fact.

Commissioners' decision. Department 1. Appeal from superior court, Plumas county; Stanley A. Smith, Judge.

Action by William R. Reese and another against the Bald Mountain Consolidated Gold-Mining Company and another to establish a miner's lien. From a judgment in favor of the plaintiffs, the defendants appeal. Reversed.

N. L. Peter, for appellants. Goodwin & Webb, for respondents.

COOPER, C. This action was brought to recover an amount claimed as wages for labor performed in mines in the lands of appellant corporation, and to have the said amount declared to be a lien upon the mining lands described in the complaint. Findings were filed, and judgment ordered for plaintiffs. This appeal is from the judgment upon the judgment roll and a bill of exceptions. The complaint alleges that the labor performed was that of miners in and upon the mines of the corporation, and that the contracts for said labor were made with defendant Pugh. There is no dispute as to the facts that the labor was performed, that the contracts were made with Pugh, that the labor was that of mining in the lands described in the complaint, and that the corporation is the owner in fee of such mines. It is provided in section 1183, Code Civ. Proc., that "any person who performs labor in any mining claim or claims, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the work or labor done, or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, addition

to, or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner, for the purposes of this chapter." It was essential, under the provisions of the above-quoted section, for plaintiffs to allege and prove that the labor was performed at the instance of the agent of appellant, within the definitions therein as to who shall be held to be such agent.

Upon this theory the complaint alleges that during all said time defendant Pugh was the superintendent and managing agent of said corporation in and about its mines. The answer denied the allegation. There is no finding upon said issue. The only finding is the following: "That at said time defendant A. Pugh was in the possession of said premises described in the complaint under a contract theretofore entered into between said A. Pugh and the other defendant, the Bald Mountain Consolidated Gold-Mining Company, under which contract said A. Pugh was authorized and empowered to occupy and hold possession of said premises, and make extensive improvements, and prosecute development work and prospecting thereon and therein." This is not a finding that Pugh was the agent of appellant. Neither is it a finding that he was a contractor, subcontractor, architect, or builder, nor that he was a person having charge of any mining, or the construction, alteration, addition to, or repair of, any building or other improvement. It is simply a finding that Pugh was in possession of the premises under a contract made with appellant, and that the contract authorized Pugh to occupy and hold possession and to make improvement and prosecute development work and prospecting therein. The fact that the contract authorized Pugh to make improvements and to do certain work does not show that Pugh was in any manner the agent of appellant. The contract, for aught that appears in the finding, may have been a conveyance of a life estate to Pugh. It authorized Pugh to improve and develop the premises on his own account and for himself. The agent referred to in the section must be the agent of the owner of the building, mining, or improvement; and where the statute says that certain persons are "deemed to be the agent of the owner" it means the agent of the owner of the building, mining, or other improvement. The failure to find upon this material issue was error. *Soto v. Irvine*, 60 Cal. 436; *Malone v. Bosch*, 104 Cal. 681, 38 Pac. 516; *Spect v. Spect*, 88 Cal. 439, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314. The above objection is attempted to be obviated by the fact that the court elsewhere found "that at the time said contract between said A. Pugh and said David R. Reese was made, and during the times said work and labor was being performed thereunder, the said defendant the Bald Mountain Consolidated Gold-Mining Company, a corporation, had full no-

tice and knowledge of the said contract, and of all work being done by the said plaintiff David R. Reese thereunder." This finding is entirely outside any issue made by the pleadings.

The complaint contains no allegation that any building or other improvement was constructed upon the lands of appellant with its knowledge. A finding outside the issues must be disregarded. That the finding is outside the issues is readily perceived. The complaint alleges a contract made with appellant through its agent Pugh. The finding quoted is applicable to a case in which there was no contract with the owner in any manner whatever, but in which the owner is held liable as a penalty for not giving notice that he would not be responsible. The statute relied upon to which it is claimed the above finding may be applied is section 1192, Code Civ. Proc., which provides: "Every building or other improvement mentioned in section one thousand one hundred and eighty-three of this Code, constructed upon any lands with the knowledge of the owner, * * * shall be held to have been constructed at the instance of such owner, * * * and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner * * * shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, * * * give notice that he will not be responsible for the same. * * *" The section mentions every "building" or "improvement" constructed "upon" lands with the knowledge of the owner, and it is expressly stated to apply if notice is not given within three days after the owner shall have obtained knowledge of the "construction, alteration, or repair" by posting a notice in some conspicuous place upon the "land, building, or improvement." The section cannot be held applicable to a claim by a miner for labor in a mine. Labor in a mine is not a building or improvement constructed upon lands. The finding is that appellant had full notice of the contract and of all work being done thereunder. Even if the complaint were sufficient, the finding does not show that any building or improvement was constructed upon the lands of appellant with its knowledge. We think the views herein expressed are supported by the cases of *Williams v. Association*, 66 Cal. 200, 5 Pac. 85, and *Jurgenson v. Diller*, 114 Cal. 492, 46 Pac. 611. In the latter case it was held that labor performed in "drifting in a tunnel" is not the construction, alteration, or repair of a building or other improvement, under section 1192, Code Civ. Proc. That the doctrine of notice does not apply when the work consists of a subtractive process,—the removal of the very corpus of the property. It was said: "As well require one who sees a trespasser cutting his timber to post notice of his nonliability under penalty of having his land subjected to

lent to a finding that the averments of the paragraphs are true.

3. Where, in an action to foreclose a mortgage, the judgment entered did not comply with the decision, in that it did not direct the sale of stock, the court, without notice, may direct an amended judgment to be entered conforming to the decision.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the Homeseekers' Loan Association against Annie Gleeson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

M. C. Hassett (Walter J. Thompson, of counsel), for appellants. Morrison, Foerster & Cope, for respondent.

McFARLAND, J. This is an appeal by defendants from a judgment in favor of plaintiff for the foreclosure of a mortgage. On July 12, 1890, the defendants executed the mortgage in question to the plaintiff to secure their promissory note of even date to plaintiff for \$3,600, due in six months, with stated interest, the whole principal and interest to become due, at plaintiff's option, upon default of payment of any interest, and also to secure certain monthly installments on capital stock hereinafter mentioned. At the same time plaintiff issued to defendants certificates for 18 shares of plaintiff's capital stock, which were of the par value of \$200 per share, and defendants promised in said mortgage to pay plaintiff each month \$1 per share until the shares were fully paid. Simultaneously with the execution of the note and mortgage, defendants pledged and delivered to plaintiff these 18 shares of stock. Defendants did not pay any of the principal of the note, nor any of the interest after June, 1894, and they did not pay any of the monthly installments on the stock after the second Monday of June, 1894. The judgment is for the amount of the principal of the note and the unpaid interest thereon, and for the unpaid installments on the stock.

The main contentions of appellants on the merits are that the amount paid by them as installments on the stock (\$792) should have been credited on the mortgage debt, and that the court should not have given judgment for unpaid installments on the stock. The rights of one who occupies the dual relation of stockholder and borrower to a modern building and loan association are somewhat elaborately discussed in briefs, and a number of authorities cited. But the cases from other states relied on by appellants are mostly based on peculiar statutory provisions. We do not deem it necessary to follow the discussions of counsel on these points, because since the briefs were filed this court in bank, in *McNamara v. Loan Ass'n*, 63 Pac. 670, elaborately reviewed the subject, and arrived at conclusions adverse to these contentions of appellants. We can see no material distinction between the case at bar and the *Mc-*

Namara Case, where the court said, "The mortgagee is within its rights in asking a foreclosure of the mortgage and a decree for the sale of the shares, and presumably they will bring their cash value, and plaintiff will have his credit therefor."

Appellants contend that finding No. 1, which is as follows: "Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of plaintiff's amended complaint are true,"—is insufficient for any purpose as a finding; but the contention is not maintainable. *Johnson v. Klein*, 70 Cal. 186, 11 Pac. 606; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965. There is no material distinction between saying that a certain paragraph of a complaint is true, and saying that the averments of the paragraph are true. We cannot see the conflict contended for by appellants between that part of finding 1 which finds that paragraph 8 of the complaint is true, and the subsequent findings 6 and 15. In paragraph 8 it is averred that no part of the principal of the note had been paid; by finding 6 it is found that appellants had paid \$792 on the monthly installments upon the stock, and \$900.90 on the interest on the note; and in finding 15 it is found that these payments were made pursuant to covenants and agreements contained in the note and in the mortgage, which is true. These findings, therefore, present no discrepancy whatever.

It appears that after the making and filing of the findings and decision a judgment was entered which did not comply with the decision, in this: that it did not direct a sale of the stock, and that afterwards the court, without notice to appellants, directed that an amended judgment be entered decreeing such sale in accordance with the decision, which amended judgment was entered. Appellants contend that the entry of the amended judgment was erroneous and without jurisdiction, but the contention cannot be maintained. This action of the court merely made the judgment conform to its decision, which a court has always the power to do.

There are no other points made which call for special notice. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(6 Cal. Unrep. 716)

DE CARRION v. DE AGUAYO et al.

(L. A. 903.)¹

(Supreme Court of California. June 29, 1901.)
ABSOLUTE DEED—WHEN A MORTGAGE—EVIDENCE.

Plaintiff's grantor borrowed money at a bank, stating that defendants had applied to him for a loan to pay off two mortgages, and that they would deed him the property. The mortgages were taken up, and assignments of them made to plaintiff's grantor, defendants deeding him the premises. Subsequently plaintiff's grantor presented defendants with a paper which showed the amount of the interest due on the alleged loan, and defendants paid him a fee for the services of the person who

¹ For opinion on motion for hearing in bank, see 65 Pac. 950.

computed the interest. After execution of the deed, defendants continued in possession of the premises, paying no rent or leasing the premises, and continuing to make improvements. *Held*, that the deed was a mortgage.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Dolores N. De Carrion against Ygnacio De Aguayo and another. From a judgment in favor of defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

S. O. Houghton, for appellant. John E. Daly, for respondents.

COOPER, C. Judgment was entered in the court below for defendants. Plaintiff made a motion for a new trial, which was denied. This appeal is from the judgment and order denying the motion.

The complaint is for the recovery of the possession of the lands described therein, and contains the usual allegations in ejectment. The answer, in addition to a denial of the allegations of the complaint, alleges affirmatively that defendants are, and were at all the times therein named, the owners and seised in fee of said lands; that on the 15th day of June, 1892, they executed and delivered to one Saturnino Carrion, since deceased, and who was the husband and grantor of plaintiff, what purported to be a grant, bargain, and sale deed of the premises, which deed was recorded; that said deed, although absolute in form, was intended to be, and was in fact, a mortgage to secure the payment of \$1,000 to plaintiff's grantor, with legal interest thereon. It was admitted that, unless the said deed was in fact made as a mortgage, the plaintiff would be entitled to judgment. This was the only issue in the case. The court found: "That the said instrument, though in the form of a deed absolute, was executed and delivered to said Saturnino Carrion as, and was intended to be, a mortgage to secure the payment of one thousand dollars, with interest at the rate of seven per cent. per annum from the 17th day of May, 1892." It is claimed that the evidence is insufficient to sustain the above finding, and this is the sole question to be here determined. We have carefully examined the evidence, and, in our opinion, it amply supports the finding. Without giving the evidence in detail, it is sufficient to state that there is evidence of the following facts and circumstances: On the 17th of May, 1892, there were two mortgages existing against the property of defendants described in the complaint; one in favor of one Hilsey for \$700, and one in favor of one Frankel for about \$180. That on said day the plaintiff's grantor applied to one Jess for a loan of \$1,000, stating that defendants owned some property on which there were mortgages, and that, as the mortgagees desired their money, defendants wanted to pay off the two mort-

gages, and deed him the property. Jess accordingly loaned the plaintiff's grantor \$1,000 upon his own promissory note. Defendants appeared at the bank of which Jess was cashier, and the two mortgages were taken up, and assignments of them made to plaintiff's grantor. The balance of the \$1,000, after paying the two mortgages, was left in the bank, and afterwards paid out either to Frankel or to plaintiff's grantor. Defendants did not receive any of it. The mortgages so assigned to plaintiff's grantor have never been satisfied of record, nor have the notes been delivered up or canceled. The money was borrowed from plaintiff's grantor. That the deed was intended as a mortgage. That, after the deed was made, the grantor of plaintiff had one Seaver compute the interest on the \$1,000 from the 17th of May, 1892, to the 17th day of November, 1896, showing the amount then due to be \$1,551.13, which computation was made upon a piece of paper, and handed to one of the defendants. Defendants paid to plaintiff's grantor one dollar, which he told them he had paid Seaver to figure up the interest for him. After the deed was made, defendants continued in possession of the premises as before. They never paid any rent nor leased the premises. They continued to make small improvements as before. Nothing appears as to any agreement of sale having been made or any price being named for the deed. Plaintiff's grantor died February 16, 1897. It does not appear that plaintiff took any greater title than that of her grantor at the time of the conveyance. It is not claimed that she is an innocent purchaser without notice. These facts and circumstances, if true, are sufficient to support the finding.

There was testimony on the part of the plaintiff tending to contradict some of the matters above set forth; but, in case of a substantial conflict in the evidence, the finding of the court below is conclusive here. Not only this, but we think the finding is supported by the great preponderance of the evidence. If Saturnino Carrion took the deed from defendants in June, 1892, as an absolute conveyance of the property, it is strange that nothing was said in the negotiations as to the price thereof. It is a circumstance of much significance that the defendants remained in possession of the property as their own continuously after the deed was made until the death of Carrion. If Carrion had in fact purchased the property, it would seem that in the ordinary course of business he would have entered into possession of it, or, if he allowed defendants to remain in possession, it would have been under a lease of some kind. If he purchased the property, why did he take an assignment of the two mortgages which he paid out of the \$1,000? The fact—which is conceded—that in November, 1896, the grantor of plaintiff had the interest computed on the \$1,000, and gave the computation to defendants, asking them for the dollar

paid to Seaver for making the computation, is wholly inconsistent with the idea that the property was his. It is entirely consistent with the claim of defendants that the deed was made as security only. The judgment and order should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(133 Cal. 302)

ROSENBERG v. PIMENTAL et ux.
(Sac. 652.)¹

(Supreme Court of California. July 3, 1901.)

PLEADING—VARIANCE—IDENTITY OF JUDGMENT—SUFFICIENCY.

In a suit to quiet title, where plaintiff alleged title in himself under an execution sale of the land in controversy in an action wherein plaintiff obtained judgment against defendant, the fact that there was a variance in the complaint in such action and the complaint in the present suit as to the date when the action accrued was immaterial, the date of suit, judgment, and the amount thereof being shown in the judgment roll, that being sufficient to show the identity of the judgment, and that it was the one referred to in the complaint.

Commissioners' decision. Department 2. Appeal from superior court, Mono county; W. H. Virden, Judge.

Action by Jacob Rosenberg, Mary Rosenberg, executrix, substituted plaintiff, against J. G. Pimental and wife. From a judgment for defendants on an order granting a motion for a nonsuit, plaintiff appeals. Reversed.

Wm. O. Parker and Henley & Costello, for appellant. Reddy, Campbell & Metson, for respondents.

GRAY, C. In this case the original plaintiff, Jacob Rosenberg, having died pending the appeal, Mary Rosenberg, executrix of his last will, was duly substituted as plaintiff and appellant herein. The action is brought to quiet title and compel a conveyance to plaintiff from defendants of certain lands situated in Mono county. The defendants had judgment on a nonsuit granted on their motion on the trial of the case. The plaintiff appeals from the judgment and from an order denying him a new trial.

The plaintiff, in his complaint, alleged title in himself under an execution sale of the land in controversy had in an action wherein he obtained judgment against the defendant Pimental for \$492.51. In his complaint he alleges that on the 2d day of October, 1894, the defendant Pimental was indebted to him in a certain sum, and then goes on to allege that suit was commenced on this indebtedness, etc. The date of the commencement

of the said action, the date and amount of the judgment, the date of the execution and sale, and the date of the sheriff's deed made in pursuance of said sale are all set out in the complaint. At the trial, plaintiff, as one step in the proof of his title, offered a certified copy of the judgment roll in the action under which he claimed to have been the purchaser at the execution sale. In the complaint contained in the offered judgment roll it was alleged that "on the 30th day of October, 1894," plaintiff loaned to the defendant, at his request, \$469.85, and it appeared that in the judgment interest was added to that sum, and judgment was rendered for the amount alleged in the complaint in this action. The date of the commencement of the action, the date as well as the amount of the judgment as appeared from the judgment roll, all corresponded with the allegations of the complaint herein. To this judgment roll the defendants objected on the ground that it appeared on its face that the action was brought for money loaned on October 30, 1894, and therefore the judgment roll is contradictory of the allegation in the complaint in this action to the effect that "the indebtedness was on the 2d day of October, 1894," and that the evidence offered is at variance with the allegations of the complaint. In sustaining this objection, we think, the court erred. The allegation of the date of the accruing of the indebtedness was not essential or material in either this or the former suit. The variance as to date in the respect complained of was, therefore, entirely immaterial. The date of the suit and of the judgment, and the amount of the latter as shown in the offered judgment roll, were sufficient to show the identity of the judgment, and that it was the same judgment referred to in the complaint, and upon which the execution sale was made under which plaintiff claimed title. The question was one of identity as to the judgment pleaded, and the case has little to do with the thing adjudicated. Therefore the doctrine of res adjudicata cuts little figure in the solution of the questions involved. The allegation in the complaint herein as to the date of the indebtedness should have been disregarded as a thing immaterial and unnecessary in the pleading. This erroneous ruling of the court made it impossible for the plaintiff to establish his case, and hence was prejudicial, and on account of it the judgment and order appealed from should be reversed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

¹ Rehearing denied July 31, 1901.

133 Cal. 308

A. F. SHARPLEIGH HARDWARE CO. v.
KNIPPENBERG et al. (L. A. 936.)

(Supreme Court of California. July 3, 1901.)

PLEADINGS—COMPLAINT—DEMURRER—IN-
DEFINITENESS.

1. A complaint on a bond to secure the faithful performance of a contract of plaintiff's agent to account, alleging that the agent received for property sold \$4,090 or thereabouts, that his expenses and amount due him for services were \$2,195, and that there remained a balance of \$1,895 of said \$4,090 in his hands, the property of plaintiff, is not demurrable as indefinite as to the amount received by the agent, since it shows the receipt of at least \$4,090, of which plaintiff claimed \$1,895, and it was immaterial whether the agent received more.

2. Under Code Civ. Proc. § 431, providing that a demurrer may be disregarded unless it distinctly specifies the grounds of objection to the complaint, a demurrer on the ground that it cannot be ascertained from the complaint what the contract is on which the action is based is too indefinite, and should not be sustained.

3. Where a complaint on a bond to secure the faithful performance of a contract of plaintiff's agent to account alleges the aggregate of expenses paid by the agent and his commissions, it is not demurrable because the expenses and commissions are not stated separately, especially as such matters are specially within the knowledge of defendants.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by the A. F. Sharpleigh Hardware Company against Will Knippenberg and another. From a judgment for defendants, plaintiff appeals. Reversed.

Mulford & Pollard, for appellant. W. T. Craig, for respondents.

HAYNES, C. The action is upon an alleged contract between the plaintiff and defendant Knippenberg, and a bond executed by both defendants to the plaintiff to secure the performance of said contract by Knippenberg. The defendants demurred severally for want of facts sufficient to constitute a cause of action, and for uncertainty and ambiguity. The demurrer being sustained, the plaintiff declined to further amend its complaint.

It is alleged that in June, 1895, the plaintiff and Knippenberg entered into an agreement whereby the plaintiff appointed Knippenberg its agent at the city of Los Angeles to represent the plaintiff for the purpose of handling its goods which it might from time to time ship to him, "to be sold by the said Knippenberg as the agent of the plaintiff upon such terms and conditions as might from time to time be agreed upon by the said plaintiff and the said Knippenberg"; that Knippenberg should keep a strict account, and make reports "as often as required by the plaintiff of all goods received, and all sales, leases, rentals made, and all moneys which might be received" therefrom, and of all moneys expended in the conduct of the

business, and would pay over all moneys properly belonging to the plaintiff. A copy of a bond executed by Knippenberg, as principal, and defendant Kregelo, as surety, is attached to the complaint and made part thereof, which bond is conditioned for the faithful performance by Knippenberg of his said contract, and the payment of all moneys that may become due and payable to the plaintiff. The complaint further alleges: That after the execution and delivery of said bond the plaintiff delivered to Knippenberg, as such agent of the plaintiff, "goods, consisting of bicycles and bicycle sundries, belonging to the plaintiff, aggregating in value the sum of \$4,090.37, and the said Will Knippenberg has come into possession of such goods to the value as aforesaid as such agent as aforesaid; and plaintiff is informed and believes, and upon such information and belief avers, that the said Will Knippenberg, while acting as such agent of plaintiff, sold and disposed of all of said goods which were delivered by the plaintiff to said Will Knippenberg under the terms of said contract. And the said Will Knippenberg has collected and received upon the sale of said goods the sum of \$4,090.37, or thereabouts, out of which sum the said Will Knippenberg has paid all the expenses connected with the sale of said goods, and the amount due and payable to him, the said Will Knippenberg, for his said services as said agent aforesaid, making in the aggregate the sum of \$2,195.02. That there remains a balance of \$1,895.35 due of said sum of \$4,090.37 in the hands of said Will Knippenberg, the property of plaintiff, which the said Will Knippenberg wrongfully retains and refuses to pay over to the plaintiff; and the said Will Knippenberg is justly and truly indebted to the plaintiff in the said sum of \$1,895.35, which said sum the said Will Knippenberg has neglected and refused to pay to the plaintiff, though often requested by the plaintiff to pay the same, and no part thereof has been paid to the plaintiff, or to any one for the plaintiff."

1. The general demurrer is not well taken, and is not insisted upon.

2. It is alleged that the complaint is uncertain: (a) "That it cannot be ascertained therefrom how much money, if any, the said plaintiff claims said defendant Knippenberg collected or received for the plaintiff." It is alleged that Knippenberg "had collected and received upon the sale of said goods the sum of \$4,090.37 or thereabouts." But it is further alleged that Knippenberg had paid all the expenses connected with the sale, and the amount due him for his services, amounting in the aggregate to \$2,195.02, and "that there remains a balance of \$1,895.35 due of said sum of \$4,090.35 in the hands of said Knippenberg, the property of the plaintiff," which he retains and refuses to pay. There is no uncertainty in the amount of the agent's expenses and compensation, nor in the amount alleged to be due to the plain-

tiff, and these amounts show that the receipts were not less than \$4,090.37. That the receipts may have been more is immaterial. But all these matters are within the personal knowledge of the agent, and he is not likely to be prejudiced by any uncertainty or ambiguity as to the amount he received from the sale of the goods, so long as he is definitely informed of the amount sought to be recovered. These remarks cover specification "b," which is that it cannot be ascertained from the complaint how much is due plaintiff. (c) "That it cannot be ascertained therefrom what the contract was between plaintiff and defendant Knippenberg upon which said plaintiff's action is based." This specification is quite as uncertain as the demurrer supposes the complaint to be. Section 431 of the Code of Civil Procedure provides: "The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded." In the absence of a statutory provision permitting a demurrer upon the ground of uncertainty or ambiguity, such defects were reached only by motion to make the pleading more definite and certain in particulars which were specified in the motion. The object of the motion was to compel the amendment of a pleading, and for that purpose the particular defect was required to be pointed out. Pom. Code Rem. § 548 et seq., and notes. A contract whereby Knippenberg was constituted the agent of plaintiff is alleged, and, if this allegation was in any respect uncertain or ambiguous, defendants should have pointed out the particulars in which it was uncertain or ambiguous. It is true, the complaint does not allege what the agent's commissions were to be, nor what expenses he should be allowed for; but it is alleged that his expenses and services aggregated \$2,195.02, and that there remained a specified balance in his hands belonging to the plaintiff. In *Blanc v. Klumpke*, 29 Cal. 156, it was held that a demurrer to a complaint for ambiguity or uncertainty should point out specially in what the ambiguity or uncertainty consisted, or it would be disregarded. See, also, *Yolo Co. v. City of Sacramento*, 36 Cal. 193; *Kreling v. Kreling*, 118 Cal. 413, 420, 50 Pac. 549. We think this demurrer was insufficient, and should not have been sustained. (d) It is specified that it cannot be ascertained from the complaint whether the agent is given credit for all sums expended for plaintiff under the contract. It is expressly alleged that Knippenberg has paid all the expenses connected with the sale of the goods out of the moneys received from the sale of them, and that there is a balance in his hands belonging to the plaintiff. We think it is not material that the expenses of the agent and his compensation for his services are not separately stated. Besides, these are matters peculiarly within the knowledge of the defendants, or at least of Knippenberg. (e)

It is not specifically alleged in the complaint that there has been an accounting between the plaintiff and its agent, but the result of the transaction is stated specifically, showing the balance which the plaintiff alleges it is entitled to recover. It is said in respondents' brief that the bond, a copy of which is attached to the complaint, recites that a large amount of property formerly in the hands of others, had been turned over to Knippenberg prior to the execution of the bond, and it is urged that plaintiff has no right to segregate the expense connected with the goods last above mentioned from those involved in this action. For aught that appears, all former transactions have been adjusted and closed. If not, it will be time enough to consider this objection when another suit is brought to recover thereon. Conceding that the complaint is not a model of good pleading, and might be improved, we think the defendants will not be prejudiced by its defects, and that the demurrer should have been overruled. I advise that the judgment be reversed, and the cause remanded, with directions to overrule the demurrer.

We concur: SMITH, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

133 Cal. 315

WEST COAST SAFETY-FAUCET CO. v.
WULFF et al. (S. F. 2,125.)

(Supreme Court of California. July 3, 1901.)
CORPORATIONS—SALE OF STOCK ON EXECUTION—RIGHTS OF BONA FIDE PURCHASER AGAINST PLEDGEE—POSSESSION OF SHERIFF.

1. One who purchases at execution sale shares of a corporation standing on the books of the corporation in the name of the judgment debtor is entitled to have the certificate of such shares reissued to him as such purchaser, if, at the time of the purchase, he acts in good faith, and without notice that the outstanding certificate has been assigned or pledged to some person other than the judgment debtor.

2. Code Civ. Proc. § 688, provides that shares of stock in a corporation may be levied on on execution in the same manner as on writs of attachment. Section 542, subd. 4, declares that shares of stock may be attached by leaving a copy of the writ, and a notice stating that defendant's stock, or interest therein, is attached in pursuance thereof, with the principal officer of the corporation. Held that, for the purposes of levy under execution and attachment, the debtor's interest in shares is treated as personal property not capable of manual delivery, and hence it was not necessary to the validity of an execution sale of corporate shares that they should be in the hands of the sheriff in order that they might be personally delivered to the purchaser.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge. Action by the West Coast Safety-Faucet

Company against N. H. Wulff and Edward H. Lake. From a judgment in favor of defendant N. H. Wulff, defendant Edward H. Lake appeals. Reversed.

F. A. Berlin, for appellant. A. L. Black and Robert Ash, for respondents.

CHIPMAN, C. Plaintiff brought the action to compel defendants to answer, and to cause their respective rights to certain shares of plaintiff company to be determined. The cause was tried on an agreed statement of facts, and defendant Wulff was adjudged to be "the holder and pledgee of certificate No. 61 for 100 shares of the capital stock of the West Coast Safety-Faucet Company, and entitled to have the same transferred on the books of said corporation to his name." Defendant Lake appeals from the judgment and from the order denying his motion for a new trial.

The essential facts were: That one Straut owned the shares in 1896, and the certificate stood in his name then and ever since on the books of the corporation. In October, 1896, he indorsed the certificate to defendant Wulff as collateral security, into whose possession it passed and has since remained. In 1897 defendant Lake brought an action against Straut in the justice's court of the city and county of San Francisco, and caused a writ of attachment to issue therein directed to the sheriff, who duly served the same upon the secretary of said corporation. Lake obtained judgment in January, 1898, and caused execution to issue thereon, and it was duly levied by leaving with the secretary of the corporation a copy of the writ and a notice that the said stock was levied upon in pursuance of the writ. The sheriff duly sold the shares at public auction, pursuant to execution, in March, 1898, and Lake became the purchaser, and he thereupon made demand for a transfer of the shares and issuance of a certificate therefor to him. Wulff had not, up to this time, demanded any reissue of the stock to him, nor had he notified the corporation that he held the certificate as pledgee or otherwise. Lake first knew of the claim of Wulff, and that he held the certificate as pledgee, in January, 1899. It is settled law in this state that one who purchases at execution sale shares of a corporation standing on the books of the corporation in the name of the judgment debtor is entitled to have the certificate of such shares reissued to him, as such purchaser, if at the time of the purchase he acts in good faith, and without notice that the outstanding certificate has been assigned or pledged to some person other than the judgment debtor. In order that an assignee or pledgee of a certificate may protect his rights as against a purchaser at execution sale, he must cause a reissue to him of a certificate, or he must serve notice on the corporation that he holds the certificate

as such assignee or pledgee. The decisions of this court on the question will be found in the following cases: *Weston v. Mining Co.*, 5 Cal. 186, 63 Am. Dec. 117; also, second appeal, 6 Cal. 425; *Strout v. Mining Co.*, 9 Cal. 78; *Naglee v. Wharf Co.*, 20 Cal. 530; *People v. Elmore*, 35 Cal. 653; *Parrott v. Byers*, 40 Cal. 614; *Winter v. Mining Co.*, 53 Cal. 428; *Bank v. Wilson*, 58 Cal. 600; *Spreckels v. Bank*, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348. The last of these cases points out what must be done by the pledgee where it is desirable to leave the stock standing in the name of the owner.

2. Respondent Wulff claims that in the suit of Lake against Straut in the justice's court the plaintiff could, under section 542, subd. 4, Code Civ. Proc., attach the interest of defendant, but that after judgment the plaintiff should have proceeded under sections 545, 905, Code Civ. Proc. The first of these sections relates to the citation of the defendant and any person having in his possession personal property belonging to the defendant, for the purpose of examining them respecting such property. Section 905 makes applicable to justices' courts sections 714-721, Code Civ. Proc., inclusive, which latter relate to proceedings supplementary to the execution. Respondent's contention cannot be sustained. Section 688, Code Civ. Proc., expressly provides that shares in any corporation may be attached on execution in like manner as upon writs of attachments. It was not necessary to the sale of Straut's interest in the shares that they should be in the hands of the sheriff, to be personally delivered to the purchaser. The writ of execution is served as is the writ of attachment, which latter is served as directed by subdivision 4, § 542, Code Civ. Proc. This section and section 688 appear to treat the interest of the debtor in shares of corporations as personal property not capable of manual delivery. When the execution is served, the sale proceeds without manual possession of the certificate by the sheriff. He does not require such possession for the levy as in the case of personal property under subdivision 3 of section 542, nor is it necessary that he deliver the certificate to the purchaser at execution sale. The certificate might at the time be in the hands of the owner, but the levy and sale would entitle the purchaser to have a certificate issue to him, and for that purpose the court would, upon appropriate proceedings, compel the surrender of the original certificate, in order that it might be reissued to the purchaser. So, also, if it turned out that the certificate was in the hands of a pledgee, of which fact the purchaser in good faith had no notice, the pledgee could be compelled to surrender the certificate that it might reissue to the purchaser. In some of the cases cited supra the procedure was the same as in the present case, and sale was

made without supplementary proceedings. It was so in the Weston Case, first above cited; also in Naglee v. Wharf Co. and in People v. Elmore, and also, we think, in Bank v. Wilson. Of the regularity of the procedure we have no doubt. As the case is here on an agreed statement of facts, there is no necessity for a new trial. The judgment and order should be reversed, with directions to enter judgment in favor of defendant Edward H. Lake.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, with directions to enter judgment in favor of defendant Edward H. Lake.

133 Cal. 297

MOORE v. RUSSELL. (L. A. 1,033.)

(Supreme Court of California. July 3, 1901.)

MORTGAGES—NOTE—DESCRIPTION—IDENTITY—DECEASED MORTGAGOR—CLAIM—PRESENTATION—TIME—PRIOR JUDGMENT—BAR—JUDGMENT AGAINST ADMINISTRATOR—MODIFICATION.

1. A note for \$800, and a mortgage to secure it, were executed at the same time, the mortgage reciting that it was given as security for the payment of \$800, with interest, according to the terms of a certain promissory note, and accurately described the note, except that the word "administrator" was inserted after the name of the payee, and that the name of the mortgagor's wife was omitted from the end of the copy. *Held*, that the description of the note was sufficient to establish its identity, and hence the mortgage was valid as a security thereof.

2. Code Civ. Proc. § 1497, provides that, in presenting a mortgage which has been recorded to an administrator for allowance, it shall be sufficient to describe it by referring to the date, volume, and page of its record. *Held*, that a presentation which stated the date, volume, and page on which the mortgage was recorded, and that the mortgage was on realty situated in R. county, and was given to secure the note described in the presentation, was sufficient.

3. A former action which was dismissed without prejudice to the right of the plaintiff to bring a new action did not constitute a bar to a subsequent action on the same cause.

4. Code Civ. Proc. § 1498, provides that in case of a rejected claim the holder must bring suit within three months after rejection, or within two months from the time it becomes due, or the action will be barred. A mortgage provided that, if any interest should not be paid when due, the whole amount of principal and interest should become immediately due and payable at the option of the mortgagee, to be exercised within 90 days from the default. Within three months after an installment of interest became due, the mortgagee presented a claim to the mortgagor's administrator for the principal and interest to date; and within more than three months after the rejection of the claim, but within two months from the maturity of the note, the mortgagee brought an action to foreclose. *Held*, that the action was not barred, since the presentation of a claim for the whole amount of principal and interest did not constitute an election that the whole debt was then due.

5. Under Code Civ. Proc. § 1504, providing

that a judgment against an administrator must be that the administrator pay the amount ascertained to be due in due course of administration, a judgment against an administrator for a deficiency after a sale of the mortgaged premises must be modified by inserting that the amount shall be paid "in due course of administration."

Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by H. P. Moore against Zadock H. Russell, as administrator of the estate of William Russell, deceased, and another. From a judgment in favor of plaintiff, defendant Russell appeals. Modified.

W. J. McIntyre and Charles R. Gray, for appellant. Purington & Adair, for respondent.

McFARLAND, J. No defense is made on the real merits of the case. That is, it is not pretended that the mortgage was not given to secure a just debt. The attacks on the judgment are based on certain alleged irregularities and failures to comply with statutory provisions; and it may be said that these attacks seem to have been invited by a spirit of carelessness which accompanied most of respondent's acts in the premises, from and including the drafting of the mortgage to the entry of the judgment. We think, however, that none of appellant's positions are really tenable, except as to the form of a certain part of the judgment. On November 18, 1898, the note and mortgage in question were made and executed to plaintiff by William Russell, since deceased, and his wife, Ruth M. Russell. The principal of the note was \$800, payable 17 months after date, within interest at 11 per cent. per annum, payable annually. There was a provision in the note that, if any interest should not be paid when due, "the whole amount of principal and interest shall thereafter be due and payable at the option of the holder of said note, to be exercised at any time within ninety days after any such default." William Russell died on the 4th day of July, 1899, and the defendant, Zadock, became his administrator on August 14, 1899. The first interest became due on November 18, 1899, and was not paid, and no principal or interest had been paid when the action was commenced. On January 18, 1900, plaintiff presented his claim on the note and mortgage to the administrator, who rejected the same. The action was commenced on June 12, 1900, —within two months after the note, on its face, matured, but not within three months after the presentation of the claim.

1. The note and mortgage were made at the same time. It is declared on the face of the mortgage that it is given "as security for the payment to said mortgagee of the sum of eight hundred dollars in gold coin of the United States, with interest thereon, according to the terms of a certain promissory note in words and figures following, to wit." Then follows what is an exact copy of the

note, except in these two particulars: (1) The word "administrator" is inserted after the name of the payee, Moore; and (2) at the end of the copy the name of Ruth M. Russell is omitted. Appellant contends that these two mistakes in the copy are fatal to the validity of the mortgage as a security for the note sued on, but the point is not maintainable. He speaks in his briefs of the "first" and the "second" note, but there is nothing in the record to warrant a pretense that there were two notes. The question here is as to the identity of the debt and note secured, and it is quite apparent, notwithstanding the two slight mistakes in the copy, that the debt of \$800 and the note sued on are the debt and the note referred to in the mortgage.

2. Appellant contends that there was no valid presentation of the mortgage to the administrator, because, as he says, the respondent in the presentation did not "describe" the mortgage. This contention is based on section 1497 of the Code of Civil Procedure, which provides that, in the case of a mortgage or of a lien which has been recorded, "it shall be sufficient to describe the mortgage, or lien, and refer to the date, volume and page of its record." In the case at bar the mortgage was recorded, and the presentation referred to date, volume, and page of its record; but appellant contends that it was not good, because the mortgage was not otherwise described. The presentation, however, shows that the mortgage was on real property situated in Riverside county, Cal., and was given to secure a note, a copy of which is contained in the presentation. This was a sufficient compliance with the section of the Code, even if anything more is required than a reference to the recordation. This contention, therefore, cannot be maintained.

3. It is contended that this action was barred by the judgment in a previous action which was brought by plaintiff against the defendants on the note and mortgage sued on in this present action; but all that appears on this subject is that on motion of the plaintiff therein, and with the consent of one of the defendants therein, Ruth M. Russell, the action was by the judgment of the court dismissed "without prejudice to the right of the plaintiff to bring a new action on the same cause of action." Nothing else appearing, there can be no valid contention that the dismissal of the former action was a bar to the present one.

4. The most plausible contention of appellant is that the action was barred by section 1498 of the Code of Civil Procedure, because it was not brought within three months after the presentation of the claim, but this contention cannot be maintained. That section provides that in the case of a rejected claim the holder must bring suit "within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall

be forever barred." Appellant contends that the respondent's presentation of the claim on January 18, 1900, within three months after the first annual interest had become due and remained unpaid, was a final and conclusive exercise of his option, under the terms of the note, to consider the whole amount of the principal and interest due, and that therefore he should have brought his suit within three months thereafter. In the first place, we do not think that the presentation of the claim can be considered as the exercise of the option in question. It certainly was not an express declaration to that effect. It was merely a presentation of the facts constituting his claim. The language of the claim was this: "To amount due at this date on a certain promissory note, dated November 18, 1898, made by said William Russell and Ruth M. Russell to H. B. Moore, payable seventeen months after date, with interest at the rate of eleven per cent. per annum, \$904.28,"—followed by a copy of the note. The words "amount due at this date" do not necessarily mean more than that the principal of the note was so much, and the interest so much, and that none of it had been paid. It does not mean necessarily that the whole amount was then due, in the sense of being payable and suable, and that respondent intended to bring suit on that theory. But, even if that intent could be attributed to him from the fact of the presentation, he was not bound to pursue that intent. It is firmly established that an option of that character is a mere penalty put on the maker in favor of the holder of the note, which the latter may waive, and that even his express declaration of an election to exercise the option does not put it out of his power to waive it. *Society v. Culver*, 127 Cal 112, 59 Pac. 292; *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72; *Belloc v. Davis*, 38 Cal. 242. In *Society v. Culver*, supra, where the note was like the one in the case at bar, the plaintiff had exercised his option in the most positive way, by bringing an action which he afterwards dismissed; and it was held that he could waive his option, even after having thus exercised it, and that, as against a subsequent action, the statute of limitations did not commence to run from the time of the said exercise of his option, but ran only from the maturity of the principal of the note. And so, in the case at bar, even if the presentation of the claim could be construed as an assertion of his right under the option, he was not compelled to continue to exercise it by bringing suit before the maturity of the note. His claim was not one "then due," within the meaning of section 1498; and, as this action was brought within two months after the maturity of the note, it was not barred by limitation.

The foregoing views dispose of all the points made by appellant which call for notice, except the contention that the part of the judgment which gives a recovery

against the administrator for any deficiency after sale of the mortgaged premises should have provided that it be paid in due course of administration. This contention must be sustained. Section 1504, Code Civ. Proc., expressly provides that in case of a judgment against an executor or administrator "the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due." The judgment in the case at bar must therefore be modified in this respect. The cause is remanded, with direction to the court below to modify the judgment by adding to the clause of the same immediately preceding the description of the mortgaged premises the words "to be paid in due course of administration," and as thus modified the judgment will stand affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

tice, to dissolve or modify the same, the court has no power to dissolve an injunction without notice to the plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; J. W. Mahon, Judge.

Bill by Sherman Page against M. L. Vaughn and another. From an order granting defendants' motion to dissolve an injunction, plaintiff appeals. Reversed.

C. C. Wright and Roger S. Page, for appellant. Alvin Fay and E. J. Emmons, for respondents.

GRAY, C. This is an appeal from an order dissolving an injunction. The plaintiff alleged in his verified complaint that he and the defendant M. L. Vaughn were each owners of an undivided one-half interest in a certain mining claim situated in Kern county; that investigation had demonstrated that the ores in said mine could not be extracted, shipped, and treated in any mill available for that purpose without great waste and loss, and for that reason on a certain day plaintiff notified defendants that he would not then engage in working said mine nor become a partner with them for that purpose, and at the same time objected to the removal of the ores in which he had an interest; that thereafter defendants, intending and conspiring to cheat and defraud plaintiff, and to deprive and exclude him from his said property, and intending to convert the same and the whole thereof to their own use, entered upon said property with a large force of men, and took exclusive possession of all parts thereof where work could be done or in which there is ore of any present value, and have ever since held such possession to the entire exclusion of plaintiff; that defendants while so in possession have committed, and are still committing, great waste and irreparable injury and damage to plaintiff's interest in said property by carrying away some of the ore, mixing it with worthless waste matter, throwing some of it over a steep incline, and covering it with a large mass of débris, where it cannot be recovered; that defendants have taken out large quantities of high-grade ore without regard to the method or safety of the shaft, and have done their work in a very unminner-like manner; that they have left the shaft untimbered and in a dangerous condition, and have committed numerous other acts specifically set out in the complaint, all of which as is alleged will tend to great waste and destruction of the property, and for all of which plaintiff has no adequate redress or remedy at law. Plaintiff further alleges that he has demanded possession of his interest in the said property, and defendants have refused, and still refuse, to permit him to enter into possession of said interest; that defendants and their employes still hold possession of said property, and are working the same as aforesaid to the exclusion of plaintiff, and

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PAGE v. VAUGHN et al. (L. A. 830.)

(Supreme Court of California. July 9, 1901.)

INJUNCTION—DISSOLUTION—NOTICE.

Under Code Civ. Proc. § 532, providing that, if an injunction be granted without notice, the defendant may apply, upon reasonable no-

threaten to continue said work, and to commit further waste and irreparable injury to the said property. Plaintiff demands judgment for the possession of his interest in said property, for damages, and that during the pendency of the action the defendants be restrained by order of the court from interfering in any way with plaintiff's interest in said property, and from taking from said property or treating any of the ores thereof, and from disposing of any of the proceeds derived therefrom.

Upon this complaint, and without notice to the defendants, an injunction was granted by the court as prayed in said complaint. Thereafter the defendants filed a verified answer denying all the material allegations of the complaint, except that the plaintiff and M. L. Vaughn are the owners as co-tenants of the mine, which is admitted, and averring that at no time has plaintiff been denied access to the mine or possession of his interest therein. Upon the said complaint and answer the defendants, without notice to plaintiff, subsequently moved the court to dissolve the injunction, and it is from the order granting said motion that this appeal is taken.

Section 532, Code Civ. Proc., provides: "If an injunction be granted without notice, the defendant at any time before trial, may apply, upon reasonable notice, to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the injunction was granted." The evident purpose of the foregoing statute is to empower the court to dissolve its injunction only after notice to the plaintiff. The meaning of the statute is plain, and to put a construction on it that would dispense with the notice required by it is to construe one provision of the statute out of existence, and thereby thwart the purpose of the legislature in enacting it. If there were ever any doubt as to the language of the statute, its meaning must be taken as settled in the well-considered case of *Hefflon v. Bowers*, 72 Cal. 270, 13 Pac. 690. On the authority of the statute cited, as construed in that case, we think the court erred in dissolving the injunction without notice to plaintiff. It would add nothing to the law to here repeat the reasoning contained in the case cited. We advise that the order appealed from be reversed.

We concur: SMITH, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

133 Cal. 347

PEOPLE v. MADDEN et al. (McGAHEY,
Intervener. Sac. 811.)

(Supreme Court of California. July 9, 1901.)
ACTION AGAINST COUNTY TREASURER—SATISFACTION—DISMISSAL.

Where a grand jury, which, under Pen. Code, § 929, is empowered to institute suits against county officers for moneys due the county, and the county board of supervisors ratify a suit brought by the district attorney against a county treasurer and his sureties to recover money fraudulently converted, the fact that such suit was instituted without authority of such board or any other official is not ground for dismissal thereof.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county; J. W. Harrington, Judge.

Action by the people of the state of California against John Madden and others. John McGahey intervened. From a judgment in favor of the latter, plaintiff appeals. Reversed.

Tirey L. Ford, Atty. Gen., and John E. Raker, Ex Dist. Atty., for the People. G. F. Harris, E. C. Bonner, and J. H. Stewart, for respondent.

SMITH, C. Appeal from a judgment dismissing the action. The suit was brought against the defendant Madden, county treasurer, and his sureties, to recover the sum of \$34,825.35, money of the state and county fraudulently converted by him. Judgment was entered by stipulation against the sureties,—excepting one, as to whom the action was dismissed,—and, among others, against McGahey, now intervener. The defendant Madden had not been personally served, and the suit was continued as to him. The complaint in intervention of McGahey was filed January 6, 1899, about six months after the judgment against him and the other sureties. The action was dismissed on the ground that the suit was commenced by the district attorney without authority of the board of supervisors, or other board or official having power to authorize the suit, and without authority of law.

The last proposition is contested by the appellant's counsel, who claim that under the law the district attorney is authorized by virtue of his office to bring suits of this character. The ruling of the court to the contrary was based on the supposed authority of the decision in *Ventura Co. v. Clay*, 119 Cal. 213, 51 Pac. 189. But it is claimed by the attorney general and his associate counsel that the decision does not apply, and, if it be held otherwise, the court is requested to review the decision, and to re-examine the question as to the authority of the district attorney to bring suits of this kind. This request, coming, as it does, from the highest officer, representing the interests of the state in matters of litigation, we would willingly accede to; but, being of the opinion that the judgment must be reversed

on other grounds, it will be unnecessary to consider either the rectitude or the application of the decision.

It appears without controversy that the action of the district attorney in bringing the suit was subsequently ratified and approved by the board of supervisors, and also by the grand jury, which, under section 929 of the Penal Code, had power to authorize the district attorney to institute and maintain the suit, and which in fact expressly directed him to continue the prosecution of this particular proceeding. The right of a defendant to move to dismiss a suit for lack of authority in the plaintiff's attorney to institute or maintain it is based on the ground that otherwise "he might be twice compelled to litigate the same cause of action" (Weeks, Attys. at Law, § 200); but this reason ceases, and with it the rule, if the act of the attorney is subsequently ratified by the plaintiff (Id. p. 439 [at top] §§ 203, 206; Ryan v. Doyle, 31 Iowa, 53). In this respect the case of client and attorney cannot be distinguished from other kinds of agency. We advise that the judgment be reversed, and the same remanded for further proceedings.

We concur: COOPER, C; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for further proceedings.

(133 Cal. 319)

AMERICAN TYPE FOUNDERS CO. et al. v. JUSTICE'S COURT OF SAUSALITO TP. et al. (S. F. 1,473.)¹

(Supreme Court of California. July 3, 1901.)
JUSTICES OF THE PEACE—TRIAL BY COURT—TIME FOR DECISION OF CASE.

Notwithstanding Code Civ. Proc. § 892, relative to justices' courts, provides that, when the trial is by the court, judgment must be entered at the close of the trial, a justice of the peace may take a case under advisement, and a judgment rendered some months after trial is valid.

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Appeal from a judgment rendered on certiorari by the superior court of Marin county affirming the judgment of a justice of the peace. Affirmed.

Gordon & Young, for appellants. T. J. Crowley, for respondents.

TEMPLE, J. This appeal is from a judgment rendered upon certiorari, by the superior court of Marin county, affirming the judgment of a justice of the peace. A case was tried by the justice, and at the conclusion of the trial was taken under advisement, and the parties were allowed to file briefs. Some months afterwards the justice rendered judgment in favor of the plaintiff in that action. The defendant subsequently

commenced this proceeding. His contention is that a justice of the peace has no authority to take a case under advisement, and that a failure to decide a case at the conclusion of the trial works a discontinuance of the cause. This contention is based upon section 892, Code Civ. Proc., which reads: "When the trial is by the court, judgment must be entered at the close of the trial." The point was made and expressly decided in *Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. 366. Counsel for the appellants contend that all that was said upon the subject in that case was obiter, because it was also urged and decided in that case that the justice of the peace had no power to set aside the judgment, it not being a judgment by default. It was held in *Winter v. Fitzpatrick*, 35 Cal. 269, that a justice could not vacate a judgment entered by him. This question was reconsidered in *Weimmer v. Sutherland*, 74 Cal. 341, 15 Pac. 849, and it was there said that the justice court could only vacate a judgment in cases where it was expressly authorized by statute, and it was authorized by section 859, Code Civ. Proc., to do so with reference to judgments entered upon a default, but could do so in no other cases. It seems that in *Heinlen v. Phillips*, notwithstanding these decisions, respondent to the writ again raised the point; but in this court, at least, his main reliance was upon the proposition that the judgment was void, and therefore could have been vacated at any time, and that, at all events, there being no valid judgment in the case, the order setting the case for trial was valid. The point was properly before the court, and necessarily decided. A decision of the other question did not dispose of the case; for, if the judgment which the justice had entered was void, it was properly struck out of the record. We have held that it is always in the power of the court to erase from its records a void judgment. The decision was one, therefore, which the court was bound to make. Without the decision upon this point, the judgment entered would have been an absolute non sequitur, provided it had also appeared that the contention was made that the judgment which the justice had set aside was a void judgment. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(133 Cal. 321)

In re HUGHSTON'S ESTATE. (S. F. 2,720.)¹

(Supreme Court of California. July 3, 1901.)²
APPEAL FROM PROBATE COURT—RETROACTIVE STATUTES—ENTRY OF JUDGMENT.

The amendment passed February 28, 1901, to the Code of Civil Procedure (section 963, subd. 3), authorizes an appeal from an order or judgment refusing to revoke the probate of a will. Section 1715, relative to probate orders, decrees, and judgments, declares that the appeal must be taken within 60 days after the order, decree, or judgment is entered. Held, that

¹ For opinion on motion for reargument, see 65 Pac. 978.

¹ For dissenting opinion, see 65 Pac. 1038.

² Rehearing denied August 3, 1901.

orders refusing to revoke the probate of a will, made before the passage of such amendment, were not appealable, though they were not entered until after its passage.

In bank. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Appeals from orders refusing to revoke the probate of a will. Dismissed.

Smith & Pringle, for appellants. W. H. Barrows and Maguire & Gallagher, for respondents.

GAROUTTE, J. The appeals in this case are taken from orders or judgments refusing to revoke the probate of a will. A motion is now made by respondent to dismiss those appeals upon the ground that such orders or judgments are not appealable. Prior to 1901 the Code of Civil Procedure (subdivision 3, § 963) did not authorize an appeal from an order or judgment refusing to revoke the probate of a will. That question was squarely met and decided in *Re Winslow's Estate*, 128 Cal. 311, 60 Pac. 931. While appellants now attack the legal soundness of that decision, this court is satisfied with the conclusion there declared, and will not disturb it. The orders or judgments here appealed from were made during the latter days of January, 1901. Upon February 28, 1901, the aforesaid subdivision of section 963 of the Code of Civil Procedure was amended by giving an appeal from orders or judgments refusing to revoke the probate of a will, and it is upon the efficacy of this amendment to the statute that appellants largely rely for authority to take these appeals. In speaking as to probate orders, decrees, and judgments, section 1715 of the Code of Civil Procedure declares, "the appeal must be taken within sixty days after the order, decree or judgment is entered." In the present case the orders or judgments appealed from were not entered until after February 28, 1901, and, not being entered until after a right of appeal was given by the aforesaid amendment, it is claimed that an appeal exists in this case. By subdivision 3 of said section 963, as amended, appeals are given from judgments and orders revoking or refusing to revoke the probate of a will. There is no intimation, even, that this amendment was intended to apply to judgments and orders already made. There is nothing whatever to indicate that the legislature contemplated that this amendment should have a retroactive effect, even conceding the existence in that body of power to so declare. The general principle of law is unquestioned that in the absence of express direction no legislative act will be construed as having retroactive effect. Indeed, the general principle as to the retroactive effect of legislative enactments is not disputed by appellants, but it is insisted that as the time for appeal only begins to run from the date of the entry of a judgment or order, and the

judgments or orders in this case not having been entered until after the amendment went into effect, therefore the law is given no retroactive effect by holding that a right of appeal is granted in the present case. The court does not agree with this contention. It is the judgment or order that the statute says may be appealed from. The entry of that judgment or order only serves the purpose of fixing the time from which the appeal may be taken. And section 1715, already quoted, only fixes the time when, and the number of days in which, a party may take his appeal. Certainly, as to probate orders, decrees, or judgments, their entry in the book prescribed by the statute is no part thereof. They are perfect and complete and have full force and effect before they are entered. The right of appeal is given from the order or judgment, and may be exercised when the order or judgment is entered. It is the duty of the proper officer to make the entry, and he can be compelled to perform his duty. The judgment is the result of judicial action. The entry of the judgment is purely a ministerial matter. Appellants rely upon cases similar to *Melde v. Reynolds*, 120 Cal. 235, 52 Pac. 491. But it is there only decided that, as the time for appeal begins to run from the entry of the judgment, therefore the statute in effect at the time the judgment is entered governs as to the time in which the appeal may be taken. For the foregoing reasons, the appeals are dismissed.

We concur: VAN DYKE, J.; HENSHAW, J.; McFARLAND, J.; TEMPLE, J.

133 Cal. 304

REYNIER v. ELTON et al. (L. A. 982.)

(Supreme Court of California. July 3, 1901.)

EJECTMENT—LOCATION OF SECTION CORNER—EVIDENCE.

A section corner located by the court had been recognized as the true corner for a great many years. The section lines in its vicinity had been traced by disinterested surveyors, and the corner fixed at the point established by the court. At this place a monument consisting of a pile of loose stones, in the center of which was a stone 18x12x8 inches, was found. The government field survey called for a stone at the corner in question, 20x12x8 inches, set 15 inches in the ground, and four witness trees marked as such, one being located in each of the four cornering sections; the courses and distances from the corner being given. One witness tree was found with surveyor's marks which corresponded with the description, allowing for the 20 years' growth, and also a stump, and traces of another, corresponding in character, description, and course with two of the witness trees described in the original field notes, with but slight discrepancies as to distance. No trace of the fourth witness tree was found, but the land had been cleared in the vicinity. *Held*, in ejectment, sufficient to justify the court in establishing the corner at the place in question.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Ejectment by Joseph Reynier against Charles Elton and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

E. O. Edgerton, Calvin Edgerton, and Ross T. Hickcox, for appellants. A. J. Utley, for respondent.

GRAY, C. This is an action in ejectment. Plaintiff obtained judgment in his favor, and defendants appeal from an order denying them a new trial. The plaintiff owned lands adjoining defendants' lands on the east, their common boundary being a line drawn through the section from north to south parallel with, and 80 rods west of, the east line of section 35 in township 4 N., range 15 W., S. B. M. The lands in controversy are located in Los Angeles county. The parties to the suit agree as to the location of the northeast corner of said section 35, and consequently they are in agreement as to the north end of their dividing line, but as to the south end of said line they are in disagreement to the extent of about 700 feet. It is claimed by the appellants that the southeast corner of said section is 714 feet west of the point claimed by plaintiff and found by the court to be said corner. The only point urged in support of the appeal is that the court fixed the corner in the wrong place; that by the evidence the corner is shown to be 714 feet west of the corner as found by the court.

We think the finding as to the location of the corner in question is supported by the evidence; and, without attempting to quote such evidence in full, we will give the principal features of it tending most strongly to support the action of the court below. In the first place, the corner found by the court had been recognized as the true corner for a great many years by those residing in the immediate neighborhood. It is undisputed that upward of nine years before the trial of this case appellants' predecessor in title recognized the corner found by the court as the true corner, and cut the timber up to a certain line established in accordance therewith. Next it is shown that the section lines in the vicinity of this corner have been traced out by two apparently disinterested surveyors, and, after a comparison of what they find on the ground with the field notes of the government surveys, they give it as their unqualified opinion that the true corner is at the point where the finding of the court fixes it. At this said point they find a monument consisting of a pile of loose stones, in the center of which is a stone 18x12x8 inches, as one witness testifies, and, as another says, 18x10x10 inches. Both of these witnesses agree, however, that this stone had one notch on one corner and five on another, and the evidence tends strongly to show that, so marked, it indicated the common corners of sections 35 and 36 in said township, and sec-

tions 1 and 2 in the township adjoining on the south. The field notes called for a stone at the corner in question 20x12x8 inches, set 15 inches in the ground, and four witness trees marked as such, one being located in each of the four cornering sections; the courses and distances from the corner being given. One witness tree was found with surveyor's marks indicating its character as a witness tree of the corner in dispute. This tree is in the course from the stone monument indicated by the field notes, and corresponds therewith in description, allowing for a difference of upward of 20 years' growth since the government survey. The distance of this tree from the corner is given in the notes of the government survey as 250 links, whereas its actual distance from the present location of the monument is 212 links. There is also a stump standing, and traces of another, in the ground, corresponding in character, description, and course from corner with two of the witness trees as described in the original field notes, and with but slight discrepancy as to distances from the corner. No trace of the fourth witness tree was found, but it is not inconsistent with the evidence that all trace of the fourth tree should have been removed by reason of the clearing and cultivation of the land. There seems to be no material controversy as to the location of the township line running between sections 35 and 36 on the north and sections 1 and 2 on the south. The contention of appellant is not that the corner is fixed by the court too far north or too far south, but that it is located by the finding of the court on the township line about 700 feet east of the government corner. The notes of the government survey call for the "top of low ridge, course north and south," 17 chains east of the corner in controversy. In the surveys made by the witnesses for respondent this ridge is located and referred to as strong evidence that the corner is where it is found to be by the court. Again, to the west of the corner as found, and on said township lines, these witnesses locate an old road in a wash about 10 chains from said corner, and at about 16 chains a small wash or creek, and on the western bank thereof an oak stump about 2 feet in diameter. All these objects as so located seem to be in practical agreement with the original government survey notes, and, while they are all consistent with the finding of the court as to the corner, they are each and all inconsistent with the location of the corner at or anywhere near the point contended for by appellant. Without attempting to state the evidence adduced by appellant to show that the corner was at the point claimed by him, we deem it sufficient to say that it was very strong; and, were it not for the testimony already stated, we think it would have been sufficient to establish the corner as so claimed by said appellant. It became necessary for the court to establish the corner somewhere, and, in

the conflict of evidence, we think it made no mistake. This is not the case of a lost corner, but each party claims to have found the corner on the ground where it was originally located. Of course, in establishing a disputed corner those objects intended to witness the corner, and referred to in the notes of the original survey as being nearest to the corner, are, when satisfactorily established, stronger evidence than objects more remote can be; and, in this view of the matter, we regard the witness tree and the accompanying stumps claimed to have been found by respondent's witnesses, taken in connection with the other objects referred to, as of controlling importance. The court below was in a better position than this court can be placed in to determine whether the witness tree claimed was genuine or not. It appears that the surveyor's mark on the witness tree was covered by a subsequent growth of several inches in thickness, and was only discovered by cutting in and removing a chip or chips from the tree. The chip showing the surveyor's marks was submitted to the inspection of the trial court, and by this inspection the court was, no doubt, aided in determining the question of the genuineness of the alleged witness tree. This court has only a description of these things before it, and from this we cannot say that the court was wrong in its finding as to the corner; but, so far as we can see, the finding was correctly based on the preponderance of the evidence. The order appealed from should be affirmed.

We concur: SMITH, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

133 Cal. 324

RIVERSIDE COUNTY v. BUTCHER. (L. A. 880.)

(Supreme Court of California. July 5, 1901.)

AGRICULTURE—KILLING INSECTS—LIENS—PLEADING—SUFFICIENCY OF COMPLAINT—SURPLUSAGE.

1. A complaint alleging that the county board of horticulture caused a notice to be served on the person in charge of, and in possession of, the orchard of the defendant, as his agent, requiring said defendant and agent to destroy the scale and insects found on the trees within 10 days, contains a sufficient allegation of the service of notice, as required by Act March 3, 1897, providing that such board shall notify the owner or person in charge or in possession of said orchard that the trees are infested with said insects or other pests, which notice may be served on the person owning or having charge or possession of such infested place.

2. Under Act March 3, 1897, providing that the expense of destroying insects found on fruit trees shall be a county charge, and that the board of supervisors shall pay the same, which sums shall be a lien on the property, and a notice of such lien shall be filed and recorded within 30 days after the right to the lien accrued, a lien filed within 30 days after

the county supervisors paid a claim for destroying insects was valid, though the destruction occurred more than 30 days before, as the lien did not accrue until the county paid the claim.

3. Under Act March 3, 1897, establishing a lien on the land for the killing of insects on fruit trees, and providing that a "notice of such lien shall be filed and recorded," a notice signed by the members of the board of commissioners, describing the premises, the name of the owner, the amount claimed, and that it was for labor performed in killing insects on defendant's orchard, was sufficient.

4. The fact that a notice of a lien for killing insects on defendant's orchard claimed the benefit of the law relative to liens of mechanics and others on real property did not vitiate it, as such claim was mere surplusage.

5. In an action to foreclose a lien on realty for killing insects on the defendant's fruit trees, the fact that the petition contained a prayer for a personal judgment did not vitiate the petition, where a prayer that the amount may be declared a lien was also included.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by the county of Riverside against Arthur Butcher to foreclose a lien. From a judgment in favor of the defendant, the plaintiff appeals. Reversed.

Lyman Evans, for appellant. P. Furguson, for respondent.

COOPER, C. The court below sustained a demurrer to plaintiff's complaint, without leave to amend, and this appeal is from the judgment for the purpose of reviewing the order sustaining the demurrer. The action was brought to foreclose a lien for money paid out by plaintiff for destroying certain scale and other insects found upon the trees in defendant's orchard, the lien being claimed under the provisions of the act of March 31, 1897, entitled "An act to promote the horticultural interests of the state by providing county boards of horticulture," etc. St. 1897, p. 244. It is said by appellant that the court below sustained the demurrer upon the ground that the act was unconstitutional, and, as the court denied the plaintiff leave to amend, it would seem that the contention is correct. The point may be regarded as settled by this court in *County of Los Angeles v. Spencer*, 126 Cal. 670, 59 Pac. 202, which case was decided a few days after the court made the order sustaining the demurrer in this case. We regard the reasoning of the court in that case as correct, and it is not necessary to further discuss the question. Other objections, however, are made to the complaint which we will notice in the order presented. It is claimed that the complaint fails to show that proper notice was served upon defendant requiring him to eradicate and destroy the scale prior to the expense incurred by plaintiff. The act provides, in speaking of the duties of the county board of horticultural commissioners, "they shall notify the owner or owners, or person or persons in charge or in possession

of the said places, or orchards * * * that the same are infested with said insects, or other pests, * * * and they shall require such person or persons to eradicate or destroy the said insects * * * within a certain time to be specified. Said notices may be served upon the person or persons, or either of them, owning, or having charge, or having possession of such infested place * * * by any commissioner, or by any person deputed by the said commissioners for that purpose, or they may be served in the same manner as a summons in a civil action." The complaint alleges that the board "caused a notice to be served upon W. Miller, the person in charge of, and in possession of, said premises and orchard, for the defendant as his agent, requiring said defendant and agent to eradicate or destroy the said scale and insects so found upon said trees within ten days after the service of said notice." A copy of the notice is attached to the complaint as an exhibit, and the copy shows that the notice contained fully all matters required by the statute. We think the allegation as to service of notice sufficient. It shows that the person served was the person in charge of and in possession of the premises. This is all that the statute requires. The allegation shows that the notice was served substantially as required by the statute.

It is further contended that the complaint fails to show that the notice of lien was filed within 30 days after the right of lien accrued. This contention is based upon the fact that the complaint shows that the labor of destroying the scale was done in the latter part of September, 1898, and that the notice of lien was not filed until January, 1899. The statute provides that the expense shall be a county charge, and the board of supervisors shall allow and pay the same out of the general fund of the county. "Any and all sums so paid shall be and become a lien on the property. * * * A notice of such lien shall be filed and recorded in the office of the county recorder of the county in which the said property and premises are situated within thirty days after the right to the lien has accrued."

The right to the lien accrued to the county at the time it paid the amount. It then became a lien upon the property, and not till then. After the lien so accrued the county had 30 days in which to file its notice. It is alleged that the county paid the amount December 9, 1898, and that it filed the lien January 7, 1899. This was within 30 days after the right to the lien accrued.

The notice of lien was sufficient when signed and verified by the members of the board of commissioners, stating that the county claimed a lien for the amount of expense. It contains a description of the premises; the name of the owner; the amount claimed; that it is for labor bestowed and materials furnished in eradicating the insects upon the

orchard of defendant. This was all that was required by the statute. In fact the statute is entirely silent as to the form, contents, or requisites of the notice. It simply says a "notice of such lien shall be filed and recorded." The complaint shows that the notice was filed and recorded. The fact that the notice stated that the plaintiff claimed the benefit of the law relative to liens of mechanics and others upon real property did not vitiate it. This part of the notice may be regarded as surplusage. The same may be said of the prayer for a personal judgment. The prayer is no part of the complaint, and, in addition to the prayer for personal judgment, it asks that the amount may be declared a lien, and that the premises be sold to satisfy such lien. We recommend that the judgment be reversed, and the cause remanded, with directions to the lower court to overrule the demurrer, and allow defendant a reasonable time to answer.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the lower court to overrule the demurrer, and allow defendant a reasonable time to answer.

133 Cal. 328

PEOPLE v. GORDON. (Cr. 737.)

(Supreme Court of California. July 6, 1901.)

EMBEZZLEMENT—BAILEE—INFORMATION—
SUFFICIENCY—CONVICTION—EVI-
DENCE—INSTRUCTIONS.

1. In a prosecution under Pen. Code, § 507, providing that a bailee who fraudulently converts the property or proceeds to his own use is guilty of embezzlement, an information in the language of the statute is sufficient, without setting forth the facts relied on to constitute the embezzlement.

2. Where, in a prosecution for embezzlement of a ring by a bailee, the owner testified that defendant took the ring from her finger before she knew it, to have it fixed for an engagement ring, which he never brought back, but sold it, a conviction was not contrary to the evidence, or an instruction that if defendant obtained the ring against the owner's will he should be acquitted.

3. Where an embezzlement by a bailee took place in the county where the trial was held, an objection to the owner's testimony as to what took place at the bailment in another county, as being without the jurisdiction of the court, was without merit.

4. In a prosecution for embezzlement by a bailee, an instruction that the mere taking of property by one from another does not constitute larceny, but there must be felonious taking with intent to steal, was not prejudicial to defendant.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

W. F. Gordon was convicted of embezzlement, and appeals. Affirmed.

A. V. Scanlan, for appellant. T. L. Ford, Atty. Gen., for the People.

CHIPMAN, C. Defendant was convicted of embezzlement. He moved in arrest of judgment, which motion being denied, he moved for a new trial. This motion was also denied, and hence this appeal. There was no demurrer to the information. It is not contended that the evidence fails to support the verdict.

1. The motion in arrest of judgment is based upon the ground that the information does not charge a public offense. The information, it is conceded, is in the language of the statute (Pen. Code, § 507); but it is claimed that the information is fatally defective, in that it fails to set forth the facts relied on to constitute the embezzlement charged (citing *People v. McKenna*, 81 Cal. 158, 22 Pac. 488). This was the case of an information charging fraud, under section 532, Pen. Code. The complaint failed to aver any of the circumstances constituting the alleged fraud, although following closely the language of the statute. It was held bad, and not sufficient to sustain the conviction. There are obvious reasons why an indictment for obtaining money or other property under false pretenses should aver with particularity the facts relied upon to show fraud, and hence it is that it is insufficient to simply follow the language of the statute in such cases. But the rule of pleading is different, as the reason is different, in the case of embezzlement. The essential elements of embezzlement are the fiduciary relation arising where one intrusts property to another, and the fraudulent appropriation of the property by the latter. *Id.* § 503. The origin or particulars of the relation need not be stated. 2 Bish. Cr. Law, § 323a. Section 507, Pen. Code, reads as follows: "Every person intrusted with any property as bailee, * * * who fraudulently converts the same or the proceeds thereof to his own use * * * with a fraudulent intent to convert to his own use, is guilty of embezzlement," etc. It was alleged in the information that on a certain day the defendant "was, by one Pauline Hankozy, intrusted, as bailee, with certain personal property [describing it, a certain diamond ring, and giving its value], which said ring was then and there the personal property of said Pauline Hankozy, and thereafter [stating time and place] the said W. F. Gordon did willfully, unlawfully, and feloniously embezzle and fraudulently convert to his own use, * * * without the consent of the said Pauline Hankozy, contrary," etc. A similar information, in the case of embezzlement by an alleged agent, was held sufficient in *People v. Tomlinson*, 66 Cal. 344, 5 Pac. 505; in the case of a public officer, in *People v. Mahlman*, 82 Cal. 585, 23 Pac. 145, and *Same v. Page*, 116 Cal. 388, 48 Pac. 326, in which cases there were demurrers. Stating that the property was intrusted to defendant as bailee sufficiently showed a fiduciary relation, and it was not necessary to allege the

circumstances of the felonious conversion; especially so in the absence of a demurrer. Nor was it necessary to aver that the owner or bailor had demanded possession of the property, and had been refused, as is claimed by defendant. *People v. Wyman*, 102 Cal. 552, 36 Pac. 932, and *People v. Royce*, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524, stated a rule applicable to the evidence, and not to the information.

2. It is contended that the verdict was in violation of the following instruction given by the court: "If you are satisfied that the defendant obtained possession of the ring mentioned in the information against the will of the prosecuting witness, Pauline Hankozy, you should find a verdict of not guilty." The prosecuting witness testified that she first met defendant at Sonora (county not mentioned; there is such a place in Tuolumne county), and that she became engaged to him. She testified that defendant took the ring from her finger before she knew it, and then told her he would take it to San Francisco, and have it fixed for her as an engagement ring, and would put some rubies in it, and would bring it back in nine days. "He never came back," but sold the ring in Stockton. Just what the witness meant by saying that the ring was taken "before she knew it" is not clear, but she seems to have acquiesced at the time. What defendant's intention was in taking the ring, and whether it was against the owner's will, were questions for the jury on the evidence. The jury manifestly construed the evidence adduced, as well they might have done, as showing that defendant took the ring with Miss Hankozy's consent. It was the subsequent felonious conversion by defendant that constituted the embezzlement. The instruction was given at defendant's request, and the verdict was neither contrary thereto nor to the evidence.

3. The property was not received in San Joaquin county, but it appeared that it was converted in that county, and this was sufficient. *People v. Murphy*, 51 Cal. 379. The evidence was sufficient to warrant the jury in finding that the intent to embezzle the property was conceived in San Joaquin county. This answers defendant's objection to the testimony of Miss Hankozy as to what took place at Sonora, claimed by defendant to be without the jurisdiction of the court, i. e. in another county.

4. The court gave the following instruction: "The mere taking of property by one from another does not constitute larceny. To constitute larceny, such taking must be a felonious taking,—a taking with the intent on the part of the taker then and there to steal the same." It is claimed that the instruction "had no place in a case like the present one." Defendant in the instruction asked by him, already noticed, sought to show that there might be an unlawful taking which would not be embezzlement. In

effect, it was to intimate that, while the evidence in the case might show larceny or some other crime, it was not the crime charged. The court had instructed very fully as to what constituted embezzlement, and no doubt, out of abundant caution, added the above instruction, which could not have resulted to defendant's injury. We discover no error in the judgment or order, and advise that they be affirmed.

We concur: HAYNES, C; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

133 Cal. 332

MATTINGLY v. NICHOLS, County Auditor.
(L. A. 1,025.)

(Supreme Court of California. July 8, 1901.)
PRELIMINARY EXAMINATION—REPORTER'S
FEES.

Pen. Code, § 871, makes it the duty of a magistrate after preliminary examination to indorse his order of discharge upon depositions taken and certified in the manner prescribed by section 869. Section 883 requires depositions so taken to be filed with the county clerk, whether defendant is discharged or held to answer. On examination of one charged with larceny, the justice appointed plaintiff to report in shorthand the proceedings at the preliminary investigation whereat accused was discharged. *Held*, that the reporter was not entitled to fees for transcribing the shorthand notes in such case.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. F. Fitzgerald, Judge.

Mandamus by Charles H. Mattingly against Thomas E. Nichols, auditor of Los Angeles county. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Charles H. Mattingly, for appellant. James C. Rivers, Dist. Atty., and Curtis D. Wilbur, Dep. Dist. Atty., for respondent.

HAYNES, C. Appellant, upon filing his complaint in the court below, obtained an alternative writ of mandate requiring respondent, as county auditor, to draw a warrant upon the county treasurer in his favor for the sum of \$34.50, for services as shorthand reporter in a justice's court upon the examination of a prisoner charged with grand larceny, or show cause why he should not do so. The defendant appeared and demurred to the complaint, the demurrer was sustained, judgment entered thereon for the defendant, and plaintiff appeals.

The complaint alleges that upon the demand of one Brogdon, who was being examined upon a charge of grand larceny, that the testimony should be reduced to writing, the plaintiff was ordered and appointed by the justice of the peace to report in shorthand the depositions, testimony, and proceedings at the preliminary examination of

the party charged; that he took said proceedings in shorthand, and, in compliance with the order of the justice, afterwards transcribed the same in longhand; that the prisoner was discharged, and the proceedings so transcribed, and his shorthand notes, were duly filed with the clerk of the superior court. Appellant's demand was for one day's service, \$10, and for transcribing the testimony, \$24.50. The controversy relates only to the item for transcribing the testimony.

Appellant's contention is that as section 871 of the Penal Code makes it the duty of the magistrate to indorse in writing his order of discharge upon the depositions taken, authenticated, and certified in the manner prescribed by section 869, Id.; and as section 883, Id., requires that the "depositions" so taken should be filed with the county clerk in all cases, whether the defendant is discharged or held to answer, that it necessarily follows that the reporter's shorthand notes should be transcribed, as otherwise the discharge could not be indorsed upon them. This contention is, we think, erroneous. If it were essential that the discharge should be indorsed "upon the depositions," there are other depositions mentioned in the Code upon which it may properly be indorsed. Section 811, Pen. Code, provides that when an information is laid before a magistrate he must examine the informant or prosecutor, and any witnesses he may produce, "and take their depositions in writing"; and section 812, Id., prescribes what "the deposition" so taken must set forth. The term "deposition" is also given to the testimony of witnesses taken upon the examination of the accused, when required to be reduced to writing, whether written by the magistrate or taken in shorthand (Id. § 869); and section 870 speaks of "depositions taken on the information or on the examination." Section 871, Pen. Code, is as follows: "If, after hearing the proofs, it appears either that no public offense has been committed, or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged, by an endorsement on the depositions and statement, signed by him, to the following effect: There being no sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order him to be discharged." It is clear that the name "deposition" is used to designate the testimony taken by the magistrate when the complaint is presented to him before the issuance of the warrant, as well as the testimony of witnesses taken upon the examination of the accused after arrest, and that the order of discharge may properly be indorsed upon the former. If so, the necessity for transcribing the reporter's shorthand notes for the purpose of having the discharge indorsed thereon is not apparent. In *People v. Wallace*, 94 Cal. 499, 29 Pac. 950, it is said: "We are of opinion that an order hold-

ing a defendant to answer is in fact and in law made when it is entered upon the docket of the justice, and the failure to indorse such order upon the complaint or the depositions taken in no manner deprives the order of its validity, or affects any substantial right of a defendant;" and in *People v. Wilson*, 93 Cal. 379, 28 Pac. 1061, it was held that, in so far as the statute provides that the order shall be indorsed upon the deposition, the statute may be regarded as directory. In *People v. Dolan*, 96 Cal. 315, 31 Pac. 107, the order of commitment referred to the complaint as "the within deposition," and it was held that it was a sufficient compliance with section 872 of the Penal Code.

We think, however, that the Code does not contemplate, much less require, the shorthand notes of the reporter to be transcribed where the accused has been discharged. Subdivision 5 of section 869 of the Penal Code provides: "The reporter shall, within ten days after the close of such examination (if the defendant be held to answer to the charge), transcribe into longhand writing his said shorthand notes, and certify and file the same with the county clerk of the county, or city and county, in which the defendant was examined, and shall in all cases file his original notes with said clerk." If it was the intention of the legislature to require the reporter's notes to be transcribed and filed with the original notes in cases where the accused is discharged, as well as in cases where he is held to answer, it would have been easy to say so. No distinction whatever would have been made. It is not material to inquire whether the transcribed notes could or would have been of any use. The question, as finally stated in the reply brief, is whether appellant is entitled to pay, having performed the service upon the demand of the accused and under the order of the examining magistrate. But neither the state nor the county can be charged with a liability unless it is authorized by law. No discretion is vested in the justice of the peace in the matter. His authority must be found in the statute, if he has it, and we do not find any. The demurrer was rightly sustained, and the judgment should be affirmed.

We concur: SMITH, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

133 Cal. 338

PEOPLE ex rel. SKELTON v. CITY OF LOS ANGELES. (L. A. 894.)

(Supreme Court of California. July 9, 1901.)

QUO WARRANTO—COMPLAINT—BURDEN OF PROOF—MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—ELECTION PRECINCTS—MODE OF VOTING—AUSTRALIAN BALLOT SYSTEM.

1. Where the complaint, in quo warranto by the state to oust a city from all corporate

franchises and control within or over certain territory, after stating generally the steps taken to effect the annexation of such territory, and charging that defendant has usurped such franchises without any authority, specifies the particulars in which the said proceedings were invalid, the state must stand or fall on the sufficiency of the facts alleged.

2. Under St. 1889, p. 358, providing that a city council receiving a written petition to annex certain territory, containing a description thereof, and signed by not less than one-fifth of the qualified voters of such municipality, must submit the question whether such territory shall be annexed to the electors of such municipality and of the territory proposed to be annexed, an adjudication by such council as to the number of electors signing the petition is conclusive, in the absence of fraud.

3. St. 1889, p. 504, § 200, provides that the council shall specify places within the limits of each ward for the holding of a special election, or may divide any of the wards into two or more precincts. Section 202 declares that all elections shall in other respects be conducted under the provisions for holding general elections. St. 1889, p. 358, provides that the places for voting on the annexation of territory to the city shall be those commonly used as voting places. St. 1899, p. 63, with relation to elections held separate from general state elections, provides for establishing precincts, and that the board may consolidate the precincts of the last preceding general state election to a number not exceeding six for each municipal election precinct. The city council, at an election to determine the question of annexing certain territory, designated each ward of the city as a precinct, each of which, except two, contained more than six of the precincts as they existed at the last preceding general state election. Held that, though the board followed the wrong provision in designating the precincts, the election, in the absence of fraud, was not void, as the provisions are merely directory.

4. St. 1889, p. 358, provides that electors shall be invited to vote on the proposition of annexing territory to a city by placing on the ballots the words "For annexation" or "Against annexation." The ticket used contained the direction, "To vote, stamp a cross (X) in the square opposite the proposition indicating your choice," while below, on separate lines, were the words "For annexation" and "Against annexation." Held a substantial compliance with the statute.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Quo warranto proceedings by the people of the state of California, by Tiley L. Ford, attorney general, on the relation of J. W. Skelton, against the city of Los Angeles. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Dunn & Crutcher, Tiley L. Ford, Atty. Gen. (George P. Adams, of counsel), for appellant. Walter F. Haas, for respondent.

HAYNES, C. Quo warranto. In December, 1898, the city council of the city of Los Angeles received a written petition, under the provisions of the act of 1889 (St. 1889, p. 358), praying that certain territory adjacent to said city be annexed thereto and incorporated therewith, pursuant to which certain proceedings were had which respondent claims effected the annexation of said

territory. Appellant contends that these proceedings were void, and prays that the city be excluded from all corporate franchises, jurisdiction, and control within or over said territory. A general demurrer to the amended complaint was sustained, and judgment thereon entered for defendant, and plaintiff appeals.

The complaint, after stating generally the steps taken to effect the annexation of said territory, and charging that the defendant has usurped and exercised, without any warrant or authority, the franchises, jurisdiction, and control over said territory, proceeds to specify and allege the particulars in which the said proceedings were invalid and insufficient to accomplish such annexation. The mode of pleading in such cases is now by no means uniform. It is undoubtedly true that the state may charge a corporation with the usurpation of a franchise in general terms, and call upon it to allege and prove the facts showing its right, and thus place the burden upon the defendant. *Palmer v. Woodbury*, 14 Cal. 43; *People v. Reclamation Dist.*, 121 Cal. 526, 50 Pac. 1068, 53 Pac. 1085. An information on behalf of the state may, however, allege the specific grounds or defects relied upon to show usurpation, instead of charging usurpation in general terms, and this mode of pleading has become quite common. *People v. Dashaway Association*, 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117. But, if the facts upon which the alleged usurpation is based are pleaded by the state, the facts so pleaded must be sufficient to sustain the charge of usurpation, if admitted, and, if denied, the burden of proof is upon the plaintiff. In *People v. Sutter St. Ry. Co.*, 117 Cal. 611, 49 Pac. 736, it was said the relief might be had "by a proceeding strictly in form of a quo warranto, but there is no reason why the proceeding may not be by a regular action. In fact there is now so little difference that it is hardly worthy of discussion." The plaintiff, having assumed the burden of allegation and proof, must stand or fall upon the sufficiency of the facts alleged.

1. The act of 1889, under which these proceedings were taken, provides that the boundaries of any incorporated town or city may be changed, or new territory annexed thereto, upon proceedings being taken as therein provided. Touching the petition therefor the statute provides: "The council, board of trustees, or other legislative body of any such municipal corporation, upon receiving a written petition therefor containing a description of the new territory asked to be annexed to such corporation, and signed by not less than one-fifth in number of the qualified electors of such municipal corporation, computed upon the number of votes cast at the last general municipal election held therein, must, without delay, submit to the electors of such municipal cor-

poration, and to the electors residing in the territory proposed by such petition to be annexed to such corporation, the question whether such new territory shall be annexed to, incorporated in, and made part of such municipal corporation." The complaint does not set out a copy of the petition, and the only defect therein alleged in the complaint or urged in argument is that it was not signed by at least one-fifth of the qualified electors of the city, computed upon the number of votes cast at the last general municipal election held therein. The jurisdiction of the city council to order an election depends upon the presentation to it of such petition signed by the requisite number of electors. Whether it was so signed was a question of fact submitted by the statute to the decision of the council, and the question arising upon this branch of the case is whether the adjudication of that question of fact by the city council is conclusive. The act might have provided that that question should be submitted to the decision of a court or jury; but it is obvious that the city council, if so authorized by the statute, is as capable of its correct decision as any tribunal that might have been named, and that such decision is, under the statute, as conclusive as though made by any other tribunal to which the legislature might have submitted it. "An inferior board may determine conclusively its own jurisdiction or power by adjudicating the existence of facts upon the existence of which its jurisdiction or power depends. Where, however, the power depends, not upon the existence or nonexistence of matters in pais, to be established by evidence, but upon allegations in a petition, a portion of the record, the question is not the same." In *re Grove St.*, 61 Cal. 453; *Humboldt County v. Dinsmore*, 75 Cal. 607, 17 Pac. 710; *Farmers' & Merchants' Bank v. Board of Equalization*, 97 Cal. 318, 32 Pac. 312. In *Wells, Jur.* § 61, it is said: "Where the jurisdiction of even an inferior court is dependent on a fact which that court is required to ascertain and settle by its decision, such decision is held conclusive." Freeman, in his work on Judgments, in speaking of tribunals acting judicially (section 531), says: "As a general rule, whenever any person or persons have authority to hear and determine any question, their determination is, in effect, a judgment having all the incidents and properties attached to a similar judgment pronounced in any regularly created court of limited jurisdiction acting within the bounds of its authority. Hence, whenever any board, tribunal, or person is by law vested with authority to decide a question, such decision, when made, is *res judicata*, and as conclusive of the issues involved in the decision as though the adjudication had been made by a court of general jurisdiction." All such adjudications are conclusive against

collateral attack, and as the statute has not, in the case at bar, given any appeal or review by a higher tribunal, it follows that it can be vacated only in the manner and upon the grounds that would justify the vacation of a judgment rendered by a court of record, and a mere error in the adjudication of a question of fact not procured by fraud, extrinsic or collateral to such question, is not a ground upon which it may be vacated, since, if it were, no adjudication of a question of fact would ever become final so long as new evidence could be had, or a different conclusion be reached upon the same evidence. Appellant makes no suggestion that the petition was in any manner defective upon its face. If it had been defective in any material matter required by the statute, the council would not have acquired jurisdiction, and the defect, appearing upon the face of the record, would have been fatal in this proceeding; and in such case appellant's citation from *In re Madera Irr. Dist.*, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, that "no board or tribunal can obtain jurisdiction by its own recital that it has jurisdiction," would have been in point. Appellant also quotes from the case last above cited the following: "Nor should this jurisdiction be held to attach whatever court may have ruled that the petition was signed by a majority, when, in fact, it was signed only by a minority, of the owners designated by the statute." This quotation, unexplained, sustains appellant's contention. But that was an action brought under the act of 1889 (St. 1889, p. 212), for a confirmation of the proceedings for the issuance and sale of bonds of said irrigation district, and which expressly declared that "the court shall have power and jurisdiction to examine and determine the legality and validity of * * * each and all the proceedings for the organization of said district, * * * from and including the petition for the organization of the district." *Id.* p. 213, § 5. The proceeding was special, and was so declared by the act. See *People v. Reclamation Dist.*, 121 Cal. 525, 50 Pac. 1068, 53 Pac. 1085.

2. Appellant also contends that the council did not properly divide the city into election precincts for the purposes of said election, in that each of the nine wards of the city was designated as a precinct, thus: "First Ward, Precinct A," "Second Ward, Precinct A," etc. That each of said precincts, except two, contained more than six of the general election precincts as the same existed for the holding of the last preceding general state election, at which time the city contained 84 precincts. Appellant refers to the provisions of the city charter, but does not fully state them. The charter provides for special elections in certain specified cases, and adds, "or for other purposes not especially provided for." St. 1889, p.

504, § 197. The charter further provides (section 200) that the council shall by ordinance order the holding of all elections, and shall specify "a place or places within the limits of each ward for the holding of such election," or may "divide any of the wards into two or more precincts"; and, after making many other provisions, declares that "all elections shall, in all other respects, be conducted and held in accordance with the provisions of the laws of the state for the holding of general elections in effect at the time." Section 202. The act of 1889, providing for the annexation of new territory, makes it the duty of the legislative body of the municipality to designate in the notice of election the voting precinct or precincts, and the polling places in the territory proposed to be annexed, "and also in such municipal corporation; and such place or places shall be that or those commonly used as voting places within such municipal corporation, and also that or those commonly used in such new territory, if any such there be." Another statutory provision, and the one apparently relied upon, is an act passed March 4, 1899 (St. 1899, p. 63), entitled "An act in relation to municipal elections where the same are held separate from general state elections, and elections held under the authority of section eight of article eleven of the constitution, to elect boards of freeholders, or to vote upon proposed charters or upon amendments to existing charters," and to repeal the act of March 31, 1897. This act provides that municipalities may be divided into municipal election precincts as often as occasion may require, and "in establishing such municipal election precincts, said board may consolidate the precincts which existed for the holding of the last preceding general state election to a number not exceeding six for each municipal election precinct. * * *" As to which of these conflicting provisions should have been followed even a city council might err. Nor do I think it necessary to decide that question. These provisions have been stated mainly in illustration of the conclusion that as to the formation of voting precincts such provisions are directory merely, so that if it be conceded that the wrong statute was followed, or that neither was strictly followed, the election was not void. Such provisions are directory, not mandatory. It is not declared that a failure to observe the direction of the statute as to the number or size of the precincts shall invalidate the election. "It is only those provisions of the statutes relating to the time and place of holding elections, the qualifications of voters, and such others as are expressly made essential prerequisites to the validity of an election, that are held to be mandatory. All others are directory merely, and a failure to observe them, caused by honest ignorance or mistake, and not resulting in manifest fraud, does not afford

ground for rejecting the entire vote of a precinct." *Russell v. McDowell*, 83 Cal. 77, 23 Pac. 183; *Tebbe v. Smith*, 108 Cal. 111, 41 Pac. 454, 29 L. R. A. 673. In the recent case of *Fragley v. Phelan*, 126 Cal. 397, 58 Pac. 923, it was said: "The provision in section 1129, that the precinct shall be sufficient to make the number of votes polled at any one precinct to be not more than two hundred, as nearly as can be ascertained," is not to be regarded as jurisdictional, but is merely directory. * * * It is not claimed that the board acted in bad faith, or that any citizen was deprived of his vote, the only claim being that, by reason of the registered vote within each of said precincts being much greater than two hundred, the board must be presumed to have abused its discretion in consolidating the precincts in the manner it did." Fraud is not charged, nor is it alleged that any one who desired to vote was unable to do so because of the size of the precincts or for any reason.

3. Appellant also contends that the ballots used at said election did not conform either to the Australian ballot system, nor to the provisions of the act of 1889, which provides for the annexation of territory to municipal corporations. Said act provides that electors shall be invited to vote upon such proposition "by placing upon the ballots the words 'For annexation,' or 'Against annexation,' or words equivalent thereto." The form of the ticket used was as follows:

To vote, stamp a cross (X) in the square opposite the proposition indicating your choice.

1.	For Annexation.....	
2.	Against Annexation.....	

This was a substantial compliance with the act of 1889, which, while specifying certain words in which the desire of the voter might be expressed, waived a technical compliance with the direction by adding, "or words equivalent thereto." This ticket uses the words expressed in the statute, while also adopting the method of the Australian system in designating the voters' choice between the alternative propositions. "It [the ballot] should be read in the light of all the circumstances surrounding the election and the voter, and the object should be to ascertain and to carry into effect the intention of the voter, if it can be determined with reasonable certainty. The ballot should be liberally construed, and the intendments should be in favor of a reading and construction which will render the ballot effective, rather than some conclusion which will, on a technical ground, render it ineffective." *Behrensmeyer v. Kreitz*, 135 Ill. 495, 26 N. E. 704. "If a ballot expresses the intention of the voter without a reasonable doubt, it is sufficient, though technically inaccurate." *Hawes v. Miller*, 56 Iowa, 595, 9 N. W. 307. The form of the ballot used could not have led to any doubt or uncertainty as to the intention of the voters, and it is not alleged

that it did. The judgment appealed from should be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

I concur in the judgment: TEMPLE, J.

(133 Cal. 371)

PEOPLE v. STORK. (Cr. 747.)¹

(Supreme Court of California. July 16, 1901.)

FORGERY—EVIDENCE—LAND CONTRACT—
INTENT.

1. Accused had procured the owners of land to deposit a deed with him in escrow, on a verbal understanding that they were to have all the time they wanted to examine certain lands which another proposed to convey in exchange. Accused drew up an instrument, to which he signed the names of the grantors in the deed without their knowledge, which stipulated that the contract should be in full effect after one month, provided title and location were not objected to by either party before that time. Thereafter the grantors in the deed of escrow, finding the lands worthless, demanded the escrow deed of accused, who refused to give it up, on the ground that the transaction was closed. *Held*, that the instrument was a forgery, within the meaning of the law.

2. A contention that the evidence did not show an intent to injure any one nor an actual injury was without merit.

Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Eugene B. Stork was convicted of forgery, and he appeals. Affirmed.

Geo. L. Sanders and D. M. McDonald, for appellant. Tiley L. Ford, Atty. Gen., and A. A. Moore, Jr., Dep. Atty. Gen., for the People.

McFARLAND, J. The defendant was convicted of forgery, and appeals from the judgment and from an order denying a new trial. The writing alleged to have been forged was a certain contract for the exchange of certain land between John A. McCarty, party of the first part, and Edna E. Nave and her husband, A. G. Nave, parties of the second part. There was ample evidence to warrant the jury in finding that neither of the Naves signed the writing in question, or authorized their names, or either of them, to be signed, and that appellant committed the alleged acts of forgery. We see nothing in the contentions that the writing in question, even if false, did not constitute a legal forgery; that there was no intent on the part of appellant to injure any one; that it did not injure the Naves; and that it was not produced by appellant until after the expiration of the time limit expressed on its face. Appellant had procured the Naves to deposit with him in escrow a deed of conveyance of the land mentioned in the contract to be conveyed by them, upon the verbal understanding that they were to have all the time they wanted to examine certain land in the state of Missouri which McCarty was to convey to them; but in the forged instrument, of which the Naves knew nothing whatever, and which was dated February 9, 1898, it was stipulated that the contract should be in full effect after the expiration of one month, "provided title and location is not objected to by either parties prior to the expiration of this agreement." The land in Missouri turned out to be worthless, and

when Nave, some time in March, 1898, demanded of appellant a return of the escrow deed, the latter refused to do so, and said that the transaction was closed, and the title had passed out of the Naves. The Naves brought an action against appellant and McCarty to recover the land, and then appellant produced the forged instrument. Under these circumstances, the making of the false instrument was clearly a forgery, within the meaning of the law on the subject.

There is some discussion in appellant's brief of the expert testimony introduced; but no legal objection to any of such testimony is urged, and all there is to be said on the subject is that this testimony was somewhat conflicting. In his brief appellant merely says that there is a variance between the forged instrument set out in the information and the one introduced in evidence, without stating in what the variance consists; leaving us to look into the record ourselves to see what the variance is. An examination of the record shows no variance except of the most trivial kind.

The brief contains a number of objections to rulings of the court in passing on the admissibility of evidence and in instructing the jury; but these are nearly all mere naked statements of objections, without argument or reasons given. We have looked at them, however, and it is sufficient to say that we do not see in these objections any legal reason for reversing the judgment. The court did not abuse its discretion in refusing to grant a new trial on the ground of newly-discovered evidence. The record does not show anything which would warrant a reversal on the ground of the misconduct of the district attorney. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(133 Cal. 360)

WILLIAMS v. SAVINGS & LOAN SOC. (S.
F. 2,749.)¹

(Supreme Court of California. July 11, 1901.)

APPEAL—PARTY AGGRIEVED—DISMISSAL.

1. Where the appeal is from the judgment roll, and without a bill of exceptions, and no motion for new trial was made, a finding that plaintiff had no right to bring the suit cannot be questioned, nor can errors of law be considered.

2. A party who has no right to bring the suit, and no interest therein, is not aggrieved by the judgment, and cannot appeal.

In bank. Appeal from superior court, Contra Costa county; William S. Wells, Judge.

Action by S. Ella Williams against the Savings & Loan Society. From a judgment for defendant, plaintiff appeals. Dismissed.

Henry Sears, for appellant. A. N. Drown, for respondent.

¹ Rehearing denied August 13, 1901.¹ Rehearing denied August 12, 1901.

TEMPLE, J. This action was brought to effect the redemption of a tract of land from the lien of a mortgage alleged to have been given by the Brentwood Coal Company, a corporation, to one James T. Sanford. It is alleged that defendant is in possession of the land as assignee of said mortgage, and is holding the land as security. It is also averred that the corporation became insolvent, and was disincorporated; plaintiff being at the time a stockholder, owning 3,000 shares of the capital stock of the corporation. As such stockholder she asserts the right to redeem the land from said mortgage. She charges that the defendant had been in possession for many years, and had received a large amount of rents and profits from the land, of which she asks an accounting, to determine the amount which will be required to enable her to redeem. Many other matters are averred in the complaint, which it is not necessary to state.

Issue was taken by defendant upon many allegations in the complaint, and particularly in regard to the ownership of stock on the part of plaintiff in the said corporation. The denial is full and specific, and the court upon that issue found that "the plaintiff herein was not on the 4th of December, 1883, or prior thereto, and was not at any time since said 4th day of December, 1883, or at the time of the commencement of this action, the owner or holder of three thousand shares, or any shares or share, of the capital stock of said Brentwood Coal Company." This was a finding to the effect that plaintiff had no right to bring the suit, and was not interested in the controversy. That being so, she is not a party aggrieved by the judgment, and cannot appeal therefrom. The appeal is upon the judgment roll, and without a bill of exceptions. No motion for a new trial was made, or, if there was, it does not appear from this record. The finding cannot be questioned on the appeal, nor can we consider errors of law committed at the trial, if such there were. We are asked to consider whether the findings and pleadings support the judgment, and whether they do not necessitate a different judgment; but, as the finding must stand that plaintiff has no interest in the matter, she will not be heard upon those questions. *Blythe v. Ayres*, 102 Cal. 260, 36 Pac. 522, 41 Am. Rep. 188; *In re Blythe's Estate*, 108 Cal. 126, 41 Pac. 33. The relief which appellant demands here is that the trial court be directed "to enter final judgment in favor of plaintiff upon the findings and admissions in the pleadings." We are not pointed to any admissions in the pleadings in regard to the ownership on the part of plaintiff of any stock in said corporation, or as to her interest in this controversy, and we have found none. The appeal is dismissed.

We concur: McFARLAND, J.; VAN DYKE, J.; GAROUTTE, J.

(6 Cal. Unrep. 719)

PEOPLE v. BRADY et al. (Cr. 746.)¹

(Supreme Court of California. July 6, 1901.)
CRIMINAL LAW — BURGLARY — CLERICAL ERROR IN VERDICT — EVIDENCE — PROPER CROSS-EXAMINATION—INSTRUCTION.

1. Under Pen. Code, § 1151, providing that a general verdict on a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment, the designation of the offense in a general verdict is mere surplusage, and a verdict finding defendant guilty of "burglary" is valid.

2. Defendant leased a house in which there was no furniture. A vacant house on another farm, about nine miles distant, contained household furniture, which was found in defendant's possession at the time of his arrest. One witness testified that the defendant had borrowed a team about the time the furniture was supposed to have been taken, and another witness testified as to seeing such a team going in the direction of the vacant house, and later return towards the defendant's place. Defendant made many contradictory statements as to where he obtained the furniture. *Held* sufficient to warrant a conviction for burglary.

3. The fact that a person was living with one guilty of burglary at the time the burglary was committed, and that he made untruthful statements as to where the guilty party obtained the property, is not sufficient evidence to warrant the conviction of such person as participating in the crime.

4. Where, on a prosecution for burglary, the defendant's wife had testified as to the purchase by her husband of the alleged stolen articles, it was proper cross-examination to ask her as to statements, inconsistent with her testimony, at the time of her husband's arrest.

5. On a prosecution for burglary, it was not error to instruct that the possession of stolen property soon after the commission of the alleged offense by the person charged was a circumstance tending to prove their guilt, and that the jury should consider the proximity of the place where the property was found to the place of the alleged burglary, the lapse of time since the property was taken, the character and nature of the property taken, and whether the parties denied or admitted the possession, in determining how far the possession of the property by the accused tended to show his guilt.

6. On a prosecution for burglary it was not error to leave it to the jury to formulate their own verdict on blank forms furnished, stating the degree of guilt of the defendants, if either of them were guilty, and that, if the jury needed further instruction as to framing a verdict, it should return to the court room for such instruction.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Walter Brady and George Helms were convicted of burglary, and they appeal. Affirmed as to Brady, and reversed as to Helms.

A. V. Scanlan, for appellants. T. L. Ford, Atty. Gen., and C. N. Post, Asst. Atty. Gen. for the People.

CHIPMAN, C. Defendants were jointly accused of the crime of burglary, were tried together and convicted, the jury returning the following verdict: "We, the jury in the above-entitled cause, find Walter Brady and George Helms, defendants, guilty in the first degree for burglary." Defendants

¹ Rehearing denied August 6, 1901.

moved for their discharge, and also for a new trial, and both motions were denied, and they appeal from the judgment and from the order denying their motion for a new trial.

1. The motion for discharge was on the ground that the verdict was no verdict, because there is no such offense known to the law as "burglary"; citing *People v. St. Clair*, 56 Cal. 406, where the indictment charged an entry into a stable with intent to commit "larcey." It was held that there was no such felony as "larcey" known to the law, and that the maxim *idem sonans* did not apply. In that case the fatal defect was in the indictment itself, and not in the verdict of the jury. The error here was in the orthography of the word "burglary" as used in the verdict, and was merely a clerical error, which seems to have been overlooked by the court and counsel until the motion for a new trial was made. Where the intention of the jury is unmistakable, mere clerical errors should be disregarded. *Jeansch v. Lewis*, 1 S. D. 609, 48 N. W. 128. The verdict, being general, and fixing the degree of the crime, would have been complete had the word "burglary" been omitted altogether. Pen. Code, § 1151, which provides: "A general verdict upon a plea of not guilty is either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the offense charged in the indictment." The obnoxious word may be rejected as surplusage, if necessary to sustain the judgment. But, aside from the foregoing considerations, we think the word used by the jury cannot be read as any other word than "burglary."

2. It is urged that the evidence is not sufficient to sustain the verdict, for the reason that there was no evidence in any way tending to establish the charge except the possession of the property claimed to have been stolen. We have carefully examined the testimony, and are satisfied that there is sufficient evidence to support the verdict as to defendant Brady, but not as to defendant Helms. It appeared that on July 5, 1900, defendant Brady leased from one Keagle a place in the country, known as the "Pope Place," situated between Stockton and Lodi, about three miles south of the latter town, and moved into the house on the place with his family, including defendant Helms, and they remained there until July 22, 1900, when defendants were arrested, and that there was no furniture in the house when Brady took possession. This place is about nine miles from the Cy Moreing place, owned by one Solari. On July 7th a vacant house on this place contained the various household articles afterwards found in the house rented by Brady, and the property was fully identified by Solari. He went to his place July 21st, and discovered that the articles were gone, and he testified "that he saw them on the Pope place on July 23, 1900." One Spelti testified that defendants

on July 11, 1900, borrowed from the Lewis ranch, where witness was working, a sorrel horse and bay mare with a sorrel colt; that they were returned to the Lewis ranch, July 23d, by Constable Coleman, of Lodi; that defendants came to witness' place in a wagon, and that Brady's wife and some children were in the wagon. Witness Mrs. America Gum testified that on the 8th of July defendant Brady, with his wife and grandson, came to her house in a light two-horse wagon, and borrowed and took away with him a heavy two-horse wagon. This wagon was afterwards found near the Pope place. Witness Dolan testified that on July 13th, "a little after sundown," he saw two wagons passing in the direction of the Cy Moreing place, about two miles south of where the witness was; he was near the wagons, one of which was a large two-horse wagon, drawn by a bay and sorrel; the other was a "small, heavy-sized spring wagon, with a bed about twelve feet long, * * * drawn by a bay and a brown"; the teams were traveling close together, and "a little sorrel colt traveling with one of the teams, and, going down, he was right near the sorrel horse"; that "the same night, about an hour and a half later, he saw the same teams, wagons, and persons pass him, at the same place, going north; that he was about twenty feet from them, and had a lantern with him; that after they passed he put away his lantern, got on a horse, and followed them about two miles, * * * to what is called the 'Goodwin Place,' where he stayed about an hour, listening to the wagons, which continued north for about two miles, and then turned west in the direction of the Pope place." He did not recognize the persons, and did not testify who they were. He testified that he afterwards saw one of the same wagons "at the Tyndal place, two hundred yards south of the Pope place." This was the same wagon that was borrowed from Mrs. Gum. Another witness "saw defendant Brady and another man, whom he did not know, in Lodi on July 20th, with Mrs. Gum's wagon." Other witnesses testified to seeing on the Pope place the wagons and horses and colt similar in description to those testified to by the witness Dolan. There was much evidence tending to show that defendant Brady made contradictory statements as to where he got the property, claiming that he bought the stove in San Francisco, and that he bought some of the property at a secondhand store in Stockton. When asked to go with the arresting officer to the place referred to in Stockton, he went with him, but was unable to find it, and he made contradictory statements as to where the place was. He also claimed that he bought the articles from an expressman in Stockton named Frank A. Jones, but several witnesses who knew all the junk dealers and expressmen in Stockton, as well as the arresting officers, were unable to locate or

find any such person in Stockton. Without further statement of the evidence, we think the jury had sufficient facts before them to warrant a verdict of guilty as to defendant Brady.

There is no evidence connecting Helms with the taking or with the possession of the goods, except that he was living in the house with Brady. There was evidence that Helms told a witness that Brady got the articles where Brady had told the witness he got them; that Helms was with Brady when the latter got a team from the Lewis ranch, but not when he got the wagon from Mrs. Gum, which was hired to Brady. So far as appears, defendant Brady had a team and wagon of his own, and it appears that on July 9, 1890, some articles of furniture were delivered to Brady at the Union Transportation Company's wharf at Stockton. Helms was seen with Brady about July 22d, and he testified that he was living with him on July 9th. But there is no evidence that he had possession of the stolen property or made any claim to it whatever or had anything to do with it. If he made statements contrary to the truth as to where Brady got it, that fact would not tend to show that Helms aided in stealing it. He was not asked to explain his possession of the property, and made no explanation, for the obvious reason that he was not in possession of it.

3. Mrs. Brady was a witness for defendants, and on cross-examination the district attorney asked her the following question: "Q. Mrs. Brady, do you remember being in the sheriff's office on the 24th of July, 1900?" Defendants objected as not cross-examination. The question was completed by stating the persons present, after which the witness was interrogated at considerable length as to what was said by her at that time relative to certain of the stolen articles and where her husband got them. She had testified in chief that her husband purchased the property in question in Stockton on July 9th from one Jones, and paid \$18 for it, taking Jones' receipt for the money. It was competent on cross-examination to impeach the witness by showing that she had made statements inconsistent with her testimony, relative to the matter about which she had testified in chief, and the cross-examination was to lay the proper foundation. We see no error in the ruling.

4. The following instructions are objected to: "The court instructs the jury that the possession of stolen property recently after the commission of the alleged offense by the persons charged, if you find any such property to have been in their possession, if unexplained, is a circumstance tending to prove their guilt; and if the jury believe from the evidence that the defendants were found with the stolen property in their possession, if you find any was feloniously taken, then, to determine the weight to be attached to that circumstance as tending to prove guilt,

the jury should consider all the circumstances attending such possession, proximity of the place where found to the place of the alleged burglary, the lapse of time since the property was taken, the character and nature of the property taken, whether the property was concealed, whether the parties denied or admitted the possession, and the demeanor and character of the accused. All of these circumstances, so far as they have been proved, are proper to be taken into account by the jury in determining how far the possession of the property by the accused, if it has been proved, tends to show his or their guilt." The court also gave the following: "Although you cannot, under the information, find the defendants, or either of them, guilty of any offense other than burglary, it would be somewhat difficult to furnish you with the complete form of every possible verdict at which, according to your view of the evidence, you may arrive. The court will therefore furnish you mere blank forms. Upon one of such forms you will formulate your verdict, and your foreman will sign it. You will be careful to dispose of the whole case, observing that there are two defendants, and if you find either or both of them guilty of burglary you will specify whether in the first or second degree. With proper care, you will probably be able to frame a verdict, but, should you need further instruction, you may request the officer in charge of you to return you to the court room for such instruction." We discover no error in either of these instructions. The judgment and order as to defendant Brady should be affirmed, and as to defendant Helms they should be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order as to defendant Brady are affirmed, and as to defendant Helms they are reversed.

133 Cal. 362

MANSFIELD v. O'KEEFE. (S. F. 2,711.)

(Supreme Court of California. July 13, 1901.)

CHANGE OF VENUE — APPEAL — NOTICE — UNDERTAKING—FILING IN WRONG COUNTY.

Code Civ. Proc. § 399, provides that, in case of change of venue, the court to which the action is transferred has the like jurisdiction as if the case had been originally commenced therein. Section 940 provides that an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from was entered a notice stating the appeal, which is ineffectual unless, within five days after service thereof, an undertaking be filed with the clerk. *Held*, that appeal from an order changing the place of trial will be dismissed where the notice of appeal and the bill of exceptions settled by the judge of the court of the county from which the change was made, and the undertaking on appeal, were filed in the county to which the cause was transferred, instead of the county in which the action was begun.

In bank. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by J. H. Mansfield against D. E. O'Keefe. From an order changing the place of trial, defendant appeals. Dismissed.

John E. Richards and Jas. T. O'Keefe, for appellant. H. E. Highton, for respondent.

VAN DYKE, J. Motion to dismiss an appeal. The appeal is taken by defendant, or attempted to be taken, from an order of the superior court of the county of San Mateo changing the place of trial of said cause therefrom to the superior court of the county of Santa Clara. The motion to dismiss the appeal is based upon the ground that the notice of appeal from said order, as well as the bill of exceptions settled by the judge of said county, and the undertaking on appeal, were each and all filed in the superior court of the county of Santa Clara, instead of being filed in the superior court of the county of San Mateo, in which court said order appealed from was entered, and that as matter of law no appeal has been taken from the order transferring the trial of said cause. "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney." Code Civ. Proc. § 940. The same section declares that "the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing." The next section provides that the undertaking on appeal must be executed on the part of the appellant, by at least two sureties, in a sum not exceeding three hundred dollars, "or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal." In support of the motion the respondent has submitted a certificate from the county clerk of Santa Clara county, showing that the notice of appeal from said order, and the bill of exceptions settled by the judge of the superior court of San Mateo county, and the undertaking on appeal, were filed in said Santa Clara county, and a certificate from the county clerk of San Mateo county, in which it is stated that no notice of appeal from said order has been filed in that county.

The appellant, in resisting the motion to dismiss, admits that section 940 is applicable to appeals in general, but contends that an appeal from an order changing a place of trial is exceptional, and that it is controlled by section 399 of the Code of Civil Procedure, which provides that, in case of a change of place of trial, "the court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had

been originally commenced therein." The meaning of that provision, as the language imports, is that the court to which the action is transferred, from that time forward, has a like jurisdiction over the trial of the action, or other proceeding relating thereto, as though the action had been commenced therein, but not over orders or proceedings had prior thereto by a court of another county. The appellant from that order must furnish this court, among other papers, with a copy of the order appealed from. Code Civ. Proc. § 951. The order appealed from in this case must have been entered in the minutes of the court in which it was granted. Code Civ. Proc. § 1003. And the clerk of that court would be the proper one to furnish a copy of said order for the appellant. The alleged error complained of was committed by the superior court of San Mateo county, and the relief is sought as against that court, and the notice of appeal and undertaking must be filed in the court from whose judgment or order the appeal is taken. The only cases cited by the appellant in resisting the motion are *Krumdick v. Crump*, 98 Cal. 117, 32 Pac. 800, and *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209. In both of these cases the court below refused to transfer the trial of the cause, and the appeals were taken from such order. They have no bearing on the question involved on this motion to dismiss. The appeal not having been taken in the manner prescribed by law, the motion to dismiss must be granted; and it is so ordered.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.

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133 Cal. 364

JACOBS et al. v. SUPERIOR COURT et al.
(S. F. 2,816.)

(Supreme Court of California. July 15, 1901.)

PROHIBITION—ARRESTING PROCEEDINGS IN RECEIVERSHIP—ADEQUATE REMEDY.

Since Code Civ. Proc. §§ 939, 943, provide for an appeal from an order appointing a receiver, and for stay of the order by undertaking on appeal, prohibition will not lie to arrest proceedings in a receivership; section 1103 authorizing writ of prohibition only where there is not an adequate remedy at law.

In bank. Petition by Jacobs & Flack for writ of prohibition to arrest certain proceedings in superior court. Dismissed.

Jacobs & Flack, in pro. per. Joseph H. Budd and Campbell, Metson & Campbell, for respondent. S. M. Spurrier, for receiver.

McFARLAND, J. This is an original petition here for a writ of prohibition to arrest all further proceedings upon a certain order of the respondent, the superior court, appointing a receiver. The appointment of the receiver was made in a certain action brought by one Gillis against one Galvan and others to foreclose a mortgage executed

by Galvan and wife to Gillis on a certain tract of farming land. The order appointing a receiver authorizes him to take possession of said land, with the crops growing thereon, etc. The receiver took possession in accordance with the order, and ousted petitioners, who claim to have been in possession as lessees of the mortgagor, and to have had growing crops on the land. Petitioners argue strenuously that, under the facts shown, they were owners of the growing crops; that the plaintiff in the action, being merely a mortgagee of the naked land, has no legal right, before foreclosure sale, to interfere, by receivership or otherwise, with their possession and control of said crops; and that for these reasons, and other reasons given, the appointment of the receiver was unwarranted. On the other hand, respondents contend that the asserted lease was without consideration, intended merely to delay creditors, and void. But, without examining into these questions, or determining whether or not the appointment of the receiver was proper, and authorized by law, it is sufficient to say that this petition for prohibition cannot be sustained, because petitioners have "a plain, speedy, and adequate remedy in the ordinary course of law," within the meaning of section 1103 of the Code of Civil Procedure. *Agassiz v. Superior Court*, 90 Cal. 101, 27 Pac. 49; *Mines, etc., Soc. v. Same*, 91 Cal. 101, 27 Pac. 532; *Murphy v. Same*, 84 Cal. 596, 24 Pac. 310; *Strouse v. Police Court*, 85 Cal. 49, 24 Pac. 747. Formerly—and when *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, was decided—there was no appeal from an order appointing a receiver, but in 1897 (St. 1897, p. 55) section 939 of the Code of Civil Procedure was amended so as to allow such appeal; and at the same time section 943 was amended so as to provide for the staying of an order appointing a receiver by an undertaking on appeal. These amendments were apparently intended to afford a remedy for prodigal, unwise, and unwarranted appointments of receivers (which seems to be a growing evil); and we think that they do afford an adequate remedy, as contemplated by said section 1103 and the decisions of this court on the subject. The fact that a question of jurisdiction arises does not change the rule as to the adequacy of the remedy by appeal. See *Agassiz v. Superior Court*, supra. The filing of the undertaking operates as a supersedeas, suspends all authority of the receiver under the order, withdraws from him the right to the control and possession of the property involved, and restores the same to the appealing party from whom it had been taken. *Buckley v. George*, 71 Miss. 580, 15 South. 46; *State v. Johnson*, 13 Fla. 33; *Bank v. Backus*, 63 Minn. 115, 65 N. W. 255; *Blondheim v. Moore*, 11 Md. 365. In the Minnesota case above cited the

court said: "The rights and powers of the receiver being suspended, of which he was duly notified, he should have restored possession of the premises to the appellant; for, his authority to take being inoperative by the suspension, his authority to hold was equally so, both being derived from the same order. The legal effect of the appeal and supersedeas was to withdraw from the receiver the right to the possession of the property, and vest that right in the party from whom it had been taken." In the Florida case, supra, the court said: "No new rights having been created, and the duties of the receiver being superseded, the bond standing in place of the property in his hands, and he having been notified thereof by proper process, it was his duty to restore that which had come to his hands to the parties from whom it had been taken and withheld; for, his authority to take being inoperative by the suspension, his authority to hold was equally so, both being derived from the same order." Therefore the appeal and the undertaking thereon provided by our Code furnish in nearly all cases at least an adequate remedy in the ordinary course of law. The case of *Los Angeles City Water Co. v. Los Angeles Co. Sup. Ct.*, 124 Cal. 385, 57 Pac. 216, appears, at first blush, to be an authority in support of petitioners' contention; but the first part of the syllabus, by inadvertence, gives an inaccurate statement of the decision. It was not there decided that an order improperly appointing a receiver would be annulled on certiorari "notwithstanding the petitioner has appealed therefrom," and given a stay bond, as stated in the syllabus. The short opinion in the case shows that the petition was not to review an order appointing a receiver, but to review subsequent orders which had been made by the superior court "after the petitioner had appealed to this court from an order of said superior court appointing a receiver, etc., and had given an undertaking to stay proceedings in the amount fixed by the judge of said court." The merit of the case had already been decided on the appeal from the order appointing a receiver (see 124 Cal. 368, 57 Pac. 210, 571), and the point was whether the court below, after an appeal from the order appointing a receiver accompanied by a stay bond, had jurisdiction to make certain subsequent orders. See *Supreme Court Records*, vol. 2047, p. 253. There might, perhaps, be exceptional facts in a case which would call for a writ of prohibition notwithstanding an appeal from an order appointing a receiver; but the general rule is as above stated, and applies to the case at bar. The petition is denied, and the proceeding dismissed.

We concur: BEATTY, C. J.; TEMPLE, J.; VAN DYKE, J.; HENSHAW, J.; GAROUTTE, J.

133 Cal. 349

In re BEGEROW. (Cr. 781.)

(Supreme Court of California. July 11, 1901.)

HABEAS CORPUS—MISTRIAL—DELAY IN RETRIAL—DISCHARGE.

Under Const. art. 1, § 13, guarantying to every person charged with crime a speedy trial, and Pen. Code, § 1382, providing that the court, unless for good cause shown, must dismiss the prosecution when an accused, if the trial has not been postponed on his application, has not been brought to trial within 60 days after indictment, an accused showing a delay, not caused by him, of more than 60 days after a mistrial, without good reason, is entitled to discharge on habeas corpus.

McFarland and Garoutte, JJ., dissenting.

In bank. Habeas corpus by Frederick Begerow for discharge from custody. Granted.

Bertram A. Herrington and George W. Waldorf, for petitioner. James H. Campbell, Dist. Atty., and C. Cooledge, for respondent.

TEMPLE, J. This is an application for a discharge from custody on habeas corpus by the petitioner, who is held under two informations filed in the superior court of Santa Clara county upon two separate charges for murder. The informations were filed August 15, 1900. Since then defendant has been tried three times upon one charge and once upon the other, and each trial resulted in a mistrial because the jury failed to agree. The last jury was discharged March 6, 1901. Since that period neither case has been upon the calendar for trial. Eighty-four days had elapsed since the discharge of the last jury before this petition was filed. The delay was not caused by the defendant or with his consent. No witness for the prosecution has been absent or ill. There are three departments in the superior court of Santa Clara county. During said 84 days one department has been occupied 15 days only in the trial of criminal cases, and the other two have not been engaged in criminal trials at all. On the 20th of May, 1901, and after more than 60 days had elapsed since the discharge of the last jury, the petitioner applied to the superior court, upon notice, for a dismissal of the prosecutions against him, and upon the hearing showed by competent evidence all the facts above set forth. No showing to the contrary was made. No reason was shown at that time or at any time why the cases had not been brought to trial, but the motion was nevertheless denied. The return shows simply that the sheriff held the defendant by virtue of a commitment made by a justice of the peace, dated August 9, 1900. It is conceded that the facts are correctly stated in the petition.

Section 1382, Pen. Code, provides that the court, unless good cause is shown to the contrary, must order the prosecution to be dismissed in the following cases: (1) If an indictment or information has not been filed

against him within 30 days after he was committed to answer; (2) when, if the trial has not been postponed upon his application, he is not brought to trial within 60 days after filing the indictment or information. The constitution (article 1, section 13) guaranties to every person charged with crime a speedy public trial. In *People v. Morino*, 85 Cal. 515, 24 Pac. 892, this court said: "The legislature has provided what shall constitute a reasonable time within which a defendant shall be brought to trial." And then, after setting out section 1382, Pen. Code, it proceeds: "The court below in denying the defendant's motion said: 'The question you raise I have considered before, and, under my construction of the law, it is discretionary, and not mandatory, and I will presume the court was engaged in the trial of other causes.' We think this is not a proper construction of the law. A party charged with crime has the constitutional right to a speedy trial, and the court has no discretionary power to deny him a right so important, or to prolong his imprisonment without such trial beyond the time provided by law. The statute is imperative. The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed. Here no cause for delay was shown. It was enough for the defendant to show that the time fixed by the statute, after information filed, had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial, it was for the prosecution to show it. The court could not presume it. Under the facts as shown, the case should have been dismissed, and it was error to deny the motion." That case has never, so far as I know, been called in question, and it decides some important points: First. The statute is a construction of the constitutional provision, so far as to indicate what is a reasonable time within which the case should be brought to trial, in order that the constitutional guaranty may be kept. And it may be fairly interpreted to mean that this guaranty is violated whenever 60 days is allowed to elapse without a trial; there being no good reason for delay, and the defendant not consenting thereto. And, in the second place, it decides that it is sufficient for the defendant, in order to make out his case upon a motion for a dismissal in the trial court, to show that he has been detained without a trial for more than 60 days. Upon such showing the court should dismiss the case, unless good cause for detaining the defendant and for continuing the prosecution is shown on behalf of the people. There is no presumption in such case, at least in the trial court, that the court has acted regularly, or that good cause in fact exists.

It is well to remember that this case involves fundamental rights, and is of universal interest. Around it the English have

waged their great battle for liberty. Without the narration of the conflicts to which it has given rise, the history of the English people would be a dull affair. The right of the government with reference to persons accused of crime has been, and is yet, a matter of great consideration. It led to the agitation which wrung from power the great charter, the petition of right, and the habeas corpus act. All the great achievements in favor of individual liberty, of which the English people are so justly proud, may be said to have come through contests over the rights of persons imprisoned for supposed crime. And justly it is deemed a matter of the utmost importance. The government cannot take property from the meanest inhabitant without just compensation paid or tendered in advance, but it takes his liberty, which it has been justly said is to some extent to take his life, upon a mere charge of crime. This is necessary, that society may be protected. But necessity is the only excuse, and to imprison beyond what is absolutely necessary is tyrannous and oppressive. And this is precisely what the state has covenanted with each inhabitant that it will not do. In this one provision of the constitution the state speaks as did the English sovereign in the great charter in 1215. It is an assurance from the sovereign, "*Nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terræ.*" Hallam says, referring to this, "From the era, therefore, of King John's charter, it must have been a clear principle of our constitution that no man can be detained in prison without trial." 2 Hist. Mid. Ages, 342. The state, then, in a criminal case is not only a party litigant, and as such bound to use diligence to prepare for trial, on pain of having its case dismissed, but it holds the defendant in custody upon this express guaranty for a speedy trial, and that it will not continue to hold him save under a legal verdict declaring him guilty; that is, without trial. In the charter, what has been called a "general jail delivery" was required in each county once each year. The act of parliament provided that a session of the court of oyer and terminer should be held twice a year in each county. The court was to inquire into the cause of the confinement of every person confined, and it was expected to try or discharge, at least on bail, all who had not been tried. The habeas corpus act (31 Car. II.) also contained provisions intended to insure speedy trials. It seems that the means of enforcing this charter, or the rights there assured, was from the first enforced through the writ of habeas corpus, which has itself been called the safeguard and the palladium of our liberties. All agree that the use of this writ was frequent after the great charter, but it is not clear whether it was in existence before. It was the refusal of this writ, or delays in its use, which led to the petition of right and to the habeas cor-

pus act. It was soon found useful in many other respects, but it cannot be doubted that its most valued function was to enforce the rights secured by these memorable charters and laws, and, so far as I know, such use was never called in question in England. In this country it has sometimes been denied that a defendant held to answer upon a valid indictment or information can be so discharged. It was so held in this state in *Ex parte Strong*, 31 Pac. 574. It was there said that the allegations of the petition, if true, showed that it was the duty of the superior court to dismiss the prosecution, "but until the information is dismissed the imprisonment is lawful." In *Strong v. Grant*, 99 Cal. 100, 33 Pac. 733, it was said, in substance, that in passing upon a motion for a dismissal the court acted judicially, and could not be compelled by mandamus. In a concurring opinion the chief justice said relief could be had in such a case through the writ of habeas corpus, and this was finally so held by the court in *Ex parte Vinton*, 47 Pac. 1019.

So far, I presume, all will agree; and I have alluded to the sources from which the idea of the constitutional and statutory provisions were derived for the sake of the remaining question, the entire difficulty in regard to which, in my view, comes from certain inconsistent decisions of this court. The constitution only guaranties a speedy, public trial; the Code, in effect, that an accused person must be tried within 60 days after filing the indictment or information. If tried within that period, and a new trial is granted by the superior court, or obtained on appeal, it is contended the statute has no further application to the case. A trial has been had within the period prescribed, and the requirement of the statute has been fully satisfied. So far as the statute is concerned, he could be lawfully held for the balance of his life. And the same result could follow, although no trial was had within 60 days, if good cause were shown why it was not tried within that period, or a continuance was had beyond that time by consent of the defendant. If a material witness could not be procured within that time, or the defendant was too ill to be tried, he would thereby lose all possible benefit of the statute. For, if the letter of the statute is to control, it certainly does not require that the trial shall be had within 60 days where good cause is shown, or the defendant consents to delay. And, if it has no force after 60 days have expired, it could not apply to the cases supposed at all. And the same contention might be indulged in regard to the constitutional guaranty of a speedy trial. If the accused has been tried, although the trial resulted in a mistrial, it might be said with equal plausibility that he has had a speedy trial, and the guaranty of the government for his benefit has been kept. And is this all that is left to us of these great

achievements in the direction of securing individual liberty as against the government? It must be remembered that in construing our declaration of rights there is no presumption that the government or its officers will act justly, but the contrary. These sections imply possible oppression, and are designed to enable the victim to assert his rights, even as against the government. The very first section in that chapter of our constitution asserts that the right of all men to enjoy and defend life and liberty is inalienable. Then follow 12 sections, all calculated to secure to individuals this right, as against the government. To the same end, section 13 declares the right to a speedy, public trial. This certainly has no other function than to protect those accused of crime against possible delay, caused either by willful oppression, or the neglect of the state or its officers. For, no doubt, as said by Blackstone (3 Bl. Comm. 138), "persons apprehended upon suspicion have suffered long imprisonment merely because they were forgotten." The declaration of rights differs from the great English charter, in that it is not an assurance to the individual from a sovereign, but it is a command and a limitation of power upon state officials by the people who created the formal government. Either is a recognition of the fact that the state cannot rightfully hold in prison even an accused person longer than is necessary that he may be tried, before trial had and judgment rendered. The imprisonment after the lapse of 60 days is just as oppressive, and, if unnecessary, as much a violation of the rights of the accused person, as within the 60 days. There is no reason why the legislature should be desirous of protecting the rights of an accused person for 60 days, and be indifferent to his fate afterwards. To attribute such ideas to the legislature is to charge them with folly. There is very little meaning or benefit in the statute unless it is construed as it was in *People v. Morino*, 85 Cal. 515, 24 Pac. 892, and in *People v. Buckley*, 116 Cal. 146, 47 Pac. 1009. Regarded as a provision to enforce this constitutional guaranty, its effect must be held to be that an unexcused delay of 60 days at any time to try a defendant will entitle him to have the prosecution dismissed. Without this statute, it may be doubted whether the prosecution could be dismissed as a penalty for delay. In some states I find a disposition to minimize the rights of an accused person, and it is sometimes provided simply that, unless tried, he may be discharged from custody. The terms of the constitutional provisions on this subject vary in the different states. In two or three there is no constitutional declaration upon the subject, but all, I think, have statutory provisions providing for the rights of accused persons in this regard. I cannot find that this precise question, under a statute like ours, has been decided. The view here taken was

suggested in *Re Murphy*, 7 Wash. 257, 34 Pac. 834. See, also, *State v. Kuhn*, 154 Ind. 450, 57 N. E. 106, where *People v. Morino*, supra, was approved; also in *re McMicken*, 39 Kan. 406, 18 Pac. 473. This construction was assumed by this court in *Ex parte Ross*, 32 Cal. 109, 22 Pac. 1086. A mistrial within the period of 60 days was had in that case, and it was there assumed that another trial must be had within 60 days after the mistrial. That the defendant had been brought to trial, and a mistrial had, excused the delay until that time, and it was assumed that there must elapse 60 days during which there was no excuse for delay. And, indeed, a mistrial is not a trial, within the meaning of the constitutional or statutory provision. The fact that there has been an attempted trial may constitute the good cause which the prosecution is required to show to excuse delay; but the speedy trial which is guarantied is for the purpose of determining the guilt or innocence of the accused person, and the guaranty of the constitution and of the habeas corpus act of England are of no substantial advantage if they mean less than this. On this subject it is said (*Church, Hab. Corp.* § 254): "The fact that a former conviction on an indictment has been reversed, and a new trial ordered, leaves matters to stand as if there had never been any trial on the indictment. In the eye of the law, he has not been tried at all," etc. This is the reason why it is held that by a mistrial he has not been in jeopardy, and cannot avail himself of it as a defense. If he has been tried in the legal sense, he could do so.

It only remains to say that the statute does not authorize the state or its officers to hold an accused person in imprisonment unnecessarily, even for 60 days. As already stated, when the prosecution is begun the state becomes a party litigant, and as such must diligently prosecute its case. No unnecessary delay against the will of the defendant is to be allowed to it. The defendant is discharged from custody.

We concur: BEATTY, C. J.; VAN DYKE, J.; HENSHAW, J.

I dissent: McFARLAND, J.

GAROUTTE, J. (dissenting). In the foregoing opinion much is said about the great charter, the petition of right, and our own fundamental law, as forbidding the unlawful restraint of the liberty of the citizen, yet it must be borne in mind that every violation of a constitutional right of an imprisoned citizen does not form the basis of a petition for a writ of habeas corpus. If a citizen is to be discharged from custody upon writ of habeas corpus because of the denial of his constitutional right to a speedy trial, I see no reason why he should not likewise be discharged from custody if deprived of his constitutional right to a trial by a jury of 12

impartial men. A citizen is no more entitled to a speedy trial by the constitution than he is entitled to a public trial by the constitution, yet a denial of a public trial, of itself, would not justify an invocation by a defendant of a writ of habeas corpus. But these suggestions outline a much more serious question than is presented by the opinion in the case at bar, for upon a careful reading of it we find that the conclusion is built upon the statutory provision of the Penal Code (section 1382) which reads: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information." This statute, to my mind, is but a foundation of sand upon which to rest the conclusion declared by the court. I cannot agree to the construction given this statute. It is declared by the opinion that, when the statute says a defendant "must be brought to trial within sixty days," it means, in effect, that he must have a trial which results in a final judgment; that is, a trial which ends in a verdict of not guilty, or, if the result be a verdict of guilty, then the verdict must be one that stands the test of appeal, if an appeal be taken therefrom. In other words, it is declared that, if the trial result in a disagreement of the jury, or a verdict of guilty, which is afterwards set aside by the trial court, or the appellate court upon appeal, then in those cases the defendant has had no trial, or, more incomprehensible still, it is said he has not been "brought to trial." In reply to the question, what does this law mean when it says, "A defendant must be brought to trial within sixty days"? the answer seems naturally to follow, it means a defendant must be put upon his trial within that period of time. And that the legislature intended this to be the meaning of the law, I have no shadow of doubt. The word "trial" is defined by Webster to mean, "The formal examination of a matter in issue in a cause before a competent tribunal." The Penal Code, in a hundred different places, by titles, chapters, sections, and sentences, uses the word "trial," and in no single place does it, standing alone, have the signification suggested in the opinion of the court. The Penal Code contemplates a procedure where a defendant may be brought to trial, convicted, move for a new trial, his motion be denied, then appeal from the order denying his motion to this court, and the order reversed and the cause remanded for a new trial. Yet, after all this has been done, it surely cannot be said that the defendant in such a case has not been "brought to trial." Instances may be found in the reports of this state where a defendant has been tried and convicted upon a single charge of crime three times, and upon appeal a new trial ordered

upon each conviction. I cannot bring myself to believe that such defendant has not been "brought to trial."

I also dissent from the construction given the statute in another important particular. The statute says the defendant must be brought to trial within 60 days "after the finding of the indictment or filing of the information." The opinion declares the statute means, not what it says, but it means, in effect, that the defendant must be brought to trial the first time within 60 days after the finding of the indictment or filing of the information, and thereafter within 60 days from the first trial, if that trial result in a disagreement of the jury, and, if an appeal be taken to the appellate court, then within 60 days after the return of the remittitur. Now, this court is not authorized by judicial construction to so broaden the effect of this statute. The construction here given the statute blots out all meaning to the words "indictment or information." It seems to me the court has now made a statute by construction which it feels the legislature ought to have made. Again, a contrary construction to the one here declared was given this statute 18 years ago, in *People v. Giese*, 63 Cal. 345,—a construction which has been approved in the very late case of *People v. Lundin*, 120 Cal. 308, 52 Pac. 807, and probably in still later cases. It seems to me, under these circumstances, that, if the law is not broad enough as judicially construed, it is for the legislative body to broaden it.

Putting behind me all questions as to the construction of this statute, I am still satisfied, upon general principles of law, that the remedy by writ of habeas corpus cannot be invoked in this and similar cases. As before stated, the decision in this case, reduced and condensed, is that this defendant should be discharged from custody upon a writ of habeas corpus because he has not been brought to trial within 60 days from his last trial, no good cause for the delay appearing. In other words, by virtue of this statute it is declared that his imprisonment has become illegal, and he is entitled to be discharged in this proceeding. But how may this be done, when the statute says the trial court must dismiss the prosecution upon motion, when the 60-day period has expired without a trial, and there is no good cause for the delay? That statute vests the trial court alone with power to discharge the prisoner for the reasons stated. It gives this court no added power or authority. Whatever power and authority this court has in the matter is above and beyond that statute. In the case of the petitioner, he asked the trial court, by motion, to dismiss the prosecution in his case, and invoked this statute to support the motion. The trial court denied the motion. It had jurisdiction to make that order, and it was specially enjoined upon it by the statute itself to exercise that jurisdiction. That order was a valid, binding order,—as

much so as any decree or judgment made within the jurisdiction of a court of record. It forever settled the question upon which it was made, unless it was successfully assailed by appeal or other direct attack. Indeed, it was not attempted in this proceeding to review the legal soundness of the order made by the trial court; but this court has proceeded upon habeas corpus as if no such order was ever made, and has tried for itself the very question of fact that it was the duty of the trial court to try, and which it tried, and, having full and complete jurisdiction thereof, decided directly to the contrary from what this court has now decided. If the court can now do this, then any superior court in the state having jurisdiction can do the same thing, and thus a novel and interesting judicial spectacle is presented. Upon the hearing of the motion to dismiss the prosecution in the trial court, perchance the evidence was overwhelming, showing good cause for delay in bringing the defendant to trial; and upon the hearing in some other court, upon habeas corpus, the evidence may not be the same, for it is a wholly independent proceeding, and there the evidence may be strong to the effect that there is no good cause for delay, and the discharge of the defendant by that court follows. A case is then presented where a trial court, having perfect jurisdiction of the question at issue, makes an order or decree refusing to discharge the defendant, the order not even being erroneous to the weight of a hair, and then a second court, upon habeas corpus, hearing the identical issue and making a decree directly to the contrary. I am satisfied these results cannot be attained within sound legal principles.

6 Cal. Unrep. 725

TAYLOR et al. v. ELLENBERGER et al. (S. F. 2,476.)¹

(Supreme Court of California. July 16, 1901.)

MORTGAGES—FORECLOSURE—MODIFICATION OF JUDGMENT ON APPEAL—SALE BY COMMISSIONER—AMENDMENT OF FINDINGS—WRIT OF ASSISTANCE—SERVICE OF DEMAND.

1. Code Civ. Proc. § 957, provides that when a judgment is reversed or modified the appellate court may make restitution of all property lost by the erroneous judgment or order, so far as such restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment. The supreme court directed a superior court to modify a judgment of foreclosure for the sale of personal and realty by ordering a separate sale of each, which modified decree was entered after the real estate had been sold. *Held* that, the direction for the restitution of the property being discretionary, such sale would not be set aside, in the absence of any showing that the mortgagors had been injured by the sale, and that the proceeds were insufficient to pay the real-estate mortgage.

2. A contention that an order of sale directed to be executed by the sheriff was void where performed by a commissioner will not be considered on appeal, the question not having been raised in the lower court.

¹ Modified in banc. See 66 Pac. 4, 134 Cal. 31.

3. Under Code Civ. Proc. § 726, as amended in 1893, providing that a commissioner, when appointed to conduct a foreclosure sale, shall possess the powers and be subject to the duties of sheriffs in like cases, a sale conducted by a commissioner is not vitiated by the fact that the order of sale was directed to the sheriff; the direction to the sheriff being a harmless irregularity.

4. Where the supreme court ordered a judgment modified, a contention that the judgment, as modified, was erroneous, in that the trial court did not amend the findings, is without merit, since the supreme court cannot modify a judgment if it is necessary to amend the findings to support it; the findings not being in the control of such tribunal.

5. Where the commissioner's deed and demand for the premises had been presented to the general guardian of an incompetent, who was the owner of the premises, the demand was sufficient, without being made on the incompetent, and a writ of assistance will not be set aside for improper service.

Commissioners' decision. Department 2. Appeals from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by George G. Taylor and others against Arnold Ellenberger and others. From an order denying defendants' motion to set aside and vacate the sale of the mortgaged premises described in plaintiffs' complaint, from the modified judgment entered in accordance with the directions of the supreme court, and from the order granting plaintiffs' motion for a writ of assistance, the defendants prosecute three appeals. Judgment corrected and affirmed.

John B. Kerwin, for appellants. H. F. Dusing, for respondents.

CHIPMAN, C. There are three appeals in this case: First, from an order denying defendants' motion "to set aside and vacate the sale of the mortgaged premises described in plaintiffs' complaint" (this motion is made on the ground that on a former appeal of the case to this court [128 Cal. 411, 60 Pac. 1034] the judgment of foreclosure was modified by directing a different sale from that provided in the original judgment, namely, a separate sale of the real and personal property); second, from the modified judgment; and, third, from the order granting plaintiffs' motion for a writ of assistance. By stipulation the three appeals are included in, and to be heard upon, one transcript.

The original decree of foreclosure was entered February 27, 1899, and sale thereunder was ordered to be made by a commissioner named in the decree May 24, 1899, and he made the sale on July 1, 1899, in accordance with the order, and on July 3, 1900, he executed and delivered his deed to plaintiffs, as purchasers at the sale. It does not appear at what date the first appeal was taken, but it does appear that no stay bond was given, and hence there was nothing to prevent the sale from taking place. On the 28th day of April, 1900, the decision of this court was filed, directing certain modifications of the amount found to be due on the

mortgage debt, and also further modifying the decree by directing the trial court to "ad-judicate separately the amounts due on the real estate described in the first two mortgages and those due on the chattel mortgage, and directing the sale of said real estate and personal property separately, each for the amount due on it. * * * And, as so modified, the judgment should stand affirmed." The modified decree was entered June 20, 1900. The real estate, however, had already been sold, and was purchased by plaintiffs, as above stated, but the personal property was not sold. It is this sale which defendants seek to set aside by their first motion. Defendants have shown no injury resulting to them from the sale. The restitution which the court may make under section 957, Code Civ. Proc., when the judgment or order is reversed or modified, is not mandatory, but rests in the discretion of the court. *Yndart v. Den*, 125 Cal. 85, 57 Pac. 761. The only showing made by defendants in support of the motion was that this court had modified the original decree; but no facts are set forth in the affidavit, nor does anything elsewhere appear, from which it can be seen that any injury has come to defendants by the sale, or that they would be benefited by setting it aside. Some question is raised as to whether the lower court modified the original decree as directed, but, conceding that in some respects the modified judgment does not conform strictly to the directions given by this court, the fact cannot avail defendants on this motion, without it is made to appear that the judgment, when modified as is claimed by defendants it should be, would entitle them to have the sale set aside. No such showing is made. There is no pretense that the real property which was sold failed to bring its full value, or that there was any unfairness in the sale, or that on resale it would bring more than it sold for at the first sale. Nor does it appear that in selling the real property to pay the entire judgment, including the note secured by the chattel mortgage, the price paid was sufficient to pay the real-estate mortgages in full. Unless the proceeds of this sale were applied in part payment also of the chattel mortgage, we cannot see that defendants suffered injury, even though it was error, as was held here on the first appeal, to sell the real property in order to pay the judgment, which in fact included the chattel-mortgage debt. The facts show that the amount realized from the sale of the real estate was less than the amount due on the real-estate mortgages. Defendants have not brought themselves within the principles laid down in *Barnhart v. Edwards*, 128 Cal. 572, 61 Pac. 176, and cases there cited, and are not entitled to have the sale set aside. It is further claimed that the order of sale is directed to the sheriff, and as it was not executed by that officer, but by a commissioner, the sale is void and should be set

aside. This was not made a ground of defendants' motion to vacate the sale, and is presented here for the first time. But, aside from this fact, the decree directed the sale to be made by a commissioner who was named therein, and the decree was copied in the body of the order of sale and formed part of it, thus plainly showing that the order of the court was intended to be executed by the commissioner, as in fact it was; and his authority to act is found in section 726, Code Civ. Proc., as amended in 1893. The Code provides that the commissioner, when appointed, shall possess the powers and be subject to the duties of sheriffs in like cases. At most, the direction of the order of sale to the sheriff was a harmless irregularity. *McDermot v. Barton*, 106 Cal. 194, 39 Pac. 538.

2. Concerning the modified judgment, which is claimed to be excessive, we can discover no error, except that in the attorney's fee allowed on the chattel mortgage, which should not exceed 25 per cent. of the amount due at the date of the original judgment, which would be \$66.55, instead of \$75, as stated in the modified judgment. Defendants make the point that the modified judgment must be reversed because the trial court did not amend the findings, and therefore the modified decree is without support. This court did not direct any amendment of findings. Indeed, if any amendment had been necessary to the modifications, the judgment would have been reversed, and not modified. This court does not direct amendments of judgments where they would conflict with the findings. It can neither make findings nor amend findings.

3. Inasmuch as the sale cannot be set aside, plaintiffs had an undoubted right to a writ of assistance on proper proceedings. No question is raised as to the regularity of the steps taken, except that it is claimed that the commissioner's deed and demand were not served on Arnold Ellenberger, the incompetent, who was the owner of the real property described in the deed. It appeared in the affidavit served with the notice of the application for the writ that one E. Ellenberger was the guardian of the person and estate of Arnold Ellenberger, an incompetent person, and that the said guardian was in possession of the premises, and that George G. Taylor, one of the plaintiffs, presented to the said guardian, both as guardian and individually, the commissioner's deed, and demanded of him possession of the premises. E. Ellenberger appeared and answered in the action as general guardian throughout all the proceedings. It was early determined by this court that a general guardian may appear in an action for his ward without personal service first made on the latter. *Redmond v. Peterson*, 102 Cal. 595, 36 Pac. 923, 41 Am. Rep. 204, and cases cited. At the hearing of the motion for the writ, counsel "appeared specially for defend-

ants." The motion was heard on the showing made by plaintiffs, and the writ was ordered after argument of counsel on both sides. We think the writ was properly granted. The modified judgment should be corrected in the particular pointed out, and, when so corrected, should, with the orders, be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the trial court is directed to correct the modified judgment by allowing \$66.55 attorney's fee on the chattel-mortgage note, instead of \$75; and thus corrected it is affirmed, as are also the orders appealed from.

133 Cal. 367

PEOPLE v. SIMPTON. (Cr. 719.)

(Supreme Court of California. July 16, 1901.)

PERJURY—INDICTMENT—SUFFICIENCY.

In a prosecution under Pen. Code, § 118, providing that every person who, having taken an oath that he will testify truly before any competent tribunal, in any of the cases where an oath may by law be administered, willfully states as true any material matter which he knows to be false, is guilty of perjury, an indictment alleging that the defendant, before a certain notary public in and for a certain city and county, duly authorized to administer oaths, did then and there willfully, falsely, and feloniously swear, take oath, and make his affidavit and state matters material in said proceeding as true, which he knew to be false, and did then and there depose and swear in substance as follows, etc., does not charge the offense of perjury, in that it does not show that defendant was sworn to testify truly, or that any party administered an oath to him.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Carroll Cook, Judge.

G. W. Simpton was indicted for perjury. From an order sustaining his demurrer to the indictment, the people appeal. Affirmed.

They L. Ford, Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People. D. J. Murphy and J. H. Budd, for respondent.

COOPER, C. This appeal is by the people from an order sustaining defendant's demurrer to the indictment. The indictment attempted to charge the defendant with the crime of perjury in making a certain affidavit in the estate of James G. Fair, deceased, in a proceeding entitled "Petition of Nettie R. Fair for a Family Allowance." The main contention in support of the ruling of the lower court is that the indictment fails to show that an oath was taken by, or administered to, defendant. The indictment is quite lengthy, and it is necessary to state herein only the portion of it bearing upon the point under discussion, nor is it necessary to discuss other questions raised by counsel, for the reason that the demurrer was properly sustained upon the grounds

herein given. The part of the indictment material here is as follows: "And the jurors aforesaid, on their said oaths, do say that on or about the said 12th day of August, 1899, at the said city and county of San Francisco, state of California, the said G. W. Simpton, before one Harry J. Lask, a notary public in and for said city and county of San Francisco, state of California, residing therein, and duly commissioned and sworn, and then and there duly authorized by law to administer oaths, and authorized by law to administer an oath to the said G. W. Simpton, did then and there willfully, corruptly, knowingly, falsely, and feloniously swear, take oath, and make his affidavit and state matters material in said proceeding as true which he knew to be false, and did then and there depose and swear in substance as follows." The Penal Code provides: "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury." Section 118. It is evident, from the definition of "perjury" contained in said section, that it is of the very essence of the offense that the person alleged to have committed the crime must have been first duly sworn that he would "testify, depose, or certify truly" before a competent tribunal, officer, or person. There is no pretense of a statement that defendant was sworn to "testify truly" in said matter. He must have been first duly sworn to "testify or depose truly" before he could have been guilty of perjury in not testifying truly. The words "swear, take oath, and make his affidavit" are not equivalent to an averment that he was "duly sworn to testify truly." It is not even alleged that any party administered an oath to defendant. If he "took oath" by having it administered by some other notary public or magistrate in the presence of Lask, or if he took it by solemn vow made to himself, it might be true that he took oath before Lask. It is essential that an indictment shall state every fact and circumstance necessary to constitute the offense charged in direct and positive language. If not in the words of the statute, it must be by plain and direct words which are equivalent. It must clearly appear upon the face of the indictment that a crime has been committed. No imagination or presumption can be called in to aid a defective indictment. If the facts stated may be true, and yet may or may not constitute a crime, the presumption is that no crime has been charged. *People v. Terrell*, 127 Cal. 100, 59 Pac. 836.

Applying the test to this indictment, it will be readily seen that it does not charge an offense. Some other than Lask might have administered the oath, and yet the in-

dictment be true. Defendant might have taken an oath to the effect that he would not testify truly, and the indictment be true because it is not even intimated that he took an oath to testify truly. At common law it was necessary for the indictment to allege that the defendant "was sworn and took his corporal oath before [naming the officer], on the Holy Gospel of God, to speak the truth, the whole truth, and nothing by the truth, of and concerning the matter then depending." 2 Whart. Prec. Indict. pp. 6, 7. St. 1 & 2 Vict. c. 105, changed the rule by providing that the oath might be administered "in form and with such ceremonies as such person may declare to be binding"; but this statute did not dispense with the necessity of administering an oath to the party. Our Code has recognized the modern tendency to regard the conscientious scruples of all persons by providing that "the term oath as used in the last section includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated." Pen. Code, § 119. But, although the term "oath" is defined, there is no provision dispensing with the necessity of being sworn to testify, declare, depose, or certify truly before a competent tribunal, board, or person; and all indictments or informations for perjury in this state, in the cases to which our attention has been called, state that the defendant was duly sworn before some competent tribunal, officer, or person to testify, declare, depose, or certify truly. *People v. Ah Bean*, 77 Cal. 12, 18 Pac. 815; *Same v. De Carlo*, 124 Cal. 463, 57 Pac. 383; *Same v. Rodley* (Cal.) 63 Pac. 351. In *People v. Dunlap*, 113 Cal. 74, 45 Pac. 183, the indictment charged that the county assessor had authority to administer oaths, and that defendant "did then and there willfully, corruptly, falsely, and feloniously testify, declare, depose, swear, and certify, * * * in a case in which said oath was by law properly administered, * * * after having taken an oath that she would testify truly, she willfully, falsely, and contrary to such oath, corruptly and feloniously swore and testified to said false and material facts as aforesaid." It was held that the indictment did not state facts sufficient to constitute a public offense, and that it was not in fact stated that the assessor or any other person did in fact administer an oath to her. In the opinion it is said: "In an indictment for perjury it must appear that the defendant was sworn, and that the person who administered the oath to him had authority therefor." In *U. S. v. McCaughy* (D. C.) 33 Fed. 168, the indictment alleged that defendant did "depose and swear," and that "said oath, taken as aforesaid, was then and there duly administered." The court sustained a demurrer to the indictment, and in the opinion said: "In an indictment for perjury it must be directly stated in some form of apt words that the defendant was

sworn. It is not sufficient that it appears by inference or argument. * * * One may swear who is not duly sworn. In one case the oath, so to speak, is self-imposed, and the swearer incurs no legal liability thereby, while in the other the oath is administered by a person having authority so to do, and the affiant takes it subject to the pains and penalties for perjury." In the case of *State v. Divoll*, 44 N. H. 142, the authorities and precedents are fully examined and stated, and it is said: "That the party was sworn must be alleged distinctly and positively. It is not enough to state it argumentatively, or to make such a statement as by inference implies that a party was sworn, however strong this implication may be." It follows that the order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; J. W. Hughes, Judge.

Action by Ralph Granger against J. A. Sheriff and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Luce & Sloane, for appellants. Frederick W. Stearns, for respondent.

GRAY, C. This is an action to foreclose a mortgage given to secure the payment of a note for the principal sum of \$48,500, besides interest and attorney's fees. The plaintiff had judgment, and defendants appeal therefrom, and urge three grounds of reversal, which we will notice in their order:

1. The sufficiency of the summons is challenged, and a motion was made to quash the same on the ground that it did not conform to the requirements of section 407, Code Civ. Proc., in that it did not contain a notice that, unless the defendants appear and answer, "the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint." The notice contained in the summons is as follows: "And you are hereby notified that, unless you appear and answer as above required, the said plaintiff will apply to the court for the relief demanded in the complaint." Under said section 407, Code Civ. Proc., before its amendment in 1897, there can be no question that a notice in a summons in the above form, in a foreclosure suit, would have been proper and sufficient. We do not think that the amendment to the section had the effect to make a summons in such a suit insufficient merely because the notice in it is not worded in the alternative. This has already been held, in effect, in the recent and well-considered case of Stanquist v. Hebbard, 122 Cal. 268, 54 Pac. 841, wherein it is said: "In deciding that a summons which follows the language of section 407 is not void, we do not intimate that a summons based on a complaint on contract for money or damages, or a summons based upon a complaint asking for equitable relief, would be void if not worded in the alternative. In one case a notice that, unless the defendant appears and answers, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, and in the other case a notice that, unless the defendant so appears and answers, the plaintiff will apply to the court for the relief demanded in the complaint, would substantially comply with the statute." It is objected by appellant that this is mere dictum, and so, indeed, it seems to be; but it may be observed that it is the dictum of the court in banc, and is supported by the reasoning of the opinion, wherein it is clearly pointed out that, under the statute as amended, the summons leaves the defendant in the dark as to the nature of the cause of

133 Cal. 416

GRANGER v. SHERIFF et al. (L. A. 797.)
(Supreme Court of California. July 24, 1901.)

SUFFICIENCY OF SUMMONS—INSANITY OF DEFENDANT—APPOINTMENT OF GUARDIAN AD LITEM—SETTING CASE FOR TRIAL.

1. A summons notifying the defendants that, unless they appeared and answered, the plaintiff "will apply to the court for the relief demanded in the complaint," is not void, as not being in the alternative, in compliance with Code Civ. Proc. § 407, providing that the summons shall notify the defendant that the plaintiff will take judgment for any money or damages demanded in the complaint, or will apply to the court for any other relief demanded.

2. Where a defendant, after appearance by attorneys and answering, was adjudged insane pending the trial, the appointment of a guardian ad litem on the hearing was not rendered void by the fact that no notice had been given her or her attorneys of record of the motion for the appointment.

3. Where a guardian ad litem appointed on the day set for the trial, appearing specially, objected to proceeding with the trial, for lack of time to prepare, and the case was adjourned three days by order of the court, without objection, such appearance will be deemed a waiver of the five-day notice of the setting of the case for trial required by Code Civ. Proc. § 594, as amended in 1899.

action, as well as to the relief sought; and the copy of the complaint which is required in all cases as part of the service of process must be looked to for much of the information required by defendant. It seems, then, that the summons, aside from the copy of the complaint, being in the alternative, affords the defendant little or no notice or information, where it follows the statute strictly, as to what will be done in case of a default. The defendant, however, cannot be heard to complain because the summons goes further than the requirement of the statute, and does in fact furnish some definite information as to what the plaintiff will do in case of a failure on the part of defendant to appear and answer. The copy of the complaint is still left him, and he may refer to that, and treat the notice in the summons as supererogatory, if he so desires. We therefore think the "dictum" referred to contains a correct statement of a rule applicable to the case at bar.

2. Pending the litigation, and after she had appeared and answered, but before the trial, and on the 11th day of November, 1898, Eliza Sheriff, one of the defendants, was adjudged to be insane, and ordered committed to the insane asylum. Thereafter the case was set for trial for April 13, 1899; and on that day, on calling the case, the court adjourned the trial to the following day at 10 o'clock a. m., at which time counsel for plaintiff, without previous notice thereof having been given, moved the court for the appointment of a guardian ad litem for said insane defendant. Thereupon Luce and Sloane, attorneys of record for said defendant, appearing specially for that purpose, objected to the hearing of the motion and to the appointment of a guardian on the ground that no notice had been "served on said Eliza Sheriff, or upon her attorneys of record in this case." The objection was overruled, and W. A. Sloane, of the said firm of Luce & Sloane, was appointed, and accepted the position of guardian ad litem, subject to the objections and exceptions taken to the power of the court to make such appointment. There is no requirement of notice prior to the appointment of a guardian ad litem to be found in the statutes, so far as we have been able to ascertain, and it has been intimated in at least one case that no such notice is necessary. In *Crawford v. Neal*, 56 Cal. 321, it is said that "applications for such an appointment are made ex parte," and section 373, Code Civ. Proc., is cited as confirming this statement. That section shows how a guardian "must be appointed," and, as it does not provide for any notice, we think that no notice is required, and that the appointment was properly made on the application of the plaintiff, and without notice. See, also, section 372, Code Civ. Proc., and

Emeric v. Alvarado, 64 Cal. 529, at page 594, 2 Pac. 418.

3. On said 14th day of April, and after his appointment as guardian ad litem and his acceptance thereof, W. A. Sloane, as guardian ad litem for said defendant Eliza Sheriff, appearing specially for that purpose, objected to proceeding with the trial on the ground that said defendant was adjudged insane, and was committed to and was still in the insane asylum, "and that said guardian ad litem has not had sufficient time to prepare for the trial, or to investigate and determine his rights and duties as such guardian ad litem," whereupon, by order of the court, further hearing of said action was adjourned to Monday, April 17, 1899, at 10 o'clock a. m. On the last-mentioned day and hour the said guardian again "objects to the trial of this action at this time," and moves the court that the order setting said cause for trial be vacated and set aside on the ground that said action has been set down for trial without five days' notice or any notice thereof to said defendant Eliza Sheriff, or to her guardian ad litem. To this motion the court made reply: "If you want time for preparation for trial, I will give it to you. If you do not, we will proceed with the trial." To which said guardian replied: "This is all the appearance I care to make,—the one I make by motion here,—and I ask that the statutory time of notice be given." The motion was denied, to which the guardian excepted. An affidavit was filed, showing that no notice had been given. We think the appearance of the guardian as such on April 14th, the day to which the trial had been postponed, and his objection to then going into the trial on the grounds then stated by him, constituted a waiver on his part, and on behalf of his ward, of the five-days notice of the setting of the case required by section 594, Code Civ. Proc., as amended in 1899. The objection that he then made was in effect a request or motion to the court to continue the trial of the case, and that the court so understood it is evidenced by the fact that it at once made an order continuing it for three days. To the time fixed in this order no objection was made, and no suggestion of a desire to have the order setting the case for trial vacated came from the guardian at the date of this request. The case, then, is not different from what it would be if it had been set for trial for the 17th of April on the guardian's own motion. It was within the power of the guardian to waive the notice, and we hold that he did waive it. The judgment should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

133 Cal. 424

PARKS v. MOCKENHAUPT. (L. A. 857.)

(Supreme Court of California. July 24, 1901.)

EXECUTORS—PLEDGES OF PERSONALTY—LOAN AS INDIVIDUAL.

Where an administrator borrowed money in his individual capacity, pledging certificates of stock belonging to the estate, he could maintain replevin therefor in his official capacity, though the money was used in part to pay debts against the estate.

Appeal from superior court, Los Angeles county; John L. Campbell, Judge.

Replevin by A. Samuel Parks, executor, against Louis Mockenhaupt. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Dockweiler & Carter, for appellant. A. J. Sherer and G. P. Adams, for respondent.

GAROUTTE, J. This action was brought in the nature of replevin to recover certain personal property consisting of a certificate representing 10 shares of water stock. The facts material to the consideration of the case are these: This property came into the possession of Parks as executor of the last will and testament of the aforesaid deceased. Pending administration he borrowed \$2,000 of defendant, giving as security therefor certain mortgages upon his interest in several parcels of real estate devised to him by the aforesaid last will and testament. As additional security, he delivered over to the possession of defendant the aforesaid certificate of stock. Plaintiff borrowed this money, as he represented to the defendant, for the purpose of paying debts resting against the estate of deceased, and in fact did apply \$700 of it to that purpose. Subsequently, after demand made, he brought the present action to recover from defendant the possession of this certificate of stock. Judgment went against defendant, and the appeal is from that judgment, and also from the order denying his motion for a new trial.

From the standpoint of plaintiff as an individual, this transaction upon its face bears the marks of being unconscionable. But the action is purely one of law. No equities are relied upon in the pleadings, and the appeal is without legal merit. Parks individually had no authority to pledge this certificate of stock to defendant. It was the property of the estate, and he could no more pledge it to defendant than he could have sold it to him. Neither is there any pretense that he borrowed the money in his official capacity, even if the statute allowed him so to do. It is claimed that the money was borrowed in part to pay the debts resting against the estate of deceased, and that, \$700 of the amount being applied to that purpose, such amount should be declared a lien upon the stock, and redelivery only be had after the extinguishment of that lien. As before suggested, there is no affirmative defense in the nature of an equitable estoppel or otherwise set out in the answer,

and the solution of the question presented by the record is wholly dependent upon the fact as to where the title to this property rests, for here the right of possession follows the title. Even conceding the pleadings in this proceeding justified evidence upon the issue as to this right of lien, still the court is unable to see how a lien could be declared within the law. This certificate of stock being property of the estate, it must remain in the estate as assets thereof, subject to the claims of creditors and fees and expenses of administration. The allegations of the complaint are amply sufficient to support the judgment. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

6 Cal. Unrep. 730

RAMUS et al. v. HUMPHREYS. (Sac. 779.)
(Supreme Court of California. July 24, 1901.)

MINING CLAIM—QUIETING TITLE—DEFENSES.

Where the plaintiffs in a suit to quiet title to mining claim had been in actual possession for a number of years, a defense that a claim prior to plaintiffs' had never been abandoned cannot be urged, the defendant not claiming title under such prior claimant; Civ. Code, § 1600, providing that occupancy for any period confers title except as to those claiming by prescription, transfer, will, or succession.

Commissioners' decision. Department 1.
Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Suit by Lawrence Ramus and others against Charles E. Humphreys to quiet title. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Warren & Taylor, for appellant. J. F. Farraher, J. F. Lodge, and J. D. Fairchild, for respondents.

SMITH, C. The plaintiffs sued to quiet title to the mining claim described in the complaint. From the special verdict, adopted by the court, it appears that the land in controversy, at the date of the act of congress granting to the state the sixteenth and thirty-sixth sections, and at the date of the approval of the United States survey, was mineral land, and known to be such; that the plaintiffs or predecessors made a valid location of it May 7, 1893, and have ever since been, and now are, in possession of the land; and that the defendant afterwards—April 19, 1894—made an attempted location of a portion of the land, but the same was invalid. It is further found that one Hicks made a valid location of part of the claim January 3, 1893,—which was prior to plaintiffs' location,—but that before the latter event he abandoned the claim. The defendant, it appears, afterwards obtained a patent from the state purporting to grant certain government subdivisions, which included the land, but it is, in effect, admitted that the patent conveyed

no title. *Hermocilla v. Hubbell*, 89 Cal. 5, 26 Pac. 611. The sole point made in the case is that the finding as to the abandonment of the mining claim by Hicks is not justified by the evidence. This, however, is a point that cannot be successfully urged by the defendant, who does not claim under Hicks. The plaintiffs were in the actual possession of the land when the suit was commenced, and had been for many years; and this, as against the defendant, who had no title, was sufficient to maintain the action. Civ. Code, § 1006. I advise that the judgment and order denying the defendant's motion for new trial be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

PER OURIAM. For the reasons given in the foregoing opinion the judgment and order denying the defendant's motion for new trial are affirmed.

(133 Cal. 412)

KLEINSORGE v. KLEINSORGE et ux.
(Sac. 812.)¹

(Supreme Court of California. July 24, 1901.)

MORTGAGE—EXTENSION OF NOTE—DEFAULT IN INTEREST—FORECLOSURE—TIME.

1. Where a mortgage is executed by both husband and wife, it will prevail over a homestead claim thereafter executed by the wife, and recorded prior to the recording of the mortgage, since Civ. Code, § 1241, subd. 4, providing that the homestead is exempted from forced sale except under mortgages on the premises recorded before the declaration of homestead was filed for record, has no application to such a mortgage.

2. A mortgage note for one year provided for payment of interest monthly, that on default of any payment the payee might declare the whole due and foreclose, and that, if the principal was not paid when due, the note should continue another year, at the option of the payee. Before the second year was ended, but while there was default in the interest for several months, the payee commenced action to foreclose. *Held*, that the action was not prematurely brought.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Action by Mary D. Kleinsorge against Albert F. Kleinsorge and his wife, Mamie S. Kleinsorge. From a judgment for plaintiff, Mamie S. Kleinsorge appeals. Affirmed.

W. A. Gett, for appellant. W. E. Kleinsorge and L. T. Hatfield, for respondent.

CHIPMAN, C. Action to foreclose a mortgage. Defendant Albert F. Kleinsorge made default. Plaintiff had judgment against both defendants, from which, and from the order denying her motion for a new trial, defendant Mamie L. Kleinsorge appeals. The note and mortgage were executed by both defendants, who are husband and wife. The note was dated August 1, 1896, and was drawn payable one year after date, with interest payable monthly. The note contained

the provision that, if the interest was not paid as stipulated in the note, "the whole note may, at the option of the holder, without notice to the makers thereof, be treated as due and collectible." It also contained the following provision: "If this note is not paid at maturity, it is hereby renewed from year to year, at the option of the holder, until paid, and during such year the maker shall not have the right to pay the same." The mortgage was not recorded until August 30, 1897, and meantime, to wit, August 28, 1897, defendant Mamie L. Kleinsorge executed and caused to be recorded a homestead on the mortgaged premises. Two questions are presented: (1) Should the mortgage prevail over the homestead claim? (2) Was the action prematurely brought?

1. The first question is answered in the affirmative by the decision in *Duncan v. Curry*, 124 Cal. 106, 56 Pac. 898, citing to like effect *Downing v. Le Du*, 82 Cal. 471, 23 Pac. 202. Appellant concedes that *Duncan v. Curry* is adverse to her contention, but she asks that the question be re-examined in the light of other cases which she seems to think are out of harmony with *Duncan v. Curry*, and also because that case, in her opinion, was not rightly decided. Attention is drawn to *Campan v. Molle*, 124 Cal. 415, 57 Pac. 208. In that case plaintiff had loaned defendants the money with which to complete the purchase of certain land, taking their note for the amount; and it was alleged that defendants promised to secure plaintiff by a mortgage upon the land when they should obtain title thereto, and that after so obtaining the title they refused to execute the mortgage. Plaintiff then brought his action on the note and obtained judgment, prior to which, however, a homestead was filed on the premises. The action was to set aside the homestead and subject the land to the payment of the judgment. It was urged on the appeal that plaintiff was entitled to be subrogated to the rights of the vendor of the land. But the opinion shows that the plaintiff failed to state a case for a vendor's lien, and states that the transaction "was merely a loan of money upon their agreement to give him security." What was said as to subdivision 4, § 1241, Civ. Code, had reference to its application on the assumption that the agreement constituted an equitable mortgage. The decision, however, turned on the fact that plaintiff had elected to look to the personal obligation of defendants, instead of the security promised by them, and it was said that, "if the plaintiff held an equitable mortgage upon the premises [which it is not determined in the case that he had], his failure to enforce it in that action [the action on the note] had the effect to deprive him of such security." Nothing in the case is inconsistent with what was held in *Duncan v. Curry*. *Bank v. Oberhaus*, 125 Cal. 320, 57 Pac. 1070, was decided mainly on the sufficiency of the acknowledgments of the mortgages. These

¹ Rehearing denied August 14, 1901.

mortgages were acknowledged and recorded, one in 1892, and the other in 1893, and foreclosure was begun and *lis pendens* filed October 19, 1895. The mortgagors lived on the premises prior to the mortgages, but they filed no homestead declaration until November 4, 1895. Under this state of facts, subdivision 4, § 1241, was referred to. The question in *Duncan v. Curry* was not involved. *Glas v. Glas*, 114 Cal. 566, 46 Pac. 667, was the case of a homestead filed by one of the spouses after the recording of the mortgage, and comes clearly within subdivision 4 of the above section. *Trust Co. v. Kauffman*, 108 Cal. 214, 41 Pac. 467, was the case of a homestead filed by the husband, whose wife was living, and comes within the category of cases cited in *Duncan v. Curry*. We have been unable to discover in any of the cases cited by appellant any intimation that the conclusion reached in *Duncan v. Curry* was ill advised or contrary to a fair construction of section 1241. With the grounds of abstract justice so strongly urged,—i. e. with the wisdom of the law as construed by this court,—we cannot concern ourselves. The only question is, was the section rightly interpreted in *Duncan v. Curry*? We cannot now see any fault either in the reasoning or in the conclusion. Re-examination of the transcript in *Downing v. Le Du*, *supra*, shows that the homestead was declared and filed before the mortgage was given, which, of course, destroys the force of the case as supporting *Duncan v. Curry*. The latter case, however, rests, not on *Downing v. Le Du*, but upon its own facts, clearly presented and carefully considered.

2. Was the action prematurely brought? It is conceded by appellant that it was competent for the parties to provide for a renewal of the note by its own terms, citing *Bank v. Bandman*, 120 Cal. 220, 52 Pac. 583; but it is contended that, if the makers of the note had not the right to pay it within any year for which it was extended, reciprocally they had the right to demand that it be not enforced within that year, or, in other words, that it could not be deemed payable during that year. The note was dated August 1, 1896, payable one year after date. It was by its terms renewed for 1897, 1898, and from August 1, 1899. Interest was payable monthly, and was paid to and including January 1, 1899, but no later; and the note provided that in default of payment of interest "the whole note may, at the option of the holder, without notice to the makers thereof, be treated as due and collectible." A fair construction of the note is that, if renewed, it shall, as to the makers, run for the full year,—i. e. that they shall not have the right to pay it sooner unless consented to by the holder; but the renewal also renewed the promise to pay interest monthly, and also renewed the option to the holder to treat the whole note as due if interest was not so paid. But for this provision of the note the renew-

al for a year would support appellant's contention. With that provision, the renewed note stood on the same footing as in the first or any subsequent year, and the option to treat it as due and payable on default in payment of interest was available to the holder. The judgment and order should be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

133 Cal. 387

In re SCHANDONEY'S ESTATE. (L. A. 1,035.)

(Supreme Court of California. July 23, 1901.)

GUARDIAN AND WARD—INVESTMENT OF FUNDS—ORDER OF COURT—PROTECTION OF GUARDIAN—FINDINGS.

1. Under Code Civ. Proc. § 1792, authorizing the court on application to direct the guardian to invest his ward's money, an order of court directing a guardian to loan funds of his ward on terms and security therein stated will absolve the guardian from all liability on account of the loan being made on insufficient security.

2. Where a guardian, after investigation, defers the foreclosure of a mortgage of his ward, believing the chance of collecting the amount due equally as good as to foreclose and take a deficiency judgment wholly uncollectible, his omission to act by immediate foreclosure is not such negligence as warrants charging him with the mortgage debt and interest.

3. In a proceeding for the settlement of a guardian's account it is not necessary that findings be made.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Proceeding in the matter of the estate of Mary Schandoney, a minor. From an order settling the final account of William T. Kendrick as guardian, and denying his motion for a new trial, he appeals. Modified.

W. S. Knott and Wm. T. Kendrick, for appellant. Oliver Miles and Charles A. McKelvey, for respondent.

HAYNES, C. The controversy relates to a single item of \$1,200 and accrued interest. On April 4, 1895, appellant had in his hands said sum of money, and on that day, upon his petition, an order was made by the superior court directing the guardian to lend said sum to one W. P. McIntosh for the term of three years, to be secured by a mortgage upon 40 acres of land described in the petition, said sum to bear interest at the rate of 10 per cent. per annum, payable quarterly. The loan was made, and the mortgage executed and recorded. The note and mortgage provided that, if the interest should not be paid quarterly, the whole sum of principal and interest should immediately become due at the option of the holder of the note. This

loan was credited to the guardian in his first annual account, filed December 14, 1895, and was allowed. The ward became of age May 15, 1900, and in the report accompanying his final account, filed shortly thereafter, the guardian referred to the note and mortgage, saying that: "The note is due, and should be collected. The payor of the note has made the guardian believe, by fair promises from time to time, that he would pay the note, and this has caused the guardian not to foreclose." Exceptions were filed to said account, in which more detailed information was sought as to said note and mortgage, the value of the mortgaged property, the solvency of the debtor, etc., and an additional report was filed, which was also excepted to, and a trial was thereupon had. No findings were made except those incorporated in the order settling the account, to the effect that the account was true except as to said item of \$1,200 claimed in the first annual account of the guardian filed December 14, 1895, for said sum loaned to McIntosh; that the value of the land described in the mortgage on which the money was loaned was at the date of the loan \$1,200, and no more, and at the present time is not worth more than \$400; and that the ward had offered to transfer to the guardian all her interest in said note and mortgage. The court thereupon charged the guardian with the money loaned, \$1,200, and interest thereon, \$532, but made the payment conditional upon the transfer of the note and mortgage by the ward to the guardian, and, in case she refused to do so, that the guardian should be discharged upon payment of 74 cents, a balance resulting from other items.

1. It is contended by the ward that the order made April 4, 1895, directing the loan to be made, is void, and that, therefore, the guardian is responsible for having improvidently made the loan upon insufficient security. This contention is based upon the assertion that it does not appear that notice was given of the hearing of the petition upon which the order was based. The order recites, however, that, the petition "coming on regularly for hearing before the court, and it appearing to the court by the evidence submitted upon said hearing that it is for the best interests of the estate of said minor that said loan should be made, * * * and the security for the said loan specified is ample, it is ordered," etc. The argument is that the petition and order were filed the same day, and therefore no notice could have been given. Section 1792, Code Civ. Proc., provides: "The court, on the application of the guardian, or any person interested in the estate of the ward, after such notice to persons interested therein as the court shall direct, may authorize," etc. There was no legal obligation or duty resting upon the guardian to give notice to any one unless directed to do so by the court. The statute does not name, or in any manner designate

or describe, the "persons interested," or prescribe a notice to be given in a particular manner, and the presumption is that the court discharged its official duty, and acted within the lawful exercise of its jurisdiction. Code Civ. Proc. § 1963, subds. 15, 16. "Nothing shall be intended to be out of the jurisdiction of a superior court but that which expressly appears to be so. Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, acted correctly, and with due authority; and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared." *Freem. Judgm.* § 124, and cases there cited. See, also, *In re Eikerenkotter's Estate*, 126 Cal. 54, 58 Pac. 370. *In Re Guardianship of Cardwell*, 55 Cal. 141, it is said, referring to said section 1792, Code Civ. Proc.: "An order for investment or other management, thus obtained, would protect the guardian, even if misfortune were to follow; but, where he acts upon his own judgment, he is held to a more strict accountability." *In Re Carver's Estate*, 118 Cal. 73, 50 Pac. 22, it is said: "By securing consent of the court, he could have invested the ward's estate without risk to himself. This he failed to do, but assumed to act upon his own responsibility. Under such circumstances he is held to strict accountability,"—citing *In re Guardianship of Cardwell*, *supra*. So far, therefore, as the making of the loan is concerned, the order of the court directing it is a full and complete exoneration of appellant. There could be no purpose in securing such order, nor any reason for the enactment of the statute authorizing it, if it did not afford protection.

2. The ward, in her exceptions to her guardian's report, alleges that it was his duty, upon the nonpayment of the first quarter's interest upon said note, to proceed at once to foreclose said mortgage, and out of the other property of McIntosh to collect such deficiency as might have remained unpaid; that, while she makes no charge of any dishonest or other improper motives on the part of said guardian, she alleges that he imprudently, and without the exercise of ordinary or proper care or vigilance allowed himself to be imposed upon by the empty promises of the debtor; that the debtor is insolvent, and has left the state; that a foreclosure would not realize more than the costs and expenses of foreclosure, the payment of taxes and attorney's fees, and that the said water stock is of no value. The testimony of the guardian as to his efforts to collect the debt is quite full, and to the effect that he called upon the debtor frequently for the payment of the interest; that he was met with repeated promises, based upon "prospects," which failed one after another; that he appeared to have considerable property, which, upon investigation, he found to be in-

cumbered; that about six or eight months after the note was executed he met Mr. Sibley, a real-estate agent, whom he knew to be reliable, and he gave "rather a gloomy prospect for selling any property then at that time"; that he knew the mortgaged property; that he thought if it was just then put up under the hammer it would not pay the debt; that things were looking bad, but thought they would soon improve, and that eventually it would be all right; and from that and other information his judgment was that, if he foreclosed, they would have to take the property, and a deficiency judgment could not be collected; that about the time the note matured he took Mr. Sibley to see the land, when he came to the same conclusion, but he thought that, "if we kept along until the rains should come, I could probably make the money out of it"; that he obtained information from Mr. Scott and others that satisfied him that he could not collect a deficiency judgment; that he would be no better off if he foreclosed, and concluded it was just as well to wait and permit him to raise the money out of his other resources to pay it; that McIntosh explained to him that he was developing water above this property; that there was a shortage of water, and, if he should be successful, he would not only get money out of it, but it would make the mortgaged property more valuable. It was stated by counsel for the ward that the pleadings and his objections "all go to show that Mr. McIntosh had deceived Mr. Kendrick by his confident talk, and he relied upon his talk, and he oughtn't to have done it. We have no question that Mr. McIntosh made these representations. I have no question about the perfect integrity of Mr. Kendrick, the guardian, in this matter. It is not that point at all. I have no doubt he was imposed upon by the talk of Mr. McIntosh. We think he ought not to have done it, and our client ought not to suffer from his misinformation." Mr. Scott, called by the guardian, testified that he had known Mr. McIntosh about 12 years, and had known his financial ability since July 1, 1895; that he was familiar with his business affairs and property, having been his attorney, and had discussed with him his business affairs very frequently; that since July 1, 1895, he has been practically insolvent; that during all that time he had a considerable amount of property in his name, but that it was all, he thought, without any exception, incumbered, and it was taken piece by piece under foreclosure; that, if this mortgage had been foreclosed in the summer of 1895, the holder of the mortgage would not have reached by execution more than the property that is included in the mortgage. Mr. Scott also testified quite fully in regard to the water stock to the effect that at one time there were 125 inches flowing, which would give an inch of water to about 35 acres of land, and the water was worth \$800 per inch, making the stock about \$20 per share, but the flow from

the tunnel had diminished until there is practically no flow; that other works have interfered with the flow, but he supposed that, if we should have good seasons, some water would come back; that the company had its pipe system, and its works, and, he believed, was free from debt; that its works cost a great deal of money, but the stock now had no market value, and he supposed the value of the land depreciated by reason of the failure of the water; that he believed the people who had established orchards would buy the stock, and pay something for it. The evidence does not show when the guardian procured the stock, nor at what date Mr. Scott placed the value of \$800 upon it. There is no conflict in the evidence except as to the value of the land and of the water stock, and none as to the fact that the guardian used every reasonable effort to collect the debt, except that he did not foreclose the mortgage. The order of the court directing the loan to be made on the terms and security therein stated, as we have seen, absolves the guardian from all liability on account of the loan having been made on insufficient security, and therefore the only question remaining is whether he should be held liable, at the option of the ward, or at all, for the amount fixed by the court, or for any sum on account of his failure to foreclose the mortgage. Upon this question the testimony of Mr. Scott would seem to be conclusive of the proposition that from the time the first installment of interest became due Mr. McIntosh was insolvent; that, while he had considerable property, it was all heavily incumbered, so that there was no property that could be reached by execution, other than that covered by the mortgage. The guardian consulted Mr. Sibley, who advised him that the land would not then pay the debt, but thought it would "eventually be all right." Whether to foreclose the mortgage under those circumstances, with a certainty of a deficiency judgment wholly uncollectible, and the further certainty of the expense of the foreclosure and sale, and the probability of being compelled to take the property for his ward, and depend upon the future for an increase of value, or to defer foreclosure with an equal chance of improvement in value, and the possibility of the debtor succeeding in his scheme for the development of water, or in some manner paying or reducing the debt, were the questions presented for his determination. His judgment was against foreclosure. Who, at that time, could say that his judgment was wrong, or that he should have foreclosed? His integrity and good faith are not questioned. If he erred, it was an error of judgment. We do not think the evidence justifies a conclusion of negligence. Negligence implies a failure to act when the judgment requires action. If, as the result of investigation and consideration by a reasonable man, acting in good faith, the conclusion reached is that ac-

tion should be deferred, the consequent omission to act is not negligence; and the fact that the conclusion reached is erroneous does not convert nonaction into negligence. It is simply an error of judgment. In *Re Moore's Estate*, 96 Cal. 525, 31 Pac. 584, the court below found that "the administrator collected the principal of said note, but did not collect the interest thereon, amounting to \$202.50, for the reason that he did not push the collection thereof until after the said Rodrigues became insolvent." This court said: "There is no finding that the balance due upon this note was lost by the negligence of the administrator. The failure to push the collection of the note may have been negligence, but it is not necessarily so. It frequently happens that indulgence to the debtor is a matter of prudence on the part of the creditor, and the court does not find as a fact that the administrator in this instance failed to exercise reasonable judgment in failing to enforce the collection of the note by process of law." And, quoting from *Ellig v. Naglee*, 9 Cal. 695, it was further said: "Trustees act for the benefit of others, and not for themselves, and the fair exercise of their judgment should be a protection to them. Supine negligence or willful default will render them liable; but, to make them liable for mere errors of judgment, would tend to discourage good and prudent men from taking any trusts." To the like effect, see *Pom. Eq. Jur.* § 1070. We conclude, therefore, that the guardian should not be charged with the \$1,200 loaned, nor with interest thereon.

Appellant insists that, as findings were not waived, it was error not to make them. Upon this subject it was said in a recent case (*In re Adams' Estate* [Cal.] 63 Pac. 838): "When findings are filed in a contest of this kind, they may be considered for the purpose of determining the issues upon which such finding was made. *Miller v. Lux*, 100 Cal. 613, 35 Pac. 345, 639. But it is not necessary to have findings in such case. In *re Levinson's Estate*, 108 Cal. 455, 41 Pac. 483, 42 Pac. 479. When the decree allowing a final account is found to be erroneous as to an item or items, this court may direct the decree to be corrected, and, as corrected, affirm it. In *re Parsons' Estate*, 65 Cal. 240, 3 Pac. 817." As the only conflict here is as to the conclusions of law to be drawn from the evidence, a new trial is not necessary. The court below should therefore be directed to modify the order appealed from so as to conform to this opinion, and, as so modified, that it be affirmed. Costs of appeal to be taxed to respondent.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the court below be directed to modify the order appealed from so as to conform to this opinion, and, as so modified, that it be affirmed.

(133 Cal. 379)

BENNETT v. WILSON et al. (Sac. 785).¹

(Supreme Court of California. July 16, 1901.)

JUDGMENT—COLLATERAL ATTACK—EXECUTION SALE—REDEMPTION—APPEAL
—LAW OF CASE.

1. Where a decision on a previous appeal determined only that a judgment was void because obtained by fraudulent collusion with the sheriff, and on a subsequent trial it is found that there was no such collusion, but service and return were made in good faith, the former decision cannot be regarded as the law of the case.

2. A judgment regular on its face cannot be collaterally attacked on the ground of failure to serve process.

3. Where a redemptioner of corporate property on execution sale under a judgment is refused a deed because a subsequent redemptioner, having a judgment regular on its face against the company, has made redemption, that the summons on which the latter judgment was rendered was served on a party who was not the company's managing agent, by a sheriff who believed him to be the managing agent, and the judgment was rendered on the sheriff's return, cannot entitle the prior redemptioner to impeach such judgment; it appearing that it did not affect his rights existing at the time of its rendition.

Commissioners' decision. Department 2. Appeal from superior court, Plumas county; Stanley A. Smith, Judge.

Action by Stanford Bennett against J. B. Wilson and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

L. W. Peter and W. W. Kellogg, for appellants. Goodwin & Webb, for respondent.

SMITH, C. The case was before this court on a former appeal on a judgment for defendant rendered on demurrer to the complaint, which was reversed. The decision is reported in 122 Cal. 510, 55 Pac. 390, where the case is thus stated: "The facts alleged which are necessary to illustrate the main question discussed by counsel may be briefly stated. Defendant company is a foreign corporation, and owned and operated mining property in Plumas county. Defendant Bransford is sheriff of said county. Defendant Wilson is a stockholder in, and the managing agent and in actual control and management of the property of, defendant corporation. In 1895 one Swearingen obtained a judgment lien against the property of defendant corporation, which was sold on execution, and one Cole became the purchaser at sheriff's sale July 18, 1896. The defendant corporation did not redeem. Plaintiff obtained a judgment lien before the time of redemption expired, and with it redeemed from the purchaser, and sixty days thereafter demanded a deed from the sheriff, which was refused for the alleged reason that defendant Wilson was a lawful redemptioner, and had within the sixty days required by law made redemption. Wilson's judgment lien was junior to plaintiff's. It is alleged that Wilson's judgment was obtained by fraudulent collusion between him and said sheriff, whereby the sheriff made a false return of service of summons on de-

¹ Rehearing denied August 13, 1901.

fendant corporation; that no service was in fact made, and said corporation had no knowledge or notice of the action commenced by Wilson, and did not appear or answer, and judgment was obtained by default, and said judgment is fraudulent and void. Plaintiff refused to accept the money tendered, and demanded a deed from the sheriff, which was refused." After the case was remanded the plaintiff recovered judgment. The defendants Wilson and Bransford appeal therefrom on the judgment roll and bill of exceptions. The other defendant named in the complaint, the California Gold-Mining & Investment Company, was not served with summons, and did not appear. The following is an abstract of the judgments and proceedings out of which the controversy grows: Swearingen against California Gold-Mining & Investment Co. Judgment for \$483.38 rendered June 17, 1895. Execution sale to L. M. Cole January 15, 1897. Bennett against same defendant. Judgment for \$642.96 rendered July 13, 1896. Redemption from sale to Cole January 15, 1897. Wilson against same defendant. Judgment July 17, 1896. Redemption from Bennett March, 1897. The summons was served in this case on June 11, 1896, prior to the date of Bennett's judgment. There is no allegation that the judgment was taken by Wilson with intent to defraud the plaintiff, or to interfere with his rights, or with intent to defraud creditors, or that there was any fraud or fraudulent intent, other than such as may be implied in the other facts as above stated. On the trial the court found all the allegations of the complaint to be true, except the alleged fraudulent collusion between Wilson and the sheriff, on which point it found that the sheriff made the service on Fant, "then believing the said Fant to be the managing or business agent of said corporation."

On this state of the record, the appellants claim that, "the findings being positively against the alleged fraud and collusion, this element is entirely eliminated from the case, and it follows that judgment should have gone for the defendant." On the other hand, the respondent claims that the question as to fraud and collusion is immaterial; that the "fraudulent acts charged are presented as the inducement leading to an imposition on the court,—an imposition which procured a judgment against the corporation, which the court had no power to enter, for want of jurisdiction over the person" of the defendant. Hence it is claimed the judgment was void on "principles not only elementary, but [that] have become the law of this case."

With regard to the former decision, we do not think it susceptible of the construction claimed by the respondent. In the statement of the case by the court, the alleged fraudulent collusion between Wilson and the sheriff is given (in the passage italicized) a very prominent place, and in the course of the opinion it is repeatedly referred to in such

a manner as to indicate that it was the ground of the decision. Thus, in the opinion the proposition that "said judgment is fraudulent and void" is stated, apparently, as the conclusion from the facts of the alleged collusion and nonservice, thus making it evident that the court understood the position of the plaintiff (then appellant) to be that the judgment was void because thus procured. And accordingly, on page 515, 122 Cal., and page 391, 55 Pac., the decision is based on the proposition that (on the facts alleged) the judgment was void as "obtained by fraud"; and on page 516, 122 Cal., and page 391, 55 Pac., the case is referred to as identical in principle with the case of a "judgment * * * collusive between the debtor and creditor." The decision must therefore be regarded as resting on the principle that a judgment obtained by fraudulent collusion between the plaintiff and the defendant, or between the plaintiff and the officers of the law, may be collaterally attacked by persons, not parties, whose rights are affected. Hence the conclusion of the court that the plaintiff's right of action comes within the principles discussed by Mr. Freeman in his work on Judgments (sections 334-337), and the authorities there given, thus making the sections cited a part of the opinion. Turning to these, we find the question proposed for discussion is to determine: "When judgments not void for want of jurisdiction [i. e. not void on the face of the record. See section 116 ad fin.], nor attacked by any equitable suit or defense may, nevertheless, be wholly or partly avoided" by strangers to the record. Section 334. Three cases are given in which this may be permitted, namely: (1) The case of parties "prejudiced [by the judgment] in regard to some pre-existing right," as in the examples given in section 335; (2) The case of judgments "procured through fraud of either of the parties or by the collusion of both for the purpose of defrauding some third person" (section 336); and (3) that of judgments impeachable for error "such as left the court without jurisdiction, and the judgment absolutely void as between the parties thereto" (section 337). It is not to be supposed from the general citation of these sections that the court intended to affirm that the case at bar came within all of the cases enumerated. The several sections are cited because the general question is discussed in them; and it is left to the reader, by aid of the maxim, "*Reddendo singula singulis*," to determine, from what is said in the opinion, the particular class treated of to which the case at bar is to be assigned. Of the classes enumerated, the first, it is obvious, must be rejected. Bennett's redemption from Cole was about six months after Wilson's judgment. At the time of the judgment he was merely a judgment creditor, his judgment antedating that of Wilson by four days. He was therefore in no way injured by the Wilson judgment, his own judgment being

a prior lien. His right to attack the judgment must therefore rest upon his interest subsequently acquired as redemptioner from Cole, who himself purchased about six months after the judgment. The case, therefore, cannot be regarded as falling within this class, which includes only those whose rights existing at the date of the judgment are prejudiced thereby. Nor can the case be assigned to the second class. There is no allegation that the judgment was obtained "for the purpose of defrauding" Bennett or any one else; and, as to Bennett, the facts of the case exclude the possibility of any such intent. When the judgment was rendered, Wilson was merely a judgment creditor, and when the summons was served (June 11th) he was not even that. Nor is there any allegation that the judgment was obtained by collusion between the parties for the purpose of defrauding creditors. On the contrary, it is expressly alleged that it was rendered without the knowledge of the defendant corporation. There remains, therefore, only the third class, namely, that of judgments apparently valid, but in fact without jurisdiction, and "absolutely void as between the parties thereto." And from the opinion itself it is clear that this was the class of cases referred to; for the judgment is therein uniformly described as void, and the decision is expressly based on the principle, cited by the court, that "a void judgment is in effect no judgment." "By it [it is continued] no rights are divested. From it no rights can be obtained. Being worthless itself, all proceedings founded upon it are equally worthless. It neither bars nor binds any one." *Freem. Judgm.* § 117. In what is said by the author in this section and in the authorities cited we must therefore find the principles by which the former decision is to be explained and understood. The rule laid down by Mr. Freeman in the section cited (337) is thus expressed: "The parties to an action or proceeding, and all persons who, though not parties thereto, are not prejudiced by the judgment when rendered, will not be permitted to assail or avoid it in any collateral proceeding for error or irregularity, unless it was such as left the court without jurisdiction, and the judgment absolutely void as between the parties thereto." Such judgments, it seems, may be attacked by strangers to the record whose rights, whether existing at the time of the judgment or afterwards acquired, are affected; i. e. by persons who, not being parties to the record, or privies, have no remedy against the judgment by appeal or otherwise in the case itself. But, in general, they cannot be impeached otherwise than by the record itself, or where the lack of jurisdiction appears on the face of the record. *Hodgdon v. Railroad Co.*, 75 Cal. 650, 21 Pac. 372; *Hill v. Transfer Co.*, 79 Cal. 188, 21 Pac. 728. Of this kind are all the cases cited by the author, and also the case of *Downs v. Fuller*, 2 Metc. (Mass.)

135, and other cases cited in the opinion in connection therewith. There are, however, some exceptions to this rule. *Ex vi termini*, living parties are essential to jurisdiction. Hence when at the time the judgment was rendered the defendant was dead, as in the case of *Warter v. Perry, Cro. Eliz.* 199, and in *Randal's Case*, 2 Mod. 308, cited in the opinion and in *Griswold v. Stewart*, 4 Cow. 457, the jurisdiction is only apparent, and the fact may be shown by parties whose interests are injuriously affected. And so if a judgment be entered on a forged sheriff's return, or by the clerk without authority; for such judgments are not in fact judgments of the court. And on the same principle collusive judgments may in certain cases be attacked by strangers. Hence judgments of this kind are included in this class by the author, in the section cited; being the same referred to in section 250, where they are more fully explained. To this class only, it is clear, can the opinion be understood as referring. Such cases are generally cases of collusion between the parties to the suit. *Pierce v. Jackson*, 6 Mass. 242; *Fermor's Case*, 3 Coke, 77; *Meckley's Appeal*, 102 Pa. 541; *Biddle v. Tomlinson*, 115 Pa. 299, 8 Atl. 774; *Sponsler's Appeal*, 127 Pa. 410, 17 Atl. 1097; *Freem. Judgm.* § 335. But, though not including in their literal expression the case at bar, they are expressly referred to in the opinion (page 516, 122 Cal., and page 392, 55 Pac.) as identical with it in principle. The decision must therefore be regarded as determining only that the judgment of Wilson against the corporation was, on the allegations of the complaint, void, because obtained by him by fraudulent collusion with the sheriff, and hence that it was not a real or "bona fide existing judgment," or "actual adjudication upon the matter in controversy." *Spencer v. Vigneaux*, 20 Cal. 449. And as it is now found there was no such collusion, but that the service and return were made by the sheriff in good faith, the decision cannot be regarded as the law of the case as now presented. The case must therefore be considered on general principles; and, in thus considering it, it will be convenient to consider separately the general question as to the effect of a judgment regular on the face of the record, where there has been in fact no service of summons, and the question as to how the case may be affected by the peculiar circumstances presented by it.

1. As to the general question, the law is well settled. No doubt, the court must have jurisdiction of the person of the defendant; but, with exceptions that have been considered, such jurisdiction, in the case of courts of record, is conclusively presumed unless the contrary appears from the record itself. And where, as in this case, it appears from the return of the proper officer that the defendant has been served, the court in fact has jurisdiction over him. *Reinhart v. Lugo*, 86 Cal. 399, 24 Pac. 1089, 21 Am. St. Rep.

52; *Lyons v. Cunningham*, 66 Cal. 43, 4 Pac. 938. For jurisdiction is but power to hear and determine the questions arising in the case, and among these is the question whether the summons has in fact been served. Its judgment, therefore, unless on a direct proceeding to set it aside, or in the exceptional cases already considered, must be taken as a conclusive determination of this question. On this point the language used in *Downs v. Fuller*, 2 Metc. (Mass.) 135, 35 Am. Dec. 393, cited in the former decision, and similar cases, is liable to be misunderstood. *Freem. Judgm.* § 337, p. 612; *Van Fleet*, Coll. Attack, § 12, pp. 11, 12. It is there said, "Although the judgment in favor of the plaintiff was not recovered by collusion with his debtor, or with any fraudulent intent, yet we think the defendant has a right to avoid it in the same manner, because he is neither party nor privy to the plaintiff's judgment, and is not entitled by the rules of law to reverse it by writ of error." But this does not mean that a judgment may be attacked by all strangers to the record. It applies only to cases "where a party has a right to impeach a judgment,"—as in the case considered; where the rights of the party existing at the date of the judgment were affected; and where the defeat of jurisdiction appeared from the record itself.

2. In this case there is no charge of collusion between the parties to the suit, and it is found there was no collusion between Wilson and the sheriff; and it affirmatively appears that the judgment did not affect, and, indeed, could not have affected, the rights of the plaintiff existing at the time of its rendition. The findings, therefore, that the service of the summons was a wrong "against the rights of the plaintiff," and that the "judgment was a fraud upon the rights of the plaintiff as a redemptioner of said property," are in conflict with the specific facts found, and must be disregarded. For it appears from the admitted allegations of the complaint that at the time of the service of summons Bennett was not even a judgment creditor, and therefore could not be defrauded by the service of summons, and also that he did not become a redemptioner until six months (lacking two days) after Wilson's judgment, which, therefore, could not be a fraud upon rights not then existing. The material facts found, therefore, are merely that Wilson was, and Fant was not, the managing agent of the company; that, with the knowledge of Wilson, and by direction of his attorney, the summons was served on the latter by the sheriff, believing him to be the managing agent of the corporation; and that the judgment was demanded and entered on sheriff's return. These facts are not sufficient to bring the plaintiff within any class recognized by the authorities as entitled to impeach a judgment regular on its face. It is ingeniously put by the respondent's counsel that the entry of the judgment was "an

imposition on the court." But this was not the case. The judgment was entered by default by the clerk, whose legal duty it was to enter it, and who had no discretion in the matter. Nor, had there been such imposition, would it have been any concern of the plaintiff. The relations of Wilson to the corporation, in the absence of explanation, might give rise to a presumption of fraud against it. But fraud against the corporation, even had it been found, would not entitle the plaintiff to impeach the judgment. *Meckley's Appeal*, 102 Pa. 536; *Sponsler's Appeal*, 127 Pa. 410, 17 Atl. 1097; *Biddle v. Tomlinson*, 115 Pa. 299, 8 Atl. 774.

Under the view we have taken of the case it will be unnecessary to examine into the sufficiency of the evidence to support the findings. I advise that the judgment be reversed, and the cause remanded, with directions to the court below to enter judgment for the defendant on the findings.

I concur: GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to enter judgment for the defendant on the findings.

133 Cal. 395

CITY OF SANTA ANA v. GILDMACHER
et al. (L. A. 899.)

(Supreme Court of California. July 23, 1901.)
MUNICIPAL CORPORATIONS—CONSTRUCTION OF
SEWERS—CONDEMNING PRIVATE PROPERTY
—PLEADING—DIRECTING VERDICT.

1. In a proceeding by a city to condemn private property for the construction of a sewer, an answer outlining a different route for the sewer through the streets of the city, and alleging that such route was better than the proposed one, though such facts could have been shown under a general denial of the necessity to construct the sewer, error in allowing the answer to stand was not prejudicial.

2. In proceedings to condemn private property for a sewer, the proposed sewer ran parallel to and 95 feet from a street. This street was paved with asphalt, and the evidence showed that it would be more convenient and less expensive to the property owners to have the sewer constructed as proposed, rather than in the street, and that the street would be materially damaged in having the pavement torn up. *Held*, under Code Civ. Proc. § 1242, providing that, where land is taken for public use, such use must be located where most beneficial to the public and least injurious to the citizens, error to direct a verdict for defendant on the question of the necessity for the construction, as being a question of fact for the jury.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Ballard, Judge.

Proceedings by the city of Santa Ana against D. Gildmacher and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

W. P. Heathman, for appellant. Victor Montgomery, for respondents.

CHIPMAN, C. Action to condemn right of way for sewer. Defendant Jacobson was a tenant of defendant Gildmacher, and made default. Defendant Gildmacher answered. At the close of the evidence the jury, on motion of defendant Gildmacher, and by direction of the court, rendered a verdict that there was no necessity for taking the property described in the complaint, and judgment was entered accordingly. Plaintiff appeals from the judgment, and from the order denying its motion for a new trial. The complaint sets forth with sufficient particularity the location, general route, and termini of the proposed line for a sewer of 8 inches in diameter in the city of Santa Ana, from Ross street to Sycamore street. It was proposed to run the sewer from the center of Ross street, commencing at a point 95 feet north of Fourth street, and it was resolved by the city trustees to run the sewer east on a direct line from this point, and parallel with Fourth street, to a manhole in sewer on Sycamore street, three blocks distant, crossing Birch street and West street in its route, and three blocks of lots, in private ownership, in one of which blocks defendant Gildmacher owned certain improved lots situated on the proposed line of sewer. He objected to the construction of the sewer through his property, and hence the action to condemn the right of way in question. Fourth street was at the time paved with asphaltum from Ross street, two blocks to West street, but the street was not paved from West street to Sycamore street. There was a sewer on the south side of Fourth street. The board of trustees passed a resolution declaring "that the public interest and convenience required that a right of way for a sewer over, under, and across the lot of land owned by D. Gildmacher be obtained; that the strip of land necessary for said sewer be ten feet wide and sixty-four feet long, and described as follows." A description of the land proposed to be taken is given, and it was provided that the sewer should be laid not less than 8½ feet deep.

1. Defendant pleaded, as a fourth and separate defense, that plaintiff is the owner of the streets and alleys of the city, upon which a complete system of public sewers can be constructed without interfering with the private property of its citizens, and that there is no necessity for taking any private property for sewer purposes; that defendant's property fronts 64 feet on Fourth street, which is a public highway 80 feet wide, in which there is ample room to construct the proposed sewer; and that all the private property lying to the north of Fourth street and to the east of West street could be as readily drained by a sewer laid along West street to the intersection of Fourth street, and thence along Fourth street in front of defendant's property. It is alleged that the land is level along these streets, with a gradual fall, the same as along the proposed line of sewer through the private property of defendant. Plaintiff in-

terposed a demurrer to the answer on the ground of insufficiency of facts, which was overruled as to the fourth defense. It is contended that the court erred "in allowing defendant to allege and describe a different route for the line of sewer than the one described in the complaint, and that, if the line described was not suitable, he should have confined his efforts and his evidence in pointing out the defects of the proposed line of sewer across defendant's land, but that there is no precedent for allowing defendant to set up in his answer a rival line of sewer, which he claims is better." The city can in this proceeding acquire no right to lay a sewer "except in exact accordance with the specifications contained in the complaint" (*City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604); and defendant's suggestion of a better line is not pleaded with the view of having it adopted and adjudged as the line to be used. It was pleaded for the purpose of showing that an equally good line over the streets of the city was available, and that by using the streets the injury to defendant could be avoided. We think he could have shown these facts under the general denial of the necessity to construct the sewer over the proposed line as alleged in the complaint, and hence it was not essential to the defense that the facts be alleged. It was held error in *City of Pasadena v. Stimson*, supra, to exclude evidence for the defendants to the effect that a much shorter route than that proposed had been surveyed, upon a better grade, through lands not thickly settled. It was certainly material to the issue of necessity to show that the sewer could be located along a street, instead of through the private property bounded by that street, although by no means necessarily conclusive on the point. It may be conceded that this fact, as well as other material probative facts bearing upon the question of necessity, need not be pleaded in the answer; but we can see no prejudicial error in the order of the court allowing the answer to stand, even though it contained averments of fact which might have been shown under the general issue.

2. After the plaintiff had rested and the defendant had put in his evidence, the defendant moved the court to "instruct the jury to render a verdict in favor of the defendant, on the ground that there is no proof in this case to show any necessity to take the property of defendant for the public use." Thereupon the trial judge remarked at considerable length upon the evidence before the jury, discussing in the course of his remarks both the law and the facts, concluding as follows: "So, gentlemen, in the case under discussion, I think it is my duty to instruct you, and I do so instruct you, upon that question of necessity, to find for the defendant; and I have prepared a form for use, if you should find according to my instructions, for your verdict. I will say under these instructions you are not obliged to find for the

defendant, but may find to the contrary." The form of verdict called for answer, "Yes," or "No," as to whether it was necessary to take defendant's property described in the complaint. The jury answered "No," as the court in fact instructed them to do, and judgment followed accordingly. Appellant urges the proceeding as error. Section 19, art. 6, of the constitution of 1879 reads: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." The provision was the same in the constitution of 1849 (article 6, § 17). It was said in *People v. Welch*, 49 Cal. 174, that this provision applies alike to civil and criminal cases, and it has been so applied in numerous instances. It was said in the case cited: "In a proper case the court may act on the assumption that there is no evidence in respect to a particular issue, and grant a nonsuit, or advise an acquittal, or frame its charge to the jury, without reference to the existence of facts as to which no evidence has been produced. * * *

The 'matters of fact' as to which the court is not permitted to charge the jury are the facts contested, or in some degree sought to be established by evidence." In *Weiderv. Water Co.*, 65 Cal. 431, 4 Pac. 415, the trial court charged the jury that if they found that defendant's dam did not have sufficient gates to let out the water, so as to prevent any break occurring below the top of the dam from being enlarged by a continual flow of water through it, then said dam is insufficiently and negligently constructed. On appeal this court said that the trial court might instruct as to the degree of care required in the construction of the dam, and that, if defendant neglected to exercise that degree of care and vigilance, it would be liable in damages, but the court could not instruct the jury that the dam was insufficiently and negligently constructed unless it had gates sufficient for a certain purpose, and in doing so it charged upon matters of fact. In the case of *Holloway v. Railway Co.*, 130 Cal. 177, 62 Pac. 478, the trial court directed a verdict for the defendant, where the question was whether plaintiff's injury was caused by defendant's negligence. It was said here: "It was the province of the judge to determine whether or not the evidence offered by plaintiff had any legal tendency to establish negligence, and it was for the jury to say, after weighing and considering all the evidence, whether or not the negligence had been sufficiently proven. If the evidence on the part of the plaintiff was such that the jury would have the right to infer negligence therefrom, the court did not have the right to usurp the function of the jury and take the case from them. * * *

The test is this: Would the evidence on the part of the plaintiff be sufficient to sustain a verdict in his favor if such verdict had been rendered?" In an action to condemn private property for a public use, the ques-

tion of necessity is one of fact, to be determined by the jury in view of all the evidence in the case. *Waterworks v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681. The evidence should show that the land is reasonably required for the purpose of effecting the object of its condemnation. *Id.* Witness Leslie, a civil engineer who was employed as one of the engineers to prepare a general plan for the city sewers, testified: That the board of trustees instructed the engineers to avoid Fourth street, as it was paved, and to put the line through between Fourth and Fifth streets. That it was the intention of the engineers to run a line from Spurgeon street to Ross street. That this gave a straight line from a point 95 feet north of Fourth street to a point in the middle of Sycamore street through to Ross street, the same distance from Fourth street. That in locating sewers the line should be made straight. That this line in question "was located as least objectionable, since it avoided heavy walls and long foundations, and was the most convenient and easy location for construction. For that reason we located it. The line 95 feet north of Fourth street does not strike any foundations that would injure buildings, so far as I know. * * *

The line located upon avoided heavy walls, and was a convenient location to the buildings, and presented the most feasible route for a sewer from Spurgeon to Ross street." He then testified that the line was specially convenient for connections with buildings fronting on Fourth street, the line being in the rear of the buildings; that the buildings on the south side of Fourth are accommodated by a sewer already on that side of the street. Speaking of defendant's frontage on Fourth, he said: "Were the sewer in Fourth street, speaking generally of the line through from Spurgeon to Ross street, and in particular as regards this property of Mr. Gildmacher, would say the pavement is in front of the Gildmacher property, and in case the sewer were in the street the sewer connections with that property along the line of Fourth street would have to go under the buildings and under the pavement and sidewalk, and under the pavement to the sewer line, and would be more expensive. It is simply a matter of expense in connections." On cross-examination he testified that he located the line under instructions of the board, but he said: "Had I not been under such instructions, but left to myself in regard to the matter, as an engineer, I would have placed the sewer, as a matter of convenience, through the building at some point in the rear, since Fourth street is paved, and the connections to the sewer line in Fourth street would have been generally expensive, would have damaged the street materially." He also testified that: "It would necessarily do some private injury to put sewer through a block. No alley way through this particular block." The witness testified that the grade on

Fourth street was substantially the same as on the proposed line of sewer; that the sewer could have been carried through Fourth street, but it would have added extra man-holes and additional angles, besides involving the tearing up of the pavement; that in some cases sewers in streets and alleys were more convenient than through the lots, but in other cases the contrary was true, and he gives instances along the proposed line. Witness Kellogg, chief city engineer, testified at considerable length on the matter. He testified: "I understood the line was to be located at some point at once the most economical and advantageous to property owners of city in general. Had careful survey made of route between Fourth and Fifth streets; exact location of every building taken; character of foundations investigated; all possible factors carefully considered. After having made investigation, selected that line which presented fewest difficulties. * * * Buildings along Fourth street do not front the way the lots do, but front on Fourth street, taking small section of lots. Buildings, as a rule, 80 to 90 feet deep. Plenty of space left between back end of property and buildings for construction of sewer, or necessary connections for convenience. In 95-foot line we saw small difficulty in securing right of way. So that line was located, making a line of sewer going over near people's houses, not injuring buildings, and within property limits in majority of cases; and that was the reason the line was located at that point." He then shows that the cost to the property owners in making connections by that line would be much less than if located in the street. He estimates that the saving in cost to the private owners between Ross and Spurgeon streets would be \$10,000. There were several other witnesses called by plaintiff whose testimony was corroborative of the foregoing. Other phases of the matter were brought out, tending more or less to support the plaintiff's contention. Sufficient of the evidence has been given to show conclusively, I think, that the court invaded the functions of the jury in directing a verdict for the defendant. The court took from the jury the principal issue of fact in the case, and in so doing made all other issues immaterial. The court charged the jury in respect of matters of fact in the sense of the constitutional prohibition. If there had been no evidence tending to show a reasonable necessity for taking defendant's property, it would not have been prejudicial error for the court to grant a nonsuit (In re Spencer, 96 Cal. 448, 31 Pac. 453); or, if the evidence had been such as that a verdict for plaintiff would have been contrary to the evidence, the error would be regarded as immaterial (Levitzky v. Canning, 33 Cal. 299); but we think there was evidence of a substantial character bearing directly on the issue of fact, namely, the necessity for taking the property, and, as this issue was for the jury,

it ought to have been left for them to decide. Among other remarks made by the learned trial judge is the following: "If we were seeking to save the city, and looking to the convenience and economy of the property owners along that line— Yet all the balance of us have it front on the public streets. We are obliged to go from 100 to 120 and 160 feet to make connections. If they have a right to take this, why not seek private property all over the route of the system, instead of using the public streets." But section 1242, Code Civ. Proc., declares that when land is taken for public use the use "must be located in the manner which will be most compatible with the greatest public good and the least private injury." The question of necessity in a given case involves a consideration of facts which relate to the public, and also to the private citizen whose property may be injured. The greatest good, on the one hand, and the least injury, on the other, are the questions to be determined, and these questions are for the jury, in passing on the question of necessity. The jury may as safely be trusted to rightly solve these questions as the court, and, whether so or not, our system of jurisprudence requires that they shall first be submitted to the jury. We advise that the judgment and order be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

133 Cal. 437
RICHARDS et al. v. MOREY. (L. A. 854.)
(Supreme Court of California. July 24, 1901.)
REPLEVIN—POSSESSION BY DEFENDANT.

Where defendant is not in possession or control of personal property when an action for the recovery of possession thereof is commenced, plaintiff cannot recover.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Charles B. Richards and others against Charles E. Morey. From that portion of a judgment which denied a portion of plaintiffs' demand, they appeal. Affirmed.

Withington & Carter, for appellants. M. L. Rawson, for respondent.

HAYNES, C. Action to recover possession of personal property. The plaintiffs had judgment for certain pipe, hydrants, tools, etc., of the value of \$845.20, but their claim for the recovery of certain buildings was denied, and from that portion of the judgment they appeal upon the judgment roll.

The evidence is not brought up by bill of exceptions or otherwise. The only question is whether the plaintiffs were entitled to judgment upon the facts stated in the sixth finding, which is as follows: "That the

house known as the 'engineer's house,' and which is of the value of \$200, and building known as the 'storage house,' and which is of the value of \$75, and the 'long shed' mentioned in the complaint, which is of the value of \$35, were formerly attached to and part of the ranch known as the 'Monte Vista Ranch,' being plat E of the Rancho Jamacha, in said county, and was the property of the plaintiffs. That the defendant, against the will of the plaintiffs, and without their consent, took the same, and removed the same from said ranch, and attached the same to the Eddy tract, so called, being plat F of the Rancho Jamacha, in said county, before the commencement of this action, the said Eddy tract being at the time of said attachment and now the property of one George S. Davis; and the said defendant has incorporated the said engineer's house into a dwelling house, and now occupied by him upon said last-named tract. That all of said buildings were removed with the consent of said Davis; and that the said Davis, previous to said removal, had agreed with the plaintiffs that said buildings should not be removed from said Monte Vista ranch, above referred to." This finding shows that these buildings were removed by the defendant from the Monte Vista ranch, and "attached" to the Eddy tract, which then was, and now is, the property of George S. Davis, who is not a party to the suit. It is not found that defendant, Morey, has any ownership in the Eddy tract, to which these buildings are found to be "attached," or had any interest or ownership therein at any time. The possession of the buildings was, therefore, in Davis at the time the action was commenced. The fact that the dwelling house into which the "engineer's house" was incorporated is "occupied" by the defendant does not affect the ownership and possession of Davis, who is the owner of the ranch, the said buildings having been attached to and thereby made part of his land before this action was commenced.

This is an action to recover possession of personal property, which, it is alleged, the defendant took against the will of the plaintiffs, and now detains from their possession. But the finding shows that the property sought to be recovered was not in the possession of the defendant when the action was commenced, nor within his power to deliver, and therefore said finding would not have sustained a judgment in favor of the plaintiffs for the delivery of the buildings, or for the value of them in case a delivery could not be had. In *Kelley v. McKibben*, 54 Cal. 195, it is said: "The distinction between this action [to recover possession, or the value in case a delivery cannot be had] and one to recover damages for the wrongful conversion of personal property is just as broad as that between the common-law actions of detinue and trover. One lies for the recovery of the property itself, with damages for the wrong-

ful detention of it; the other for the recovery of damages for the wrongful conversion of it." It is a general proposition that an action will not lie where it is clear that relief under it cannot be obtained. So an action to recover possession of personal property will not lie when it is apparent at the time the action is commenced that the defendant has not the possession, or the power to deliver it in satisfaction of the judgment for its possession. When, however, the defendant has the property in his possession at the time the action is commenced, the code provisions will not permit him by the subsequent transfer or destruction of the property to wholly deprive the plaintiff of relief, and in such case the alternative judgment for the value of the property is granted. In *Riciotto v. Clement*, 94 Cal. 107, 29 Pac. 414, it is said: "Quite often the plaintiff may choose whether he will content himself with damages for the conversion, or seek to recover the specific property; but the two remedies are quite distinct. In what is called 'trover,' present possession of the property is immaterial, but the relief sought in claim and delivery cannot be had from the defendant unless he is then possessed of the property, which fact must, therefore, constitute an essential element in plaintiff's cause of action." *Riciotto v. Clement*, supra, is cited and followed in *Henderson v. Hart*, 122 Cal. 332, 54 Pac. 1110, and *Keech v. Beatty*, 127 Cal. 183, 59 Pac. 837. *Faulkner v. Bank*, 130 Cal. 258, 266, 62 Pac. 463, was distinguished by the court from *Riciotto v. Clement*, in that it was founded on the contract of bailment.

Appellant makes the point that "the only necessary defendant in replevin is he who has possession of the property"; but this assumes that Morey has the possession, and the right to surrender the property to the plaintiffs, and that plaintiffs have the right to receive or take the possession. It may be that the evidence would have justified a different finding from that before us; but it is quite clear that the finding shows no right, power, or authority in the defendant to remove the buildings from Davis' land, and to deliver them to the plaintiffs, or to put them in possession of them while on the land of Davis. Morey may be the occupant of these buildings, but the possession and the power of disposition are not shown to be in him. The presumption is that a building becomes part of the land—the real estate—upon which it is built or placed, and a stranger to the title cannot remove it without special authority to do so. As the finding in question would not justify a judgment thereon in favor of the plaintiffs, the judgment appealed from should be affirmed.

We concur: SMITH, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

133 Cal. 433

In re DAMKE'S ESTATE. (Sac. 898.)

(Supreme Court of California. July 24, 1901.)
ADMINISTRATORS — RIGHT TO LETTERS — AP-
PEAL—NOTICE—COURTS—JURIS-
DICTION—EVIDENCE.

1. An appeal from an order appointing an administrator will not be dismissed because of the notice of appeal being entitled as in the superior court of a county other than that wherein the appointment was made, where the parties treated the notice as sufficient throughout the proceedings, and the appellee's attorneys were not misled.

2. Where a public administrator of one county claims the right to administer on an estate, he has the right to appeal from an order of the court of another county appointing another as administrator.

3. A court appointing a special administrator of an estate acquires jurisdiction alone for the special purposes of that character of administration.

4. Where a court of one county appoints a general administrator of an estate after the appointment of a special administrator, but before the appointment of a general administrator by the court of another county, it thereby acquires general jurisdiction of the estate.

5. In proceedings for the appointment of an administrator, a claimant to letters introduced evidence that the deceased had been superintendent of a ranch in a county other than that in which proceedings were had for ten years immediately preceding his death; that he furnished a house for his occupancy on the ranch, doing his own cooking, sleeping there, keeping poultry and cattle about the place, and receiving his mail at a post office on the ranch. Against this evidence a witness testified that prior to the ten-year period deceased stayed at a hotel in the county wherein proceedings were had, claiming that as his residence, and that he voted there; but during the ten years he had been to the hotel but four or five times for two or three days at a time. *Held*, that the residence of deceased was not in the county wherein proceedings were had.

Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Proceedings for the appointment of an administrator of the estate of Fred W. Damke, deceased. From an order appointing C. C. Franklin, public administrator of San Joaquin, S. B. Smith, public administrator of Sacramento county, appeals. Reversed.

Bruner & Brothers, for appellant. Avery C. White, Buck, Miller & Clark, and Gus. G. Grant, for respondent.

GAROUTTE, J. The public administrator of the county of Sacramento appeals from an order of the superior court of the county of San Joaquin, appointing C. C. Franklin, public administrator of that county, administrator of the estate of Fred W. Damke, deceased. He had theretofore in said proceeding filed a written opposition to the appointment of Franklin administrator of said estate, claiming that said Damke at the time of his death was a resident of the county of Sacramento. It is asked that this appeal be dismissed because the notice of appeal is entitled "In the superior court of the county of Sacramento," and also by reason of other defects appearing upon its face. These objec-

tions are too technical, for the defects are unsubstantial. The notice recites that the appeal is taken from an order and decree made and entered the 2d day of August, 1900, directing letters of administration to issue to C. C. Franklin, public administrator of the county of San Joaquin. This order and decree was the only one made upon that day, or any other day, appointing C. C. Franklin, public administrator of the county of San Joaquin, administrator of the estate of the deceased. It is perfectly evident that respondent's attorneys were not misled by the defects appearing upon the face of the notice, and, in addition to this, subsequent to the service of the notice, a bill of exceptions was prepared and settled, to be used upon appeal from the order appointing Franklin administrator, and no suggestion was ever made that the aforesaid notice was defective in substance. Throughout the proceedings the notice has been treated as sufficient, and acted upon, and it is now too late to make the objections here made for the first time.

It is next claimed in support of the motion to dismiss that the appellant is not a party aggrieved, and hence has no right of appeal. Appellant claims the right to administer upon the estate of Damke, deceased, and under these circumstances is entitled to take this appeal. In *re Healy's Estate*, 122 Cal. 162, 54 Pac. 736. If Damke was in fact a resident of Sacramento county at the time of his death, it was not only the right, but the duty of the public administrator of Sacramento county to appear in the court of San Joaquin county, and contest Franklin's right to letters of administration. And, if he had the right to contest the issuance of letters of administration to Franklin, he had the right to appeal from the decree entered against him. The fact that he claims the right to administer in Sacramento county, and that these proceedings were inaugurated before the superior court in San Joaquin county is not material. Appellant, by an order of the superior court of Sacramento county, made July 12, 1900, was appointed special administrator of the estate of the aforesaid deceased. Upon July 21, 1900, Franklin filed his petition in the superior court of the county of San Joaquin, asking for general letters of administration upon the estate of said deceased. Upon July 23d appellant filed his petition in the superior court of the county of Sacramento, asking for general letters of administration upon said estate. Upon August 2d general letters of administration were issued to Franklin in the superior court of the county of San Joaquin, appellant's written opposition thereto being overruled, and it is from this order that the present appeal is taken. Thereafter general letters of administration were issued to appellant in the superior court of the county of Sacramento. It is now insisted upon the part of appellant that, the superior court of the county of Sacramento having made an order appointing

him special administrator of the estate of Damke, deceased, prior to the filing of Franklin's petition for letters in the superior court of San Joaquin county, therefore that court was deprived of jurisdiction to hear his petition. This court has concluded that appellant's position in that regard is not well taken. By the appointment of a special administrator of an estate, the court making the order may be said to have only a limited jurisdiction over the estate. It has jurisdiction alone for the special purposes of that character of administration. By the proceeding which resulted in the appointment of the special administrator, the court gained no jurisdiction to appoint a general administrator. That appointment could only be made by a separate and independent proceeding, and the prior proceeding had to no degree fed the jurisdiction of the court as to the appointment of a general administrator. If the public administrator of San Joaquin county could not there file in the court a petition to be appointed administrator of the estate of deceased, for the reason that a special administrator had already been appointed in Sacramento county, then the subject-matter of this litigation would be in a most peculiar situation, for non constat the public administrator of Sacramento county would ever file a petition for general letters of administration, and thus most serious complications would necessarily arise; for no general administrator might ever be appointed, and this, too, notwithstanding the right to appoint in the superior court of San Joaquin county might be ever so clear. For these reasons the court concludes upon this branch of the case that, when the petition was filed in the superior court of San Joaquin county to appoint a general administrator in the estate of Damke, deceased, there was no proceeding pending in any other court to appoint a general administrator, and for that reason the superior court of San Joaquin county first took jurisdiction of the matter.

Appellant attacks the finding of the trial court which is to the effect that the deceased, Damke, was a resident of the county of San Joaquin at the time of his death. This court has carefully examined the evidence found in the record bearing upon the question of residence, and has concluded that it points unerringly to the fact that the residence of Damke at the time of his death was in Sacramento county. There is but a small amount of evidence upon the issue. Damke was a German, without relatives in this state. For ten years immediately prior to his death he was acting as superintendent and manager of a large ranch belonging to Williams & Bixler, which was situated in Sacramento county at a point called "Ryde." Here Damke was furnished a house in which he lived alone for these 10 years. He did his own cooking, and slept there. He had his own bed, dishes, and other furniture there. He had chickens, pigs, and a cow about the

place. Indeed, he seemed to live here in this house and at this place, if it can ever be said that a person lives in a certain house and at a certain place. If a person may, by his acts, create a residence for himself, then Damke's residence was at Ryde. While it may be said that the residence of a person is to be determined by his intentions, still it may also be said that his intentions are to be determined by his acts. The deceased received his papers and his letters at Ryde post office, situated upon the ranch; and many of his neighbors testified that he lived at this place continually for the past 10 years prior to his death, only being absent a day or two a few times each year. Against this evidence, a witness testified that prior to the aforesaid 10 years, and for 13 years prior thereto, Damke was an ordinary laboring man, working wherever he could obtain work, and when not working he stayed at the hotel of the witness in the city of Stockton, which he claimed to be his residence; that 20 years or more prior to his death he registered in the city of Stockton, and voted there. This witness also testified that he never heard Damke say anything about his residence during the aforesaid 10 years. The witness further stated that during the past 10 years Damke had been in the city of Stockton upon business four or five times, and stayed at his hotel during these visits, which only extended over a day or two. This may be said to be, in substance, all the evidence which was offered upon the issue of residence, and the court sees but one conclusion to be drawn from it. It points with certainty to the fact that Damke, at the time of his death, was a resident of the county of Sacramento. The court concludes that there is no substantial conflict in the evidence upon the issue of residence, and for the foregoing reasons the order and decree is reversed, and the cause remanded.

We concur: VAN DYKE, J.; HARRISON, J.

(133 Cal. 430)

IN RE DAMKE'S ESTATE. (Sac. 885.)

(Supreme Court of California. July 24, 1901.)
EXECUTORS AND ADMINISTRATORS—COURTS—
JURISDICTION.

1. A court appointing a special administrator of an estate acquires jurisdiction alone for the special purposes of that character of administration.

2. A court appointing a general administrator of an estate after the appointment of a special administrator pending appointment of a general administrator by the court of another county, thereby acquires jurisdiction of the estate, wherefore proceedings in the latter court should stand in abeyance.

Department 1. Appeal from superior court, Sacramento county; Joseph H. Budd, Judge.

Proceedings for the appointment of an administrator of the estate of Friedrich W. Damke (sometimes known as "Friedrich

Damke," sometimes known as "Fred Damke"), deceased. From an order directing general letters of administration to be issued to S. B. Smith, public administrator of Sacramento county, C. C. Franklin, public administrator of San Joaquin county, appeals. Reversed.

Avery C. White, Buck, Miller & Clark, and Gus G. Grant, for appellant. Bruner & Brothers, for respondent.

GAROUTTE, J. This is an appeal by C. C. Franklin, administrator of the estate of one Damke, deceased, from an order of the superior court of Sacramento county made and entered on August 4, 1900, directing general letters of administration upon said estate to be issued to S. B. Smith, public administrator of that county. The facts of this cause are closely connected with the facts of cause numbered "Sac. No. 898," entitled "In the Matter of the Estate of Fred W. Damke, Deceased" (65 Pac. 888), which involved an appeal from an order of the superior court of the county of San Joaquin appointing C. C. Franklin administrator of the estate of said deceased; and reference is herewith made to the opinion rendered upon that appeal, and filed this day, for additional facts. At the time appointed for the hearing of the application of the public administrator of Sacramento county for general letters of administration upon the estate of the aforesaid deceased, Franklin, public administrator of San Joaquin county, appeared, and filed an opposition thereto, wherein he set out that the estate was in due course of administration in the superior court of the county of San Joaquin, and that he had, by that court, already been appointed administrator of the estate of said deceased. At the hearing, evidence to this effect was offered by him, but was rejected by the court, and it is the soundness of this ruling that the present appeal has been brought to review. At the hearing it also appeared that prior to the time when the proceedings were inaugurated in the superior court of San Joaquin county, which led up to the appointment of a general administrator of the estate of the deceased, Damke, the superior court of Sacramento county had appointed Smith, the respondent herein, special administrator of the estate of said deceased. Upon this ground it was urged by respondent that jurisdiction over the administration of said estate had been first taken by the superior court of the county of Sacramento, and that, therefore, the cause was pending in that court at the time the proceedings were had in the superior court of the county of San Joaquin. Upon this state of facts the superior court of Sacramento county held that, it having first taken jurisdiction over the administration of the estate, that jurisdiction could not be interfered with by any subsequent procedure taken by the superior court of another county. The principle invoked by the Sacramento

court to sustain its jurisdiction cannot be questioned. But it has been held in the opinion filed this day in the cause appealed from the superior court of the county of San Joaquin, and numbered "Sac. No. 898," that the superior court of Sacramento county, in taking jurisdiction over the administration for the purposes of appointing a special administrator, did not thereby secure jurisdiction over the estate of the deceased for the purpose of appointing a general administrator. With that declaration of the law the court is entirely satisfied. It necessarily follows that when the order from which the present appeal was taken was made in this case, the administration of the estate of Damke was progressing in the superior court of an adjoining county, which court had taken jurisdiction of the proceeding prior to the filing of the petition in Sacramento county for the appointment of a general administrator. In view of what has been said, the conclusion necessarily follows that the superior court of Sacramento county, upon the question of jurisdiction, should have given way, and allowed the superior court of San Joaquin county to conduct the further administration of the estate. It is not intended to intimate, under this rather peculiar state of facts, that the proceedings should be dismissed in the superior court of Sacramento county, but rather that they should stand in abeyance until a final judgment has been rendered in the superior court of the county of San Joaquin, holding that said court either has or has not jurisdiction over the administration of said estate. For the foregoing reasons, the order appointing a general administrator is reversed, and the cause remanded.

We concur: VAN DYKE, J.; HARRISON, J.

133 Cal. 446

In re DOW. (L. A. 846.)

(Supreme Court of California. July 25, 1901.)
GUARDIAN AND WARD—GUARDIAN'S ACCOUNT
—APPROPRIATION OF TRUST FUNDS—COM-
POUND INTEREST—CONCLUSIVENESS OF
FINDINGS.

1. Where an account of a guardian, though designated an "annual account," showed on its face that it extended over eight years, and the guardian had resigned, and another had been appointed, and the executrix of the guardian's bondsman appeared and filed a written consent, though the notice stated an annual accounting, the account was properly settled as the final account.

2. Where a guardian loaned money belonging to the trust estate to his bondsman, and received certain stocks and bonds in payment, the failure of the court to require the guardian's final account to show the amount actually invested in the stocks is not prejudicial to the bondsman.

3. Where a guardian invested his ward's money in stocks and bonds, and appropriated them to his own use, it was not error for the court to refuse to credit the guardian with such stock.

4. Trust funds appropriated by a guardian to his own use are chargeable to the guardian, with compound interest.

5. Where, in appeal from proceedings for the settlement of a guardian's final account, the evidence was not brought up, the findings are conclusive.

Department 1. Appeal from superior court, Los Angeles county; John L. Campbell, Judge.

Proceedings for the final settlement of the account of Fred C. Howes, guardian of the estate of Ralph G. Dow, a minor. From a decree affirming the final account, Clara F. Howes, executrix of the will of Felix C. Howes, deceased, who was bondsman for said guardian, appeals. Affirmed.

Flint & Barker and Jones & Weller, for appellant. Albert J. Sherer, for respondent.

VAN DYKE, J. This appeal is taken by Clara F. Howes, executrix of the last will and testament of Felix C. Howes, deceased, from a decree settling the account of Fred C. Howes, as guardian of the estate of said Ralph G. Dow. The said guardian, April 15, 1899, filed his account, in which he states in his affidavit to the same that it "contains a full, true, and particular account of all my receipts and disbursements on account of the said estate from the 23d day of May, 1891, to the 13th day of April, 1899, and of all sums of money belonging to the said estate which have come into my hands as such guardian, or which have been received by any other person, by my order or authority, for my use." By said account a balance is found in his hands, to the credit of his ward, in the sum of \$3,576.80. The appellant, as executrix of Felix C. Howes, deceased, filed objections to said account, in which it is stated that said Felix C. Howes, deceased, was one of the sureties on the bond given by the said Fred C. Howes upon qualifying as such guardian, and that he remained as such up to his death, 14th of September, 1898; that Fred C. Howes is insolvent, and is unable to pay the balance, shown by the said account to remain in his hands, due his ward; that said guardian in his account charged himself the sum of \$1,628.01, as interest coming into his hands, which interest in fact never did come into his hands, and that said interest is computed with annual rests, whereas, if any interest should be charged against him, it should be no greater than simple interest on the principal sum found to be due; that said guardian had not given himself credit in his account with certain bonds, of the face value of \$4,000 or more, coming into his hands as such guardian; and that said guardian invested the funds in said bonds in good faith, for the interest of his ward. After hearing upon the account and the objections thereto, the court found, among other matters, "that the said guardian invested all the money of said ward coming into his hands in bonds of the East Riverside Irrigation district and stock of the North Riverside Land & Water Company; that said investments were made in

bad faith, and that the guardian at the time of said investment did not regard said stock or bonds worth the amount of money invested therein, but relied wholly upon the representations of Felix C. Howes, now deceased, from whom such purchases were made, that he would guaranty the repayment to said guardian of all sums of money so invested by him, together with 7 per cent. interest per annum, compounded annually, upon all sums so invested; that without said guaranty, verbally made, the said guardian would not have made said investment; that at the time of the appointment of said guardian, as such, up to and including the date of the death of said Felix C. Howes, to wit, on the 14th day of September, 1898, the said deceased was a man of large means, reputed to be worth about \$250,000, and was the cashier of the Los Angeles National Bank, a banking institution of the city of Los Angeles, and was the uncle of said guardian, and that said guardian, during all of said time, was a paying teller of said Los Angeles National Bank, and was subject to the directions of said Felix C. Howes, deceased; that after receiving the moneys of said ward the said guardian loaned the same to Felix C. Howes, upon his own individual note, bearing interest at the rate of 7 per cent. per annum, compounded annually; that said note was afterwards repaid, not in cash, but in the bonds and stock heretofore mentioned; that at all the times after the receipt of said moneys by said guardian he could have loaned the same, upon good security, at a rate of interest exceeding 7 per cent. per annum, compounded annually; that all of the investments made by said guardian were made without any order of court so to do; that said guardian received interest upon said bonds up to the 1st day of January, 1896, and that he commingled said interest with his own funds, and appropriated the same to his own use." It is further found "that on the 28th day of April, 1899, the said Fred C. Howes resigned his trust as said guardian, and thereupon his successor was duly appointed and qualified, and the said Fred C. Howes offered to turn over to said successor said bonds, but that said successor refused to accept the same, and that afterwards the said Fred C. Howes appropriated said bonds to his own use, and disposed of the same."

Appellant assigns the following as errors:

1. That the court erred in settling the account as a final account when it purports to be only an annual account. The Code provision with reference to the accounts of guardians reads: "The guardian must, upon the expiration of a year, from the time of his appointment, and as often thereafter as he may be required, present his account to the court for settlement and allowance." Code Civ. Proc. § 1774. The account in this case is headed: "Annual Account of Fred C. Howes, Guardian. C. C. P. 1623." "To cash received as follows, to wit: Balance on hand, as

shown by account rendered May 23, 1891, \$2,549.03." Then proceeds to carry forward, to the credit of the ward, annually, the cash balances, deducting expenditures for the use of the ward in clothing and books for schooling, etc., leaving a balance in the hands of the guardian as already stated. From the heading of the account it is evident that it was made up upon a printed blank prepared for executors and administrators as provided in the section of the Code referred to, to wit, Code Civ. Proc. § 1628. It would seem, however, from the heading, that he had rendered an annual account as mentioned in the section with reference to guardians, to wit, Code Civ. Proc. § 1774; and that this, although designated an annual account, was really intended for a final settlement of his guardianship; and the court, in its findings in settling the same, designates it as "the final account of Fred C. Howes, as guardian of said Ralph G. Dow, a minor," and it appears also that prior to the settlement of said account said Howes had resigned his trust as guardian, and another had been appointed in his place. This, therefore, as to him and the sureties on his bond as such guardian, was a final account. The appellant could not have been misled by the account having been called an annual account instead of a final account, nor by the fact that the notice for the settlement used the same term; for she appeared and filed a written contest, and took part in the settlement of said account. Upon its face it shows that it was not the account rendered at the expiration of one year after the appointment, and also that it was an account rendered nearly eight years thereafter; and the settlement in which appellant took part shows that it was the final settlement of the account of said guardian. The liability of the guardian to his ward was fixed by the final settlement of said account. The misnomer or misdescription of the paper filed as an account in this case is quite immaterial. In substance, it was the final account of the guardian, although miscalled "annual account," and the law respects form less than substance. It is the duty of the court to disregard any error or defect which does not affect the substantial rights of the parties. Code Civ. Proc. § 475.

2. The court did not err in not requiring the account to show the amount of money actually invested in the stocks and bonds referred to in the findings. That was not specified as one of the objections in the contest filed by the appellant. The money so paid, whatever the amount may have been, was received by the bondsman of said guardian whose estate is represented by appellant, and it is not apparent how the failure in not showing the amount so invested can prejudice the appellant.

3. It is claimed that the court should have given the guardian credit for the shares of stock and bonds resulting from the investment of the money of the ward. The find-

ings, however, show that such stock and bonds were disposed of by said guardian, and the proceeds appropriated to his own use, together with the interest thereon.

4. It is claimed on the part of appellant that the court erred in charging the guardian compound interest. In *Re Stott's Estate*, 52 Cal. 403, the executor had mingled the funds of the estate with his own, but there was no evidence of actual profit, and it was held that he was responsible for presumed profits upon the moneys employed, "and that the general rule in such cases was that he should be charged with legal interest, with annual rests." The same rule was held in *Re Clark's Estate*, 53 Cal. 359; and in *Re Cousins' Estate*, 111 Cal. 445, 44 Pac. 183, it is said: "The general rule now thoroughly well established in this state, as to the limit of the liability of a trustee for mingling the trust funds with his own, and their use in his own business, where it is not shown that a larger profit was realized therefrom, is the return of the principal, with legal interest thereon, compounded annually. This rule is applicable alike to guardians and executors as to other trust relations."

5. It is finally claimed that the account should not have been settled, for the reason that the findings show that it does not contain a true and correct statement of the moneys of the ward received, invested, and disbursed by the guardian, and does not exhibit a true condition of the estate, but the findings are "that all the items of debits and credits appearing in said guardian's account are true and correct; that said account is entitled to be allowed and settled." And as conclusions of law: "That said account as presented is true and correct, and is entitled to be settled, and allowed as such; that the objections of said objector are not correct, and should not be allowed." And in the decree: "It is ordered, adjudged, and decreed that the said account be, and the same hereby is, in all respects as the same was rendered and presented for settlement, approved, allowed, and settled as and for the final account of said guardian." The evidence not having been brought up, the findings are conclusive, and they are ample to support the decree. Decree affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(133 Cal. 400,

HAYNES v. TREADWAY et al. (Sac. 772.)¹
(Supreme Court of California. July 24, 1901.)

MORTGAGES—FORECLOSURE SALE—TIME TO
REDEEM—CHANGE OF STATUTE
—SALE FOR SURPLUS.

Plaintiff foreclosed a mortgage executed by defendant, and at the sale purchased the property for more than the mortgage debt, with costs and expenses added. At the time the mortgage was executed, the statutory right of redemption was limited to six months. Before the sale it was extended to one year. *Held*,

Rehearing denied August 14, 1901.

that the time for redemption was fixed by the statute in force when the mortgage was executed, and was not affected by the change of statute, or fact that the premises sold for more than was due.

Department 1. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Action by M. Haynes against George W. Treadway and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Budd & Thompson, for appellants. J. B. Webster and J. T. Summerville, for respondents.

GAROUTTE, J. Plaintiff, as assignee, brings an action of foreclosure of mortgage against defendants, the mortgagors. He became the purchaser of the property at the sale, and six months thereafter, receiving his deed, he made an application for a writ of assistance, which writ was ordered issued. The present appeal is now prosecuted by defendants from the order granting the writ of assistance. At the time the mortgage was executed, the statutory right of redemption was limited to six months after the sale. At the time of the foreclosure sale the statute had been so amended that the right to redeem existed for twelve months. Defendants, in their brief, declare: "The only point involved in the appeal is whether or not the time of redemption for said property sold by the commissioner under foreclosure of said mortgage as against a purchaser at the foreclosure sale expired six months or one year after the time of said sale." We pass to the examination of the question thus presented. It appears by the record in this case that plaintiff became the purchaser at the foreclosure sale; that third parties were bidders at the sale, and bid an amount in excess of the amount of plaintiff's claim, including costs, interest, taxes, etc. It further appears that plaintiff became the purchaser at the sale at a price exceeding in amount his aforesaid claim, costs, expenses, etc., in the sum of about \$350. By reason of this state of facts it is asserted by defendants that plaintiff stood in the position of a purchaser at an ordinary execution sale, and the principle of law is then invoked that the rights of a purchaser at an execution sale are determined by the law at the time of the sale. In other words, it is conceded that, if the purchaser had bid in the property at the sale for an amount less than his claim, that he would have been entitled to his deed at the expiration of six months from the sale; but, it is asserted that by reason of the fact that he bought for an amount exceeding his claim, including costs, etc., he was not entitled to his deed until twelve months after the day of sale. It is thus conceded that, if plaintiff had been a purchaser for the less amount, the statute, as amended, allowing the mortgagors twelve months to redeem, would have been as to him unconstitutional, because impairing the obligation of his mort-

gage contract; but it is asserted that by reason of the fact that the purchaser's price exceeded the amount of his claim in full the obligation of the mortgage contract was in no sense impaired, and therefore the statute as to the purchaser is constitutional. The court is not prepared to say that the constitutionality of an act can be tested in this way. Indeed, we see no difference in principle, when testing the constitutionality of this act, whether or not the purchaser bid in the property for an amount less than his claim or bid a sum in excess of that claim. By the mortgage contract incorporating therein the statute of redemption existing at the time, the agreement of the mortgagor was that the purchaser at the foreclosure sale, in case of default, should be entitled to the possession of the property six months after the sale in case no redemption was had. In another form it may be said that the agreement of the mortgagor was that the purchaser at the sale should have title to the property, subject to a right of possession thereafter in the mortgagor for six months. That was the contract in this case, and the necessary result of giving the amended statute effect here is to give the mortgagor the right to the possession of the property for twelve months after the sale. It is thus patent upon its face that a statute extending the right of possession in the mortgagor to a period of twelve months is a substantial impairment of the obligation of a contract limiting the right of possession to six months.

The mortgagee's security is the interest of the mortgagor in the property, less the equitable interest reserved to the mortgagor by the statute of redemption. The greater the reserved interest in the mortgagor, the less the security. If the interest of the mortgagor in the form of the right of redemption may be extended from a six-months interest to a twelve-months interest, after the contract between the parties has been executed, it may be extended from a six-months interest to a five or ten years' interest, and thus the security of the mortgagee absolutely wiped out. Defendants attempt, by the facts of this particular case, to take it without the general principles thus declared by saying the plaintiff here bought the property for an amount in excess of his claim, expenses, etc. As before suggested, we are unable to give that fact the force and effect which defendants seek to impress upon it. Who can say that the third parties, or the purchaser himself, would have bid the amounts for this property which the record shows they bid, if the mortgage contract had not been that the mortgagors were entitled to but six months within which to redeem? No court can say but that the period of redemption fixed by the mortgage contract was the actuating cause which induced them to bid an amount for the property in excess of the claims of plaintiff. In support of the views declared by the court, we have conclusive

authority in a recent case decided by the supreme court of the United States. *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93. The court there said: "Without pursuing the subject further, we hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage." Again, it is said: "An equitable estate in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security by rendering the property unsalable for anything like its value. This law gives to the mortgagor and to the judgment creditors [meaning creditors other than the mortgagee] an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the constitution." This case and the case at bar are alike in principle, except that in *Barnitz v. Beverly* the mortgagee bought the property for less than the amount of her claim. Yet, as already suggested, this difference in the facts does not affect the principle of law involved. The supreme court of the United States tested the constitutionality of the act involved in that case by weighing its provisions. By the face of the act itself, it was tried and condemned, and here the act must stand or fall by the strength or weakness of its provisions. In this case the amended act, fixing the right of redemption at a period of twelve months, was unconstitutional and void as to this mortgage contract when it was enacted, or it was at that time and is now a valid statute affecting that mortgage contract. The mortgage contract said that the mortgagor should have six months in which to redeem. The amended statute declared that the same mortgagor should have twelve months in which to redeem. Thus the obligation of the mortgagee's contract was impaired when the amendatory act was passed, or it was not impaired at all. See, also, *Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914.

Defendants rely upon the case of *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236, 27 L. Ed. 648. In speaking as to that case the court said in *Barnitz v. Beverly*, supra: "The case of *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236, 27 L. Ed. 648, does not collide with the previous and subsequent cases. There the new statute did not lessen the duty of the mortgagor to pay what he had contracted to pay, nor affect the

time of payment, nor affect any remedy which the mortgagee had by existing law for the enforcement of his contract." Possibly, there is language in the *Insurance Company Case* which collides with *Barnitz v. Beverly*, but, if so, the collision only results in injury to the earlier case. While in the *Insurance Company Case* the fact is disclosed that the mortgagee at the sale bought in the property for the full amount of his claim, and while the statement of that fact is reiterated in the opinion of the court, still it does not appear to be the pivotal fact in the case, and the conclusion arrived at, judging by the reasoning of the court, would have been the same in the absence of that particular fact. The order appealed from is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

133 Cal. 441

SMITH v. BLANDIN. (Sac. 663.)

(Supreme Court of California. July 24, 1901.)

CONTRACTS FOR SALE OF LAND—RESCISSON—CONSIDERATION—FAILURE TO PERFORM—ACTIONS—COMPLAINT—DUPPLICITY—TENDER.

1. Under Civ. Code, §§ 1689, 3406, providing that a party may rescind a contract if, through the fault of the other party, the consideration fails in whole or in part; and section 1691, providing that, on rescission, everything of value received must be restored,—a complaint alleging that the sole consideration for a contract to convey land was one dollar and defendant's agreement to pay the price in installments at specified times, that such times had passed without payment, and the one dollar was returned, states a cause of action.

2. Under Civ. Code, § 1689, providing that a party to a contract may rescind if, through the fault of the other party, the consideration fails in whole or in part, when the contract to sell land is executory the failure of either party to perform his undertaking constitutes a failure of consideration.

3. The complaint in an action to rescind a contract to convey land, on the ground of defendant's failure to make payments as agreed, alleged that defendant had no intention to perform. *Held*, that the complaint was not demurrable for duplicity, since such allegation was not a statement of a separate cause of action, under Civ. Code, § 1572, providing that actual fraud consists of a promise made without any intention of performing it, to induce another party to enter into the contract.

4. Where plaintiff contracted to convey land to defendant on payments in installments, a certain amount of land, to be selected by defendant, to be conveyed after each payment, plaintiff need not tender a deed before bringing an action to rescind because defendant failed to make any payments.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by James C. Smith against Charles F. Blandin. From a judgment for plaintiff, defendant appeals. Affirmed.

Nowlin & Fassett and Farrall & Carroll, for appellant. Nicol, Orr & Nutter, for respondent.

CHIPMAN, C. Action to rescind a certain agreement between plaintiff and defendant

for the sale of land. Defendant demurred to the complaint on several grounds. His demurrer was overruled, and, defendant declining to answer, the court gave judgment for plaintiff. Defendant appeals from the judgment by bill of exceptions.

Plaintiff alleged ownership and possession of the land. That on June 30, 1898, plaintiff and defendant entered into the contract in question, which is set out in the complaint. By the terms of the contract plaintiff agreed to sell the land to defendant by bargain and sale deed, free from all incumbrances, "upon his demand and payment therefor as herein provided." The tract consisted of 2,231.42 acres, and the entire purchase price was \$400,000. The consideration mentioned was \$1, receipt of which was acknowledged, "and of the further payment of \$100,000 on or before October 30, 1899, in installments of \$10,000 each, beginning on the 30th day of October, 1898, and continuing on the 30th day of each and every month, until said \$100,000 was fully paid; and the further payment of \$75,000 on or before October 30, 1900, and \$75,000 on or before October 30, 1901, and \$75,000 October 30, 1902, and \$75,000 October 30, 1903,—making in all \$400,000. Interest was to be paid annually thereon at 6½ per cent. There were stipulations in the contract that as payments were made plaintiff was to convey a part of the land. Upon the first payment being made as agreed, plaintiff was to convey land at the rate of \$250 per acre, in a certain part of the tract "as may be elected or selected by" defendant, and so as to other payments; certain parts of the tract being designated out of which defendant was to make his selection. It was alleged "that the only consideration for the said contract received by this plaintiff was the promise and agreement on the part of defendant, Charles F. Blandin, to pay to this plaintiff the sums of money mentioned and specified in said contract at the times and in the amounts in said agreement specified"; that the first installment became payable October 30, 1898, but was not paid and has not been paid, "nor has he, said Blandin, at any time offered to pay said sum or any part thereof; that, through the fault of him, said Blandin, the consideration for said contract has failed." It is further alleged that the promises of defendant "were the considerations for the said agreement, and this plaintiff, in consideration of such promises and agreements; and not otherwise, made and executed said contract; that plaintiff believed and relied upon said promises and agreements made by said Blandin, and thereby he was induced to and did make and deliver said contract to him, said Blandin; and the plaintiff, on information and belief, alleges that said Blandin, at the time of making said agreements, had no intention to perform the same; that plaintiff has faithfully kept and performed said contract, and has at all times since the making thereof been ready, able,

and willing to do and perform each and every act and thing therein and thereby required to be done and performed by him; that on the 1st day of November, 1898, plaintiff notified said Charles F. Blandin that he rescinded the said contract and the whole thereof, and at the same time he restored to him, said Blandin, everything of value which he received from him under said contract, viz. the sum of one dollar in silver coin of the government of the United States; that notwithstanding the said failure of consideration and rescission said Blandin continues, without right, to assert and claim some interest in said premises under said contract." The complaint prays judgment decreeing "that by said rescission the said contract is extinguished and is of no force or effect"; that defendant has "no interest in or claim to the said described premises, or any part thereof, under, by virtue, or because of said contract," and for costs of action, "and for such other or further relief as to this honorable court may seem proper in the premises."

The demurrer on the ground of ambiguity will not be considered, as defendant does not insist upon it in his brief. A demurrer was interposed on the ground of misjoinder of causes of action; also a general demurrer on the grounds (1) that the complaint fails to show tender of a deed or offer to convey before the action was commenced; (2) it fails to show that plaintiff offered to permit defendant to select any lands which by the agreement he was to select on payment of \$10,000, or that plaintiff offered to join defendant in such selection; (3) it fails to show that plaintiff is able to perform.

Defendant's brief is directed mainly to his general demurrer, and his points may be summarized as follows: (1) That there is a failure to state a cause of action on the ground of fraud, under section 1572, Civ. Code, for the reason that there is no statement that plaintiff was induced to enter into the contract under promises of defendant made with intent to deceive plaintiff; (2) the contract cannot be rescinded for failure of consideration, because time is not of its essence, and also because there was no tender of a deed to defendant.

The misjoinder of actions relied on was that a cause of action to rescind upon the ground of actual fraud is united with a cause of action to rescind upon the ground of failure of consideration, and not separately stated. Plaintiff is proceeding under section 1689, Civ. Code, and not under section 1572, as claimed. Section 3406, Civ. Code, provides that "the rescission of a written contract may be adjudged, on the application of a party aggrieved, (1) in any of the cases mentioned in section 1689"; and this latter section provides that "a party to a contract may rescind the same in the following cases only: * * * (2) If, through the fault of the party as to whom he rescinds the consid-

eration for his obligation fails, in whole or in part; (3) if such consideration becomes entirely void for any cause; (4) if such consideration, before it is rendered to him, fails in any material respect, from any cause." Section 1691, *Id.*, prescribes the conditions upon which rescission can be accomplished, and they are: (1) That he must rescind promptly; and (2) he must restore to the other party everything of value which he has received from him under the contract.

It is not necessary to inquire whether the complaint states facts sufficient to constitute a good ground for rescission for fraud. The contract is executory. As was said in *Richter v. Stock Co.*, 129 Cal. 367, 62 Pac. 39: "In all executory contracts, the several obligations of the parties constitute to each, reciprocally, the consideration of the contract; and a failure to perform constitutes a failure of consideration, either partial or total, as the case may be, within the meaning of section 1689 of the Civil Code." The complaint states that plaintiff promised to convey upon payment being made by defendant at the time agreed, and that the consideration which induced plaintiff to enter into the contract was such payment by defendant. The failure of defendant to make the payment as agreed constituted a failure of consideration, and plaintiff could at once rescind, as he alleges he did, having first returned to defendant everything of value received by plaintiff. If there existed any equitable considerations which would entitle defendant to performance, they cannot be determined on the demurrer, but should have been pleaded by answer. The contention that the complaint lacks in the vital particular that it does not show time to have been of the essence of the contract cannot be maintained. The complaint could not so state, for the contract contained no such provision. Nevertheless the breach on defendant's part was complete when he failed to pay as he agreed. What the respective rights of the parties would be had the contract contained the clause as to time being of its essence need not be considered. But if it had contained such a provision defendant would be required to perform before he could avail himself of it. He could not refuse to make any payment, and at the same time hold plaintiff to performance. Where the contract does not contain a provision that time is to be of its essence, defendant's rights are defined in section 1492 of the Civil Code. See, for a full consideration of meaning of the clause referred to, and as to the rights of the purchaser, *Glock v. Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199.

Plaintiff was not called upon to deliver, or offer to deliver, a deed before rescinding. Defendant put himself in default by failure to make the payment he had agreed to make. The contract left with defendant the selection of the land to be deeded upon any pay-

ment made. Plaintiff could not know in advance what land defendant would select, and he could not, without such knowledge, make tender of a deed. It was only after payment and selection made by defendant that plaintiff was to convey.

Nor can we discover any misjoinder of causes of action. Plaintiff is not rescinding on the ground of fraud, in its legal sense. The ground for rescission is the failure of consideration caused by defendant's breach of the contract.

The facts alleged state but one cause of action. The complaint, when reduced to concrete form, simply alleges plaintiff's right as growing out of his agreement to sell and defendant's agreement to purchase, and alleges defendant's wrong in refusing to perform his part of the contract, out of which arises the cause of action alleged.

There was a motion to strike out certain portions of the complaint, and the bill of exceptions brings up for review the order denying the motion. The alleged error is not now urged. It is advised that the judgment be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(133 Cal. 426)

**GERMAIN FRUIT CO. v. CALIFORNIA S.
R. CO. (L. A. 834.)**

(Supreme Court of California. July 24, 1901.)

**CARRIERS—RAILROADS—CONTRACTS—CON-
STRUCTION.**

Plaintiff delivered a shipment of oranges to the defendant to be transported to C., a place beyond the terminus of defendant's road. The bill of lading provided that the goods were to be transported over defendant's road to the company's freight station, "as designated below," and the only place mentioned in the bill was C, though this was in connection with a guaranty of the freight rate. The contract also limited the liability of the defendant to its own road. *Held*, that the defendant contracted to transport the goods to C., and was liable for delivering them to the wrong parties at such station.

Department 1. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by the Germain Fruit Company against the California Southern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. N. Sterry and Henry J. Stevens, for appellant. J. S. Chapman, for respondent.

GAROUTTE, J. This action is brought against defendant, a common carrier, to recover as damages the value of 300 boxes of oranges consigned by plaintiff at Los Angeles to itself at Chicago. Upon the arrival of this fruit at Chicago, a mistake in the delivery thereof was made, and negligence

in this regard is charged against defendant. The case is here upon an agreed statement of facts, and the construction of the contract entered into between the parties is the real question before the court. The aforesaid contract is evidenced by a writing, and the material part thereof is as follows: "California Southern Railroad Co. Bill of Lading. * * * Los Angeles, Cal., May 6, 1887. Received from Germain Fruit Co. the following described packages in apparent good order, * * * consigned as marked and numbered in the margin, to be transported over the line of this road to the company's freight station, as designated below, and delivered in like good order to the consignee or owner, or to the order of said consignee or owner, at said station, or to such company or carriers (if the same are destined to a point beyond said station) whose line may be considered a part of the route, to the place of destination of said goods or packages, it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where delivered to such person or carrier, the company being liable as warehousemen only; but it guaranties, upon the conditions expressed herein, * * * that the rate of freight for the transportation of said packages from the place of shipment to Chicago shall not exceed \$1.15 per cwt. and charges advanced by this company." The important question presented from a construction of the foregoing writing is, did the defendant agree to transport this fruit to Chicago? It is contended upon the part of defendant that it only agreed to transport it to Barstow, the terminus of its road. It needs but a glance at the entire writing to justify the declaration that it is somewhat vague and indefinite; and, as pointed out by this court in the case of Colfax Mountain Fruit Co. v. Southern Pac. Co., 118 Cal. 649, 50 Pac. 775, 40 L. R. A. 78, the indefiniteness and ambiguities in this character of contract arise largely from the fact that railroad companies use the same form of shipping contract for the transportation of freight upon their own lines alone as they do for the transportation of freight upon their own lines in conjunction with connecting lines. Litigation of the character here involved would be to a great degree avoided if different forms of shipping contracts were used for these different classes of transportation. It will also be borne in mind that in the consideration of the question before us it is a material element that this form of contract was prepared by defendant. A railroad company, as a common carrier, may contract to carry freight beyond the terminus of its own line of road, thereby making connecting lines its agents for that purpose (Colfax Mountain Fruit Co. v. Southern Pacific Co.,

supra); and we have concluded that such was the character of the contract made in this case. As already suggested, by reason of a single printed form being used in all of its contracts for the carriage of freight, apparent inconsistencies show themselves in the context of this instrument; yet that it was the intention of both parties defendant should transport this fruit to Chicago is made plain. It is recited in the agreed statement of facts "that the California Southern Railroad Company, the California Central Railway Company, and the Atlantic & Pacific Railroad Company are all parts of a general system of the Atchison, Topeka & Santa Fé Railroad Company," and it was upon the respective lines of this general system that this fruit was transported to Chicago. The fruit was consigned to plaintiff at Chicago. Freight was paid upon it to Chicago. It was carried to Chicago without change of cars; and the defendant agreed to transport the fruit "over the line of this road to the company's freight station, as designated below." Upon examination of this contract "below," we find the following: "But it guaranties * * * that the rate of freight for the transportation of said packages from the place of shipment to Chicago shall not exceed," etc. Thus it appears that Chicago is the station designated. It is not only the station designated "below," but it is the only station designated in any portion of the instrument. If the word "Chicago" had been used in the body of the writing in lieu of the words "designated below," then there could be no question whatever as to the proper construction to be given the language. Yet, if these words "designated below" mean anything, they must be held to refer to the word "Chicago." If this be not so, then there was no express contract to carry the fruit to any designated place or station, for no other place or station is suggested. Barstow, a station claimed by appellant to be the terminal point of its road, is not mentioned anywhere in the instrument.

Appellant attaches importance to the clause in the agreement limiting its liability as a common carrier to its own line of road. It is only necessary to say that if appellant agreed to deliver this fruit to a named consignee in Chicago, and delivered it to some one else there, then a breach of its contract was committed, and a clear legal liability established. The court is satisfied that the complaint is sufficiently broad to justify a recovery upon that theory.

For the foregoing reasons it is ordered that the judgment and order appealed from be affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

133 Cal. 508

O'LEARY v. CASTLE et al. (L. A. 818.)

(Supreme Court of California. Aug. 2, 1901.)

APPEAL—MOTION FOR NEW TRIAL—INSUFFICIENCY OF EVIDENCE—SPECIFICATIONS.

Under Code Civ. Proc. § 659, providing that, when the notice of motion for new trial designates as the ground of the motion the insufficiency of the evidence to justify the decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient, the question of want of evidence to support the findings cannot be considered on appeal where there are no such specifications.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; J. W. Mahon, Judge.

Action by Timothy O'Leary against Zerah Castle and another. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

W. A. Harris and L. R. Garrett, for appellants. Charles L. Batcheller, for respondent.

COOPER, C. This action was brought to recover \$2,000, balance claimed to be due plaintiff upon a written contract for services in the development of certain mines, upon a contingent contract providing for such payment in case of the said mines being sold. Findings were filed, upon which judgment was entered for plaintiff. Appellants made a motion for a new trial, which was denied, and this appeal is from the judgment and order, upon the judgment roll and a statement on motion for new trial. It is claimed that certain findings are not supported by the evidence, but we cannot examine this question on the record here presented. The Code provides that, when the notice of motion for new trial designates as the ground of the motion the insufficiency of the evidence to justify the decision, "the statement shall specify the particulars in which such evidence is alleged to be insufficient." Code Civ. Proc. § 659. In this case the statement contains no specification whatever. It was settled June 3, 1899. There is printed in the record what appears to be a copy of certain specifications as to the alleged insufficiency, but it is no part of the statement, is wholly without authentication, and is signed by appellants' attorneys only. It is marked "Filed June 12, 1899." This paper is no part of the statement or record.

It is also argued that the appellants were improperly joined with the other defendants in the action. The court found that there was no misjoinder, and we must presume that the finding is supported by the evidence, in the absence of any specification of insufficiency. The judgment is the legal conclusion from the facts found. The court found that the said \$2,000 is wholly unpaid, and that appellants are indebted to plaintiff for said amount. The judgment and order should be affirmed.

We concur: SMITH, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

6 Cal. Unrep. 716

DE CARRION v. DE AGUAYO et al. (L. A. 903.)

(Supreme Court of California. July 29, 1901.)

On motion for hearing in bank. Denied.

For opinion in department, see 65 Pac. 618.

PER CURIAM. Rehearing denied.

McFARLAND, J. I concur in the denial of a hearing in bank, but I think that the expression in the opinion that "in case of a substantial conflict in the evidence the finding of the court below is conclusive here" should be stricken out. That rule does not apply to a case where an absolute deed is sought to be declared to be something else.

I concur: BEATTY, C. J.

6 Cal. Unrep. 731

ANDERSON v. SOUTHERN PAC. R. CO. (L. A. 866.)

(Supreme Court of California. July 25, 1901.)

APPEAL—FINDING OF FACT.

In an action to recover purchase money paid on contracts for the sale of lands claimed by defendant under grants from the United States, which contracts provided that the money was to be returned in case "it shall finally be determined" that patents shall not issue to the defendant, a finding that neither the supreme court of the United States nor any court had determined that patents should not issue to the defendants for the land in question was a finding of fact, and not a conclusion of law; the complaint alleging that a contrary finding had been made by the United States supreme court, which allegation was denied.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by C. V. Anderson against the Southern Pacific Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Anderson & Anderson, for appellant. Wm. Singer, Jr., and H. V. Reardan, for respondent.

VAN DYKE, J. This action is brought to recover purchase money paid on several contracts given by the defendant to two certain parties, and by them assigned to plaintiff, for the sale of lands claimed by defendant under grants from the United States. Among other things, each of said contracts contains the following clause, to wit: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that as, in consequence of circumstances beyond its control, it sometimes

fails to obtain patent for lands that seem to be a portion of its said grant, therefore, nothing in this instrument shall be considered a guaranty or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for." The court found "that it has not been finally determined by the supreme court of the United States, or by any court or tribunal, that patents should not issue to the defendant for the lands described in each of the several counts of the plaintiff's complaint herein, or for any part or parcel thereof." Appellant contends this is not a finding of facts, but a conclusion of law. In this he is clearly mistaken. It is alleged in the complaint "that it has been finally determined by the supreme court of the United States that patents for said tracts of land shall not issue to the defendant company," and without such an averment in the complaint it would have failed to state a cause of action. The answer denies specifically this allegation of the complaint, thus presenting an issue of fact, and a vital one at that. Under this state of the pleadings, the burden was upon the plaintiff to establish by evidence, documentary or otherwise, the affirmative of that issue, and the court by its findings says he did not do so. On an appeal like this from the judgment, upon the judgment roll alone, without a bill of exceptions or statement, this court can only examine the findings upon which the judgment is based; "all between that and the pleadings drop out of the case." *Harper v. Minor*, 27 Cal. 109. This rule is thoroughly well settled. *Tomlinson v. Ayres*, 117 Cal. 568, 49 Pac. 717; *Hayne*, New Trials, § 229, and cases there cited. In the absence of the evidence, the opinions of courts cited by appellant's counsel are of no avail, for it cannot be said that the facts proved here are identical with the facts proved in such cited cases. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

133 Cal. 409

CROCKER-WOOLWORTH NAT. BANK OF
SAN FRANCISCO v. CARLE. (Sac. 741.)

(Supreme Court of California. July 24, 1901.)

ESTATES—CLAIMS—PARTICULARS—PROMIS-
SORY NOTE—CONTINGENCY—
"DUE"—"OWING."

1. Where a claim against the estate of a decedent consists of a note not then due, a copy of the note, followed by the statutory affidavit, is sufficient, under Code Civ. Proc. § 1494, which requires that "if the claim be not due when presented, or be contingent, the particulars of such claim must be stated."

2. Where a note is payable on or before the completion of a specified contract, the promise

to pay is absolute; the completion of the contract merely fixing the time of payment.

3. An affidavit to a claim against the estate of a decedent, which is actually owing, but not then payable, is not false in stating that such claim is "due," since the word is there used in its primary sense of "owing."

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Action by the Crocker-Woolworth National Bank of San Francisco against Malissa S. Carle, executrix of the will of Silas Carle, deceased. From a judgment for defendant, plaintiff appeals. Reversed.

Chas. M. Beckwith, for appellant. Holl & Dunn, for respondent.

SMITH, C. The plaintiff sued as assignee to recover the amount due on a promissory note of date August 5, 1897, made by Silas Carle, the defendant's testator, to the "Rae Building & Contracting Co." for the sum of \$1,000; "said amount to be paid on or before the completion of a certain contract entered into the month of September, 1896, by and between [the maker] and the board of regents of the University of California," etc., and assigned to the plaintiff. The complaint, besides the other necessary allegations, alleges the death of the maker on or about September 20, 1897, the presentation of the claim to the executrix May 13, 1898, and its rejection; but it is further alleged that the contract referred to in the note was completed on or about September 8, 1898, i. e. subsequent to the presentation of the claim. Judgment was rendered for the defendant on demurrer.

The principal objection made to the complaint is that the note was not due when presented, and that the claim does not conform to the provisions of section 1494, Code Civ. Proc., which requires that "if the claim be not due when presented, or be contingent, the particulars of such claim must be stated." The claim—of which a copy is attached to the complaint—is in the usual form, containing a copy of the note, followed by the affidavit required by the provisions of the section cited. This, we think, was a substantial compliance with the law, and that "the particulars of the claim are sufficiently stated." *Landis v. Woodman*, 126 Cal. 454, 58 Pac. 857. As said in the case cited: "A promissory note past due requires no statement of particulars other than that found upon its face; yet there is no good reason why the law should make any different rules in the two cases,"—i. e. in the cases of notes before and after maturity. It is, however, claimed by the counsel for respondent that the case at bar is to be distinguished from the case cited in the following particulars: (1) The promise to pay, it is claimed, is in this case contingent on the completion of the contract referred to in the note; or (2) if not contingent, the date of payment is uncertain; and (3) the affidavit that the claim was due was false. But

we do not think that any of these objections can be sustained. The promise to pay was not contingent, but was absolute. The completion of the contract was referred to merely as fixing the time. 1 Daniel, Neg. Inst. §§ 44, 88; Cota v. Buck, 7 Metc. (Mass.) 588, 41 Am. Dec. 464. The note involved in Chandler v. Carey, 64 Mich. 237, 31 N. W. 309, cited by respondent's counsel, was altogether different. The other cases cited have no application, except Cota v. Buck, supra. It is immaterial that the time of payment was not a fixed date. It was a matter more peculiarly within the knowledge of the executrix than of the plaintiff. Finally, the affidavit was not false in saying the claim was "due." The word was evidently used in its primary and proper sense, as meaning simply "owing." Cent. Dig., word "Due," par. 6; Bouv. Law Dict., same word. The word is also sometimes used in the sense of "payable," but this is a secondary sense. In section 1494, Code Civ. Proc., it is used in both senses, viz. in the clause "if the claim be not due when presented," etc., and in the clause "every claim which is due," etc., where the term is used in the sense of "payable," and in the clause "justly due," required in the affidavit, where it is used in the sense of "owing." Otherwise, no affidavit would be required in the case of claims presented before maturity.

An objection is also made to the complaint that it is not alleged that the payee of the note was a corporation, or a co-partnership, or a mere nonentity. Such an allegation was quite unnecessary; but were it otherwise, the note, which is attached to the complaint as part of it, was written on a bill head of the payee, where the concern named in the note is expressly referred to as "incorporated." Evidence of the fact is therefore furnished by the writing itself, signed by the maker. I advise that the judgment be reversed.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

133 Cal. 420

BLACKBURN v. WEBB et al. (L. A. 873.)
(Supreme Court of California. July 24, 1901.)

WILLS—TRUSTS—TITLE OF BENEFICIARIES—
CONVEYANCE—INCOME—DISTRIBUTION.

Where a will left land and property thereon to a trustee for certain children, "to hold and to manage until the youngest child shall have attained his majority, at which event said property shall vest absolutely in the children," and the decree of distribution to the trustee followed the language of the will, the trust was within Civ. Code, § 863, declaring that beneficiaries take no estate in the property, but may enforce the trust, and was not under section 867, permitting a beneficiary of a trust for rents and profits to transfer his interest; and a transferee of one of the children before the time limited had no present right to a share of the income.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

Proceedings by Cecelia Blackburn, trustee, against W. H. Webb, F. A. Dorn, and others to quiet title. From a judgment in plaintiff's favor, defendant Dorn appeals. Affirmed.

William Shipsey, for appellant. W. H. Spencer, for respondent.

CHIPMAN, C. Action to quiet title. The cause was dismissed as to all the defendants except Dorn. James H. Blackburn died testate, and in his will he provided as follows: "I give, devise, and bequeath to Frank Blackburn, Harry Blackburn, Daniel Blackburn, and Frederick Blackburn, children of Daniel and Cecelia Blackburn, my dairy ranches, part of the Rancho San Jeronimo, in San Luis Obispo, state of California, together with all the personal property thereon; and for the better preservation of said property, I hereby appoint their mother, Mrs. Cecilia Blackburn, trustee for said children and property, to have and to hold said property, and the whole thereof, and to manage the same, until the youngest of said children shall have attained his majority, at which event said property shall vest absolutely in the four children in this devise mentioned, and not before." On August 17, 1888, the property in question was distributed, in accordance with the terms of the will, to the said Cecilia Blackburn, "as such trustee, to have and to hold said property, and the whole thereof, and to manage the same, until the youngest of said children shall have attained his majority, at which event said property shall vest absolutely in said four children." No appeal was taken from the decree. The trust was accepted, the trustee went into possession under the decree, and ever since has been in possession, "and every year during her said possession she has collected and received the rents, issues, and profits of said real property." All the devisees are adults except Frederick Blackburn, who is a minor. On December 20, 1895, Harry Blackburn, one of said devisees, conveyed to defendant Dorn, by deed of grant, bargain, and sale, for a valuable consideration, an undivided one-sixteenth of all the said real property, "together with all and singular the tenements * * * rents, issues, and profits thereof," and said Dorn is still "the owner of the property, estate, and interest, rents, issues, and profits so conveyed to him," being an undivided one-fourth of the aforesaid interest of said Harry Blackburn. Defendant Dorn, ever since the delivery to him of said deed, has claimed, and now claims, to be entitled to the rents, issues, and profits accruing since the date of his deed, and is entitled to have the same paid to him, from time to time, as they accrue. From the foregoing facts, taken from the findings, the court found as conclusions of law that plaintiff, as trustee

of the devisees of the will and their successors in interest, "owns an estate in the above-described land, with its tenements, * * * during the minority of said Frederick Blackburn; that she has a right to hold, possess, and manage the whole of said property during said minority, for the purposes of the trust; that she has no other or greater estate * * * in or to said property; * * * and that she has a right to have her afore-said estate and title quieted, in accordance with this conclusion." As to defendant Dorn the court found, in accordance with the foregoing facts, that, "upon the termination of said estate during minority, he or his successor in interest will be entitled to the possession of said real property, as tenant in common with whoever may then own the other undivided interest or interests in said property"; and it was adjudged in the judgment that he would be entitled to his proportion of the rents, issues, and profits "which will accrue after the termination of said estate during minority." The appeal is from the judgment on the judgment roll.

The sole question is, may defendant Dorn compel the payment to him of a proportionate shares of the rents, issues, and profits of the land from December 20, 1895, and during the minority of Frederick Blackburn? We must look to the decree of distribution to discover the interest in the property owned by appellant's grantor at the date of his deed. *Williams v. Marx*, 124 Cal. 22, 56 Pac. 603, and cases there cited. By the creation of the trust the whole estate vested in the trustee, "subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust." Civ. Code, § 863; *In re Walkerly's Estate*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97. No present interest in the land passed to the children, but a future estate vested (Id. §§ 680, 690, 694), and could be transferred (Id. § 699). It is also true that under section 867 of the same Code, as it now reads, the beneficiary of a trust for the receipt of the rents and profits of real property may transfer his right thereto (*Fatjo v. Swasey*, 111 Cal. 628, 44 Pac. 225), notwithstanding the provisions of section 863, supra. But unless such a trust was here created, the section would not apply.

Appellant contends that the only right given by the decree of distribution to the trustee is to "have and hold" and "manage" the land, that there is no authority given the trustee to receive the rents, certainly none to accumulate them, and that it follows that the beneficiaries are entitled to the rents as fast as they accrue; citing *Coburn v. Anderson*, 131 Mass. 513. This case does not support appellant. The testator made the following provision in his will: "I give and devise to my said executor eight hundred dollars in money, to have and to hold the same to the use of my sister S., as follows: I desire, in case my sister S. should at any time

need assistance or come to want, that my executor should expend such part of said eight hundred dollars as will make her comfortable and keep her so during her lifetime. The remainder, if any, * * * at the time of the decease of said S., I give and devise to my brother, said P., and his heirs." It was held that the testator intended to create a trust in the money given for the use of S., and that he also intended that the income of the fund should be paid to her during life, and so much of the principal as might be necessary for her comfortable support, if she should come to want. We find no intention in the devise before us, nor can the decree be construed to mean, that the incomes were to be paid to the devisees as they accrued. The decree conveys the land to Mrs. Blackburn as "trustee, to have and to hold said property, and the whole thereof, and to manage the same, until the youngest of said children shall have attained his majority, at which event said property shall vest absolutely in" said four children. It was competent for the testator to create a trust to receive the rents and profits, and to accumulate the same, within the limits prescribed by title 2, pt. 1, of the Civil Code; section 857, subd. 4, Id. The testator, however, did not specifically provide for the disposition of the accruing incomes, nor did the decree do so, for it followed the language of the will. We are left to determine the question from the language used in the decree. By it the legal title to the land vested in the trustee, and, in the absence of any provision as to incomes, carried with it the right to the rents and profits, for she was to have and to hold and manage the property during the continuance of the trust, and it was not to vest in the beneficiaries until the happening of the future event named. What right the beneficiaries may have at the termination of the trust to the accumulated incomes, should there be any, is a question not now necessarily before us, and need not be decided.

No question is raised as to the right of plaintiff to the relief prayed for. The judgment quiets plaintiff's title as against the present right of Dorn to demand and receive any part of the rents and profits of the property, and in our opinion the judgment should be affirmed, and we so advise.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed

6 Cal. Unrep. 743

JOHNSON-LOCKE MERCANTILE CO. v.
HOWARD. (Sac. 778.)

(Supreme Court of California. July 25, 1901.)

CONTRACTS—SALES—TENDER—QUALITY.

1. Defendant, in writing, authorized plaintiff to sell all his crop of raisins at specified prices

and terms. Shortly after, plaintiff notified him by letter that sale had been so made, repeating the prices and terms, and asking confirmation. Defendant answered that he wished to confirm sale to plaintiff of his entire crop at the prices and terms specified. Plaintiff answered, accepting the modification, making it the purchaser, and inquiring when the raisins would be ready for inspection and shipment. At the time defendant said the crop would be ready, plaintiff sent its agent, who inspected and accepted all except a few boxes, which he claimed were marked a grade too high; but said he would accept them at the grade they actually inspected. Afterwards defendant refused to deliver any of the raisins. *Held*, that there was a contract binding on defendant to sell all his crop to plaintiff at the prices and terms specified.

2. Where, on a contract for the purchase of raisins, plaintiff tendered its check for the proper amount in payment, and no objection was made to the amount or form of the tender, defendant cannot afterwards object that the tender was not in money.

3. Where defendant contracted to sell his entire crop of raisins to be Fresno grade, he could not invalidate the contract by marking boxes of a higher quality than the raisins would grade, but plaintiff was entitled to the crop at the actual grades by the standard agreed on in the contract.

Department 1. Appeal from superior court, Yolo county; E. E. Gaddis, Judge.

Action by the Johnson-Locke Mercantile Company against H. C. Howard. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

E. R. Bush (R. Clark, of counsel), for appellant. Hudson Grant, for respondent.

PER CURIAM. Action on contract for the sale and purchase of certain raisins. Plaintiff had judgment, from which, and from the order denying his motion for a new trial, defendant appeals.

The court found the following facts: (1) That on or about July 30, 1898, the plaintiff agreed to buy from defendant, and defendant agreed to sell to plaintiff, the entire crop of muscat raisins of defendant, produced in the year 1898, estimated to be eight car loads, at the following prices, to wit: For 2-crown raisins, $2\frac{1}{2}$ cents per pound; for 3-crown raisins, 3 cents per pound; for 4-crown raisins, 4 cents per pound; for seedless raisins, $2\frac{1}{2}$ cents per pound,—less 5 per cent. of the gross amount computed at the above rates. Whole crop to be boxed in 50-pound boxes, and to be shipped in October, 1898. Fresno grading. Terms cash on delivery f. o. b. Woodland, Cal. (2) That the crop fell far short of the estimate, there being only 2,192 boxes, as follows: 1,158 boxes of 2-crown raisins, 734 boxes of 3-crown, 88 boxes of 4-crown, and 212 boxes of seedless raisins, of the aggregate value of \$2,840.02. (3) That on October 31, 1898, plaintiff offered to accept the above-mentioned quantities in fulfillment of defendant's agreement, and tendered him therefor the sum of \$2,860.21 (being \$20.19 in excess of the amount due), and demanded delivery,

but defendant refused to deliver the raisins, or any part thereof, to plaintiff's damage in the sum of \$814.72. (4) That the tender made by plaintiff was a draft on plaintiff, payable to defendant's order, for \$2,860.21, "which the defendant refused to accept, and refused to deliver the raisins, or any part thereof; but at the time of the tender of the check aforesaid, the defendant made no objection to the said check, or to the amount thereof, or to the form or manner of the plaintiff's tender." Defendant alleged in his answer, in effect, that negotiations were entered upon in July, 1898, for the purchase by plaintiff and sale by defendant of the raisins in question, and that the negotiations continued until about October 30, 1898, "but at no time was any final and conclusive agreement made or entered into by and between the parties in respect of said crop of raisins, or in respect to all the terms and conditions of such purchase and sale thereof, and said negotiations were never finally consummated or brought to a close until on or about said 30th day of October, 1898"; that about said date plaintiff sent its duly-authorized agent, one C. C. Kinsey, from San Francisco, to examine said crop of raisins, with a view of finally consummating said negotiations; that said agent made examination of the raisins, and thereupon refused to comply with the terms mentioned during the negotiations, and thereupon defendant "broke off all further negotiations with said plaintiff relative to such purchase and sale of said crop of raisins, and put an end to the same, and refused to have any further dealings with said plaintiff with regard thereto, and then and there so notified said plaintiff; that afterwards, to wit, on or about October 31st, and at the time mentioned in plaintiff's complaint, the said Kinsey, acting as the agent of said plaintiff, made the offer, tender, and demand hereinbefore set out in this answer." As to these allegations the court found: (5) That they "are not true as therein made, but in relation thereto the court finds that on or about the 30th day of July, 1898, the plaintiff and defendant entered into negotiations which resulted in the agreement on the part of plaintiff to buy, and on the part of the defendant to sell, all of his crop of muscat raisins of the year 1898, as alleged in plaintiff's amended complaint," and as above stated in findings 1, 2, and 3; "that it is true that on or about the 30th day of October, 1898, the plaintiff sent its authorized agent, C. C. Kinsey, from San Francisco to the farm of defendant, to examine said crop and accepted the same." It was further found that the said Kinsey did not refuse to comply with the terms mentioned during said negotiations, nor did he repudiate the offers made by plaintiff during said negotiations; but that it is true that "defendant then and there broke off all further negotiations with plaintiff relative to said

purchase and sale of said crop of raisins, and refused to have any further dealings with plaintiff in regard thereto, and so notified said Kinsey"; and that on October 31, 1898, the said Kinsey made the tender and demand as already shown.

Appellant's points are: (1) That the evidence does not sustain the findings that an agreement was made on or about July 30, 1898; (2) that the finding that such agreement was made is irreconcilable with finding 5; (3) that the evidence does not support finding 5 that there was an acceptance October 30th; (4) that no tender was made.

The transaction must be judged by what the parties did and said in the course of their dealings. Defendant argues the case on the assumption that the agreement found by the court rested entirely on the letters written by the respective parties, one to the other. The contract, as we view the matter, was the result in part of a written memorandum signed by defendant July 18, 1898, in part of letters subsequently passing between plaintiff and defendant, in part of what occurred between the parties when plaintiff examined the fruit, accepted it, and made tender of payment. If the agreement rested wholly on the letters, it would become a matter of law whether they constituted a contract, and we would probably be called upon to state the correspondence in extenso. Not being such a case, there would seem to be no necessity for setting forth all the letters in full, and all the evidence bearing upon the question whether there was a contract as found by the court. The witness Kinsey, who was the agent of plaintiff, and conducted the negotiations on the part of plaintiff, testified that defendant came to plaintiff's office in San Francisco, and stated that he would have certain raisins on his farms near Woodland and Blacks, and desired to make sale of them. Defendant stated the price he wanted. Kinsey wrote in plaintiff's book used for such purposes, July 18, 1898, the following memorandum, which defendant then and there signed: "Henry Howard authorizes us to quote and sell entire crop of raisins within fifteen days, shipment October, 1898, at 2½ cents for 2-crowns, 3 cents for 3-crowns, 4 cents for 4-crowns, seedless 2½ cents; in 50-pound boxes; less 5 per cent. Estimated 8 car loads. Estimate to consist of one-sixth 4-crowns, one-sixth seedless, one-sixth 2-crowns, one-half 3-crowns. Fresno grading." On July 29th plaintiff wrote defendant that a sale had been made in accordance with the authority given in the memorandum of July 18th, repeating the gradings and prices in the memorandum, and closing, "Please confirm, and oblige." To this letter asking confirmation defendant wrote plaintiff on July 30th as follows: "I wish to confirm sale to you of my entire crop of muscat raisins at the following prices: 4-crown, 4 cents; 3-crown, 3 cents; 2-crown, 2½ cents; seedless muscat, 2½ cents; less 5 per cent. commis-

sion to you. Terms cash. Delivery f. o. b. Woodland." It will be observed that this confirmation by defendant treated the memorandum as a sale to plaintiff, rather than as confirming an authority to sell. In other respects it confirmed the memorandum. Plaintiff again wrote to defendant August 1st, acknowledging his letter of July 30th, in which reference is made to defendant's letter as confirming the sale to plaintiff, apparently accepting the change from an authority to sell to an absolute sale to plaintiff, stating, "This is all in order," but, to avoid any misunderstanding, plaintiff restates the terms of the memorandum with some amplifications, but making no material changes as to prices or other conditions in the memorandum. The shipping point was stated "Woodland or common shipping point," whereas defendant had stated it as Woodland. Hearing nothing in reply, plaintiff again wrote defendant August 16th, asking confirmation, "so that we [plaintiff] may pass contract with our New York people." Defendant replied, August 18th, that, if his confirmation of July 30th was not sufficient, "we had better call the whole thing off," to which plaintiff replied that this was impossible, as the goods had been sold by plaintiff in accordance with the original memorandum. Plaintiff added: "However, let the matter stand just as it is for the present, and we will examine the raisins before shipment, and pay you cash for them against bill of lading as originally agreed. Please let us know by return mail what is the earliest possible date you think you can commence shipping these raisins, as, the earlier they are shipped, the better." Defendant replied August 27th: "In reply will say you wanted so many confirmations on raisin deal that I thought possibly you wished to call it off. I will be ready on my part to deliver the raisins just as fast as I can get them ready. Can't say how soon, but will try and get at least one car off in September." No further correspondence took place until, September 22d, plaintiff wrote inquiring how defendant was getting along with his drying, and making some other inquiries, and also suggested that the separate grades should be shipped in separate cars. Defendant replied September 24th that to ship each grade separately would delay shipment, and be a great inconvenience to defendant; and he closes, "I shall expect to deliver in car lots as fast as ready, irrespective of grades, as originally agreed upon." Plaintiff replied October 4th, regretting that each grade could not be shipped separately, but said the matter could be arranged so that there would be no additional expense to defendant, and adding: "We will have to suit your convenience. Let us know when you will have the raisins ready for examination, and we will do the needful at once." Towards the end of the month (October) plaintiff again wrote, inquiring how soon some raisins would be ready to ship, and on October 22d defendant replied: "The raisins are

not quite all dry yet. Will have most of them ready by the 29th." An effort was made by plaintiff to get defendant to the telephone, which failing, plaintiff on October 25th wrote him, acknowledging receipt of his letter of the 22d, and asking how many raisins defendant would have ready by the 29th. This closed the correspondence, and about October 28th Kinsey went to Woodland on a request by telephone from defendant. The two went to defendant's packing house at Blacks. There is evidence tending to show that Kinsey examined the raisins, and accepted all of them except 88 boxes marked 4-crowns, which were in fact only 3-crowns. These he was willing to receive as 3-crowns, but would not receive them as 4-crowns. He also offered to take them, and ship them, and allow defendant what they brought. Defendant made no statement one way or the other at that time as to these 4-crown raisins, but both parties proceeded to get ready to ship the raisins; defendant saying that he could put on four teams, and could deliver in time to make the shipment in October. They then went to Woodland, where defendant had some more raisins in a packing house. Defendant gave Kinsey a list of the boxes there. Kinsey examined them, and found them satisfactory, and accepted them. Kinsey met defendant later; had some further talk about shipping; told defendant he must telephone his house the quantities defendant had reported, so that the New York customer could be notified at once. This Kinsey did, and on returning from the telephone office met defendant, who then told him he would not deliver the fruit, and, on demand being made, positively refused. Kinsey, on the next day, again demanded the fruit, and on refusal tendered his check, drawn on plaintiff, for the full amount, as found by the court. This tender included the 4-crown raisins at 4-crown prices, and covered the entire lot at the agreed prices and as graded by defendant. There was evidence that the 88 boxes of raisins marked 4-crowns were in fact only 3-crowns.

Defendant relies on *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136, and cases where the same principle there decided was involved. The contract there related to the sale of land, which plaintiff sought to prove by a series of letters written by the parties. The court held that the correspondence failed to show a meeting of the minds of the parties, and that oral testimony could not be received, as plaintiff had failed to prove an agreement in writing, there being no pretense of part performance. The rules of law laid down in that case need not be disputed. Before the court can determine that letters which have passed between parties constitute an agreement, they must show an unqualified acceptance of the actual thing proposed. There must be a proposal squarely assented to. It was so held, and that is undoubtedly the law. But here we may look to the entire transaction

from its inception to its close. Not only may we look to the memorandum, and what took place at the time it was signed, and to the subsequent correspondence, but we may look to the acts and words of the parties after the correspondence ceased, and while they were giving a practical construction to their correspondence by their acts and words. Looking to all these facts and circumstances, they show entire agreement on all essential elements of the contract. There was no misunderstanding, even as to the right of plaintiff to examine the raisins, and to insist that they should come up to the grade agreed upon. Defendant cites *Benj. Sales* (6th Am. Ed.) 488, to the point that the fact the goods must be examined and paid for later would make no difference as to the binding effect of the agreement. Plaintiff did not agree to receive, and defendant did not expect to deliver, raisins other than according to Fresno grade, and the evidence was that the 88 boxes of 4-crowns did not come up to Fresno grading, and were properly rejected as such. But this rejection did not affect the validity of the contract. The evidence was that they were 3-crowns, and plaintiff was willing to accept them as such. Plaintiff also offered to receive them and allow for 4-crowns if they could be made to pass as such; and finally plaintiff concluded to accept them as 4-crowns, and made tender for them as such. We think that the agreement found by the court clearly resulted from the evidence, and that the evidence sustains the finding.

2. It is doubtful whether any tender was necessary after defendant refused absolutely to deliver the goods. But it is certain that he cannot now be heard to object that the tender was insufficient because made by a check, and not in money. The court found and the evidence was that "at the time of the tender of the check aforesaid the defendant made no objection to said check, or to the amount thereof, or to the form or manner of the plaintiff's tender." Defendant testified, "The reason I refused to deliver the fruit and accept the money was because Kinsey refused to take my 4-crown raisins at 4-crown prices;" and he testified that he "did not object to the kind of money offered." All objections to the character of the tender must be considered as having been waived. Civ. Code, § 1501; Code Civ. Proc. § 2076.

3. We discover no irreconcilability between finding 1 and finding 5. Defendant's agreement was to sell his entire crop; but the raisins were to be Fresno grade, and plaintiff had the right to insist upon delivery according to this grade. Defendant could not invalidate the contract by boxing 3-crowns and marking them 4-crowns. He sold subject to Fresno grading, and, if he put 3-crown raisins in boxes marked 4-crowns, plaintiff had a clear right to insist that they should be paid for as 3-crowns. As plaintiff had the right to these 88 boxes as 3-crown raisins, which the evidence showed they were in fact, defendant

cannot complain that plaintiff was unwilling to pay for them as 4-crowns. The judgment and order are affirmed.

133 Cal. 470

RAWLINS v. FERGUSON et al. (S. F. 1,516.)

(Supreme Court of California. July 27, 1901.)

PLEADING—INSUFFICIENT ALLEGATIONS—
WAIVER—MORTGAGE—DEED AB-
SOLUTE—EVIDENCE.

1. Where an affirmative defense was so insufficiently pleaded that it would have been held bad on demurrer, but was sufficient to enable plaintiff to understand the issue defendants endeavored to make, plaintiff, after going to trial without objection by demurrer or otherwise, should not be heard to say that there was no such issue to try.

2. Plaintiff's agent loaned her money to defendant, taking his note, with sureties thereon. The day before limitations ran against the note, and after she had had trouble with the agent, she sued on the note. Defendant pleaded in abatement that the note was secured by a mortgage. The mortgage claimed consisted of two deeds absolute in form from defendant to the agent's wife, executed after the note was due, and of which plaintiff had no knowledge. *Held*, insufficient to sustain claim that note was secured by mortgage, so that only suit to foreclose could be maintained.

Department 2. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action by Rebecca A. Rawlins against J. W. Ferguson and others. From a judgment for plaintiff and order denying a new trial, defendants appeal. Affirmed.

H. H. Welsh and Stanton L. Carter, for appellants. George E. Church, for respondent.

TEMPLE, J. This is an action upon a promissory note, brought the day before it would have been barred by the statute of limitations. The defense attempted is in the nature of a plea in abatement; that the note was secured by a mortgage, and only a suit to foreclose such mortgage can be maintained. The pleadings are verified, and the amended answer makes no denial sufficient to throw the burden of proof upon the plaintiff, except as to the allegation that \$200 is a reasonable fee for plaintiff's attorney. In regard to that no question is made here. The objection is made here that the affirmative defense is also insufficiently pleaded, and would have been held bad on demurrer. The objection is well founded as matter of law, but cannot avail respondent. There was an attempt to plead such defense, and the pleading was sufficient to enable plaintiff to understand the issue which defendants were endeavoring to make. Upon this, plaintiff went to trial, without having objected by demurrer or otherwise. She will not now be heard to say that there was no such issue to try. The court found very fully, upon this matter, in favor of plaintiff, that the debt was not, and never had been, secured in any mode. This finding is attacked, and it is contended that the

affirmative of the issue was established without conflict. This is the only question of importance in the case.

The loan was made by plaintiff through her agent, Jackson, who was also her attorney. The money was derived from an insurance upon her husband's life, and after her husband's death was collected from the insurance company by Jackson as her attorney. She authorized him to lend it for her, directing him to consult her about proposed loans, and to take security on first mortgages. December 9, 1891, he made this loan for her to defendant Ferguson, of \$2,000, taking his note payable to plaintiff, and signed by all the defendants. The note, by its terms, was due four months after date. It was not secured by mortgage or otherwise, except that the three defendants other than Ferguson were, in fact, sureties. This suit was brought April 8, 1896, by Jackson, as attorney for plaintiff. Jackson also verified the complaint, and at the same time sued out a writ of attachment, to obtain which he in person made the statutory affidavit, which contained this language referring to the note sued upon: "And that such contract was made and is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property." Soon after this suit was brought, differences arose between plaintiff and her said attorney. She not only dismissed him as her attorney, but caused a criminal prosecution to be commenced against him. After this an amended answer was filed in this case, and upon some incidental proceeding afterwards the said attorney made an affidavit, to be used against plaintiff, in which he swore that he made the loan to Ferguson as agent of the plaintiff, and that "subsequently, at my express instance and request, as such agent, the said defendant J. W. Ferguson, as further security for said loan, executed to said Sarah F. Jackson, my wife, deeds," etc. At the trial the deeds were in evidence. One was dated November 11, 1892, and the other November 28, 1892. The deeds were absolute conveyances, running to Sarah F. Jackson as grantee.

Mr. Jackson was the principal witness for the defense. Part of his testimony was as follows: "I accepted the note, and some time after the note was due, I knew at the time Mr. Ferguson came and said he wanted to further secure the note,—wanted to deed me some two other properties,—and he executed a deed to my wife." "There was no definite extension of time of payment, as far as I remember, when the deeds were made. Mr. Ferguson came, and stated his desire to further secure the payment of that note by the transfer of certain properties. That was done. I don't know that it was because he couldn't pay it. I don't think any demand had been made upon him for the payment at all. The note was just due. I

don't think any default had been made in the payment of interest." "I think it was Ferguson who made the proposition to convey the property to my wife. She was not consulted, nor did she know anything about it, at that time. Subsequently I told her about it. Don't remember exactly when." He further stated that he was sure he told Mrs. Jackson about the deeds when Mrs. Rawlins brought suit against himself and Mrs. Jackson to obtain an injunction. "But I told her prior to that time, I do not remember just when." He further testified that he first learned that Mr. Ferguson had the property at the time the deeds were made. Mrs. Jackson testified, and made confused and contradictory statements upon the subject as to when she first knew of the deeds. Finally, after her attention had been called to her testimony in another case, she said: "I remember testifying to that. I don't know whether it was at the time the deeds were made to me Mr. Jackson explained them to me, or at the time the suit was commenced against me. I don't know anything about it except what Mr. Jackson has told me, and I don't know when it was or what it was, and I don't know whether I have ever claimed the property as my own or claimed that Mr. Jackson bought it with my money." I think upon this evidence the court was abundantly justified in holding, as impliedly it did, that Mrs. Jackson did not understand until after this suit was commenced that she held the property to secure the loan to Mrs. Rawlins.

Mr. Ferguson testified also for the defense. His testimony was, in many important particulars, in sharp conflict with the testimony of Mr. Jackson. He, however, insisted that the deeds were made to secure the note in question. He only talked with Mr. Jackson about the matter, and did not testify that either Mrs. Jackson or the plaintiff were aware that the deeds had been given. He said also that an agreement had been made for a sale of the property, and the understanding was that, if the sale was consummated, Mrs. Jackson would convey to the purchaser, Mr. Jackson would retain a sufficient amount from the proceeds to pay the debt, and the residue should go to him (Ferguson). Mrs. Rawlins testified that she never heard that the note was secured in any way until after Mr. Jackson ceased to be her attorney. She had conversed with him about the debt, and disapproved of the loan; but he did not inform her that it was secured. To maintain the proposition that there is no evidence in support of the finding specified, appellant contends that the deeds only raise a presumption, which can have no force against evidence; that they only furnish a rule of decision where there is no evidence. To this point *Society v. Burnett*, 106 Cal. 514, 39 Pac. 922, is cited. The presumption there under consideration was that in a special instance the usual

course of business had been followed, and that an instrument delivered to the obligee implied that the obligation evidenced by it had been performed. It was said that such presumptions or inferences were evidence of the weakest character, and simply controlled the decision in the absence of proof. It merely shifted the burden of proof. There is no more propriety in denominating the probative force of these deeds a mere presumption than there would be applying the term to the most positive and satisfactory testimony. It is evidence of a very high order, tending to show that the intention was to convey a full title. In *Henley v. Hotaling*, 41 Cal. 22, it is said that, to authorize a court "by evidence to establish an equity outside of the deed, and thus to convert the deed into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage; otherwise, the intention appearing on the face of the deed ought to prevail." This language has been, in substance, often repeated since. A deed is evidence of such a controlling nature that it is now only permitted to question its expressed effect where expressly authorized by statute, which instances are exceptions to the rule. These exceptions are that a deed may be shown, contrary to its terms, to be a mortgage; and in certain cases a resulting trust may be established by parol. No proposition is more familiar than that a deed affords a very high degree of proof. And many circumstances militate against the theory of the defense. The owner of the alleged mortgage had never heard of it, although she had expressed to her agent her disapproval of the loan. The agent, when called upon to make an affidavit for an attachment, forgot it, although the only important matter in respect to the affidavit was to show that the debt was or was not secured by a mortgage. The grantee named in the deed did not know that she held the title as security, and, of course, had never agreed to so hold it, or that she would permit it to be so applied. The deeds were executed eleven months after the loan had been made and seven months after the note became due, and, according to the main witness, were tendered by the debtor, although no demand had been made upon him for payment or for security. The debtor testified that he suggested at the time that the property had been sold, and expected Mrs. Jackson to convey to the purchaser the property, and that he (Jackson) would retain sufficient of the proceeds to pay the debt due Mrs. Rawlins. We do not think it necessary to determine whether, if the facts were as the witnesses for the defense testified, the transaction would amount to a mortgage. The practical conclusion of the court that the idea that the deeds were given to secure the payment of the note was gotten up after Jackson was discharged by Mrs. Rawlins as her attorney has suffi-

cient evidence in its support to prevent our interference. There was at least a substantial conflict. The judgment and order are affirmed.

We concur: **McFARLAND, J.; HENSHAW, J.**

6 Cal. Unrep. 740

CHAPMAN v. BENT. (L. A. 987.)

(Supreme Court of California. July 24, 1901.)

PLEADING—COMPLAINT—BILL OF PARTICULARS—CONFLICTING EVIDENCE—FINDINGS—APPEAL—WORK AND LABOR—ACTION—EVIDENCE—SUFFICIENCY.

1. A bill of particulars, served by plaintiff in response to a demand therefor, becomes a part of the complaint.

2. In order that findings and judgment on conflicting evidence may stand on appeal, such conflict must be one that is material.

3. Plaintiff hauled certain pipe for a third party, who was under contract with defendant, at so much per ton, upon the terms of that contract, up to a certain date, when he claimed to have commenced working for defendant. Plaintiff testified that he sent defendant word that he would not work unless defendant paid him; that such third party was going away; and on cross-examination he said defendant agreed to pay him for what he had done if he could get an order from such third party, which order was obtained. He testified that nothing was said whether he was to be paid by the day or the ton in making his alleged contract with defendant. A witness testified that plaintiff told him, after he commenced working for defendant, that he was hauling by the ton. Defendant testified that he made no agreement with plaintiff, and that the latter asked him to guaranty the payment for the work done for such third party. Plaintiff submitted a bill of particulars, specifying the number of teams used, and number of days at work, having, at the conclusion of his work, submitted a statement of the number of tons hauled. *Held*, that a finding that plaintiff performed work and labor for defendant was not justified by the evidence.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; **B. N. Smith, Judge.**

Action by **D. D. Chapman** against **A. S. Bent**. From a judgment in favor of plaintiff and an order denying a new trial, defendant appeals. Reversed.

Jas. Burdett, for appellant. **Halsey W. Allen**, for respondent.

HAYNES, C. Action for work, labor, and services. The plaintiff had findings and judgment, and defendant appeals from the judgment and from an order denying a new trial.

In April, 1899, the defendant entered into a contract with the South Mountain Water Company to construct for it a pipe line near Redlands. On June 1st he entered into a contract with one George Nolan, in writing, to haul the pipe and cement necessary to construct it from the railroad, and distribute it along the line, for the first part of the line, to a specified point, at the price of \$1.15 per ton, and for the remainder—the longer haul—at \$1.50 per ton; Nolan “to stand all break-

ages in handling and hauling” the pipe. The plaintiff, **D. D. Chapman**, was consulted by Nolan in determining the terms upon which the contract should be taken, but, so far as known to Bent, had no interest in it, except that when Nolan commenced work under his contract, about June 9th, Chapman put on several teams, and did hauling thereon for Nolan upon the terms specified in the contract between Nolan and defendant. The contract between defendant and the water company required the pipe line to be completed on or before August 1st. Nolan, as well as Chapman, put on several teams, but about the last of June defendant became convinced that, unless more teams were put on, the pipe would not be hauled in time to complete the line within the time limited therefor. Defendant thereupon notified Nolan to put on more teams, and was told that he could not find them, and Nolan thereupon authorized defendant to procure them, and to pay for them at the rate of six dollars per day, the teams so procured to be first paid for out of the money that would be due to him under his contract. Defendant thereupon advertised for teams, and procured sufficient, in conjunction with the teams of Nolan and the plaintiff, to complete the hauling on July 31st. The plaintiff claims that about the last of June or first day of July he quit working for Nolan, and thereafter worked for Mr. Bent; and this action is prosecuted to recover therefor. The action is upon a quantum meruit for work, labor, and services in furnishing teams for the defendant for hauling water pipes, alleged to be of the value of \$750. The court found the value to be \$456, and gave judgment therefor.

When suit was commenced, the defendant demanded a bill of particulars of plaintiff's claim, and it was furnished, showing the number of teams furnished by plaintiff each day from July 1st to July 26th, both days included. The plaintiff testified, in substance, that he was working for Nolan up to the 1st of July, and after that he worked for Mr. Bent; that he sent word to Mr. Bent by two of his teamsters, Reynolds and Dutch, that, if he wanted him to team, he would have to pay for it himself; that next morning, June 29th, he thought, he saw Mr. Bent, and told him he would have nothing more to do with Nolan, and, if he did any more hauling, he must pay for it himself, and that Bent said he would if he (plaintiff) did the work; that plaintiff continued to work, and put on three more teams, and kept on working until the job was finished. Upon cross-examination he testified that he did not suppose that he could compel Bent to pay for the work he had already done, but that he asked him if he could not see that he got his pay for that, and that Bent agreed to pay him for what he had already done if Nolan would give an order, and that Bent said he would get an order, and that he commenced work for Bent on the 1st of July; that he had been hauling for Nolan

by the ton, but he had no understanding with Bent as to whether he should be paid by the day or the ton, but supposed he was to work by the day, and did not know whether he worked by the day or the ton; that he changed his mind about working for Nolan because Nolan was going to Mexico with his outfit, and Bent was hiring other teams at six dollars per day, and that he knew Bent had obtained an order from Nolan. Reynolds testified that plaintiff sent him to Bent with a message "that, unless Bent would pay him for hauling, that he would not haul any more"; and Bent said he would pay him; that he did not want him to quit hauling. This witness was cross-examined at considerable length, and his attention was called to his deposition taken in the case, and, among other things, the following: "Q. State what message you delivered. A. Mr. Chapman told me to tell Mr. Bent that, unless he would secure his pay for hauling, he wouldn't haul any more, but would take his teams off." Daniel Leibee, called for the defendant, testified that on or about July 16th he was trying to see Bent to get a job of hauling, but did not find him; that Chapman told him he could go on with his team at \$6 per day, and said, "My teams are hauling by the ton." The defendant, testifying in his own behalf, testified: That at the time he made his contract with Nolan, Nolan said that Chapman was trying to back out of the whole thing now. That Chapman undertook to explain, but Bent said that it did not concern him, as his bid was from Nolan. That Nolan then said, "Of course, Chapman and I are working together on it." That he (Bent) could not state the exact words, but that he was given to understand that they expected to put on an equal number of teams; and that Chapman, as Mr. Nolan expected to go away to Mexico, would have a general supervision of the work. That the work commenced June 9th, but it soon began to drag, and he sent Mr. French to Chapman repeatedly to tell him "that he must put on the teams that he led us to believe he would, or else tell us he would not." That he came near forfeiting half of his contract on account of the delay in hauling. That he then arranged with Nolan to get teams by the day; to pay six dollars for four-horse teams, and to pay them first of all out of moneys due to Nolan. That on July 5th or 6th he met two of Chapman's teams as he was driving along the road in his buggy, and the teamsters told him that Chapman wanted to see him, and he asked, What about? and they said, "He wants to know where his pay is coming from;" and that he replied he would see him. That he did not say that he would pay him, or be responsible for his pay. That he drove over to see Chapman the next day, and he said he wanted to make some arrangement by which he (Bent) would guaranty his pay. That he (Bent) said: "What is the matter with Nolan?" That Chapman replied: "Nolan is all right,

but he is going to Mexico, and I don't want to chase him for a year or two to get my money to come through him. I want you to secure it. I want you to guaranty it." That witness replied: "I can't do that, Mr. Chapman. I have no contract with you. My deal is with Mr. Nolan." That Chapman then said: "Then I will have to take off my teams, because I won't run any risk." That witness replied: "I don't want you to do that. Why don't you get an order from him?" He replied: "I can't get an order from him." That witness said: "I will. Perhaps I can help you get an order;" and Chapman replied: "If you can get an order, so that I am safe, I will go on and haul." That witness telephoned for an order, and received it on the 8th or 9th. It was dated July 7th. That two or three days after that he passed Chapman on the road, and told him that he got the order, and Chapman replied, "All right," and both drove on, neither stopping the horses. That about 10 days afterwards Chapman asked whether the order covered the board of his teamsters and his blacksmith, and Mr. Bent replied that he did not know; that he had to pay him out of the money due Nolan when he and Nolan have agreed upon the amount; and that Chapman replied: "All right. Of course, that is all that I could expect." When the work was completed, defendant settled with the teamsters he had procured for Nolan, Nolan being present, and approving the payment to each, and the amount was charged to Nolan. Chapman's account was sent for, and he sent a pencil memorandum of the number of tons hauled, and the amount of the board and blacksmith bills which he had charged to Nolan; but this memorandum did not distinguish between the long and the short hauls. Afterwards, on August 8th, a typewritten bill was presented by Chapman, giving the number of pieces of each size of pipe, with the weight of each in tons, the number of tons of cement, and distinguishing between the long and the short haul, and also the amount of the board and blacksmith bills, and the amount of the hauling at the contract price per ton, without deducting breakages, to be \$609.50. It was found, however, that, after paying for the extra teams, there was nothing due Nolan, and defendant had paid out therefor \$560 in excess of the contract price. The defendant was strongly corroborated in reference to the order on Nolan, to the effect that Chapman did not want his money to come through Nolan, and that he would put the teams on if he could get an order from Nolan to Bent for his pay, as well as in other matters not so important. Plaintiff was called in rebuttal, and testified that in a certain interview at the Windsor Hotel he did not say that he was not under obligations to Bent, and was not working for him, and explained that by the use of the word "we," in a certain letter, he did not mean that he and Nolan were partners; that they were not partners; and further testified that

he got a dollar and a half for all he hauled. No other evidence was given in rebuttal.

When this action was commenced the defendant demanded a bill of particulars, and it was served. It stated the number of his teams used in hauling each day from July 1st to July 26th, inclusive, aggregating 90 days for one team. It contained no statement of the number of tons hauled. The testimony showed that Nolan was to pay him the same compensation for hauling that Nolan was to receive under his contract, and that compensation was a given price per ton. Plaintiff testified, "There was nothing said between Mr. Bent and me whether by the day or by the ton." At the conclusion of the work, however, he furnished a statement giving the total number of tons hauled, but no dates at which any part of the hauling was done, and charged the same price per ton that Nolan was to receive under his contract. Plaintiff's bill of particulars, served in response to a demand therefor, became a part of his complaint, and, if he can recover in this action, he must recover upon the cause of action shown thereby. But plaintiff's statement to defendant and Nolan, made at the conclusion of the work in the settlement between Nolan and defendant, showed conclusively: First, that he performed no services by the day, as alleged by his complaint and bill of particulars; and, second, that, defendant having obtained an order from Nolan, as desired by plaintiff, he continued to work for Nolan to the end. If, after the 1st of July, he worked for defendant, and not for Nolan, he would either have charged for his teams by the day, specifying the number of days, and the amount or the number of tons hauled before the date of his alleged agreement with Bent, and the number of tons hauled after that date. The plaintiff knew of the order given by Nolan. He said Nolan was all right, but he was going to Mexico, and he did not want "to chase him for a year or two to get his money," and asked Bent to guaranty his pay; not that he wanted a new contract. On the 8th of August plaintiff presented his typewritten bill, before referred to, in which was charged the whole number of tons hauled by him, but giving no dates at which the hauling, or any part of it, was done. He was then informed by defendant that there was no money due Nolan. Defendant testified: "He said: 'Why, what about that order? Didn't you expect to pay me when you got that order?' I said, 'I certainly did.' He says, 'You know I told you I would take off my teams unless I was sure of my pay.' I said: 'Yes, you did. But,' I said, 'I supposed, and we all supposed, there would be money not only for you, but a balance for Nolan. Nolan had this contract all through. That was a loss to himself. There is not a dollar coming to him, and you are in the same boat.' He expressed his disappointment, and wanted to know what he was going to do. I said: 'Either you are a partner, or you are

working for somebody. You certainly were not working for me.' He replied: 'No, I wasn't working for you. You got that order, and I considered you were going to pay me.'" Defendant further testified that he and the plaintiff went over the figures together; that in none of the conversations was anything said about working by the day, or that plaintiff was working for him. Mr. French, who was present at the foregoing interview, fully corroborated Mr. Bent, and though the plaintiff testified in rebuttal, he denied no part of the conversation on the 8th of August except the statement that he was under no obligations to Bent, and was not working for him.

Respondent contends that there is a conflict in the evidence, and that, therefore, the findings and judgment must stand. But the conflict must be a material one. There cannot be a doubt that the plaintiff continued to haul upon the faith of the order given by Nolan upon defendant. The plaintiff not only testified that Nolan was all right, but that he did not want to follow him for a year or two, and wanted his money to come through defendant; but he also testified that he did not suppose that he could compel Bent to pay him for work already done, nor has he attempted to do so. True, he testified that he went to work for Bent at that time. This was before the order was obtained. That he did go on, relying upon the order, is clear. He did not keep a separate account of his work after that date, and his account was for all the work done, stating only the entire number of tons of each size of pipe in a single item, with no possibility of ascertaining therefrom how much he hauled after his alleged arrangement to work for the defendant, and doubtless for that reason he brought his action charging the defendant by the day for his teams. It is not necessary to discuss the question whether Chapman was Nolan's partner or was a subcontractor or employé. Bent's contract was with Nolan. Mr. French, a witness called by defendant, was cross-examined by the court, and this question was put: "So these extra teams absolutely ate up the whole profit on the \$1.50 for the upper and \$1.15 for the lower hauling? A. Yes." The suggestion made by this question should be noticed. The plaintiff sought to recover upon a quantum meruit for the use of his teams, and gave evidence that \$6 per day for each team was the reasonable value thereof. It is shown that that was the price paid for the extra teams that were employed by defendant for Nolan. The plaintiff, therefore, proved that not more than the reasonable value of the services of those teams was paid, and therefore he was not injured. Besides, the plaintiff testified that nothing was said between him and Bent as to whether he was to haul by the day or by the ton, and added, "Well, it did not make any difference, but amounted to about the same thing."

But it is immaterial whether it cost more or not, since it would not affect plaintiff's right to recover from Nolan according to whatever agreement he had with him under which he did the hauling. That defendant, by completing his contract on time, earned and received a bonus of \$500 from the water company is wholly immaterial. He was not bound to share it with any one. The finding that plaintiff performed work, labor, and services for the defendant is not justified by the evidence. I advise that the judgment and order appealed from be reversed, and the cause remanded.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded.

(133 Cal. 451)

CARTER v. LOTHIAN. (L. A. 835.)¹
(Supreme Court of California. July 25, 1901.)
PLEADING—AMENDMENT—DISCRETION OF COURT—NEW TRIAL—TRANSFER OF MOTION.

1. The trial court does not abuse its discretion in allowing plaintiff to amend his pleading after the close of the testimony, so as to have it correspond with the evidence introduced.

2. Under Const. art. 6, §§ 6, 7, authorizing the holding of as many sessions of the superior court as there are judges thereof, and directing that judgment, orders, etc., of any session held by one or more of the judges shall be equally effectual as if all the judges presided at the session, a motion for new trial in one department of the superior court may be transferred for hearing to another department of the court over the objection of the moving party.

Department 1. Appeal from superior court, Los Angeles county; John L. Campbell, Judge.

Action by F. A. Carter against I. A. Lothian. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Walter Bardwell and W. B. Mathews, for appellant. Barclay & Camp, for respondent.

VAN DYKE, J. The action is in equity to perpetually enjoin the enforcement of a judgment for \$446.50 rendered by the superior court of Los Angeles county in a case entitled "I. A. Lothian vs. Richardson-Kimball Co. et al." in favor of plaintiff therein (appellant here) and against respondent here, one of the defendants in said action. The appeal is taken from the judgment in favor of plaintiff and from an order denying defendant's motion for a new trial.

On the trial, after the testimony had closed, at the suggestion of the court, the plaintiff asked and obtained leave to file an amended complaint, so as to have it correspond with the evidence introduced. Appellant contends that under the circumstan-

ces, the testimony having closed, it was an abuse of discretion on the part of the court to allow the plaintiff to amend the complaint. This court has frequently reversed for refusing to allow amendments to pleadings, but not for granting amendments. In *Marr v. Rhodes* (Cal.) 63 Pac. 364, it developed on the trial in the court below that the defendant had a set-off. The court held, under the pleadings as they stood, that such set-off could not be allowed, whereupon the defendant moved for leave to amend his answer by pleading the set-off in his favor against the plaintiff so that it would correspond with the evidence introduced, which motion the court denied. In passing on the appeal, it is said in the opinion: "We think the court should have allowed the defendant to amend his answer to enable him to prove facts which would have constituted an offset or defense to plaintiff's demand, as proposed; and if, by reason of such amendment, the plaintiff would have been taken by surprise, and required further time to prepare to meet the defense, the case could have been continued, or such terms imposed as might seem just under the circumstances." In *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786, it is said: "It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues, or properly presented by his pleading." Many other cases to the same effect might be cited, but it is altogether unnecessary to do so. It is the policy of the law for courts to be liberal in allowing amendments to pleadings and proceedings, where the same can be done without prejudice to the rights of other parties. If the defendant had asked for time to plead to the amended complaint, or for a continuance of the cause, to allow him to introduce further testimony in reference to the new issue raised by the amended pleading, no doubt the request would have been granted; but he failed to do either. See *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560.

Appellant claims that the evidence is insufficient to support the findings. The plaintiff was made defendant in the case entitled "I. A. Lothian vs. Richardson-Kimball Co. et al." on the supposition that he was a subscriber to stock in said company, and indebted for such subscription in whole or in part. The evidence shows, however, that prior to the commencement of said action the defendant in said action, the plaintiff here, was not indebted to said company, but, on the contrary, said company was indebted to him in a sum aggregating more than \$800, for which he then had judgment against said company; and that the fact of such indebtedness from said company

¹ Rehearing denied August 26, 1901.

to the plaintiff was known to the defendant. Plaintiff testified that he met defendant's attorney some time after that suit was commenced in Los Angeles, and said: "I asked him what he meant by suing me, and he said: 'Well, I thought you were a stockholder, or possibly had subscribed for a lot of that Richardson-Kimball Company's stock, and, like Richardson and Kimball, you had never paid for it, and that—' He told me I would have been liable if I had, but said he had since discovered that I had not subscribed for any, and he promised me never to hurt me; that I would not be hurt in that suit; that I need not give it any attention at all. As a result of what he said to me with reference to my defending the suit brought by Lothian, I gave the thing no further attention, and just supposed the matter ended there. I was back East, and gave the thing no further attention. Q. Did you believe that he would do as he said, and not take any steps against you? A. Why, yes. He told me that he had discovered that I had subscribed for no stock at all, and that he had brought this suit in a kind of sweeping way against all the men that he had heard had subscribed for any of the stock, with the hope of finding some that had not paid theirs; and that they were liable if they had subscribed, and had not paid for the stock; and he found out that Richardson and Kimball had done that, and he didn't know but what I had when he brought the suit and served me; but he had afterwards found out I didn't subscribe for any, and that I need not give the thing no consideration or further thought at all; that he would promise me I wouldn't get hurt. That was—the thing ended right there." The judgment roll in Carter against the Richardson-Kimball Company was introduced, showing a deficiency judgment in favor of the plaintiff, and a garnishment against the Los Angeles National Bank thereunder for all moneys, credits, etc., belonging to the Richardson-Kimball Company; and also the judgment roll in the case of Carter against the Los Angeles National Bank to enforce said garnishment, which latter case shows that the defendant, Lothian, was a party to that action. Said bank filed a cross complaint in said action, asking that all parties making claims against said fund belonging to the Richardson-Kimball Company in its hands be required to interplead, which they did; and said defendant, Lothian, in his answer to said cross complaint, made no claim against said Carter, nor did he ask a preference as against him to the fund in litigation. Defendant's attorney, in his testimony, stated that he discovered that Carter was a stockholder in the Richardson-Kimball Company just about the time he commenced the suit. "I got my information from George Granger, and understood from him that Mr. Carter was owing something on his stock in the Rich-

ardson-Kimball Company. I did not understand how much. Q. What evidence did you have or produce that he was owing the Richardson-Kimball Company? A. Well, I never had any further evidence than that. Q. You never produced any evidence in the court did you that he was owing? A. Not to my recollection. By the Court: You did know that he had begun an action against the company for fourteen or fifteen hundred dollars? A. Oh, yes. Q. By Plaintiff's Attorney: In the conversation you have referred to with me, did you ever state to me that you had taken any default or judgment against Carter? A. No. I never mentioned it in the world to you." Without going into the testimony further in detail, it is sufficient to say that there is enough to support the findings, both as to the merits and upon the plea of the statute of limitations.

The motion for new trial coming on to be heard in department 5 of the Los Angeles superior court, Judge Shaw, presiding, before whom the cause had been tried, transferred the hearing of said motion for a new trial to department 2 of the same court. Appellant contends that this transfer of the cause from one department to another, against his objection, is error. There is nothing in this contention. Under the present constitution, whatever the population or amount of business, there is but one court of general jurisdiction in each county, to wit, the superior court. This court may be and is provided with such number of judges as required to transact the judicial business before said court. The so-called "departments" are unknown to the constitution, but have been adopted for convenience by the judges in apportioning the business before said court, which they are authorized to do by the constitution. There may be held "as many sessions of said court at the same time as there are judges thereof," and "the judgments, orders, and proceedings of any session of the superior court held by any one or more of the judges of said courts, respectively, shall be equally effectual as if all the judges of said respective courts presided at such session." Const. art. 6, §§ 6, 7. By this scheme, where there is more than one judge provided for the court, such judges may interchange among themselves in holding court, and, in case one be sick, absent, or engaged in the trial of other causes, another judge of such court can step in and fill his place, and thus prevent the interruption of judicial business. Any judge, therefore, of the superior court of Los Angeles county, had jurisdiction to hear and determine the motion for new trial in this case. The motion for a new trial, under our system of procedure, is an independent collateral proceeding. An affirmance of the judgment on direct appeal therefrom does not prevent the court below from setting aside the verdict, or finding and judgment based thereon, and granting a new trial.

Spanagel v. Dellinger, 42 Cal. 148; 1 Hayne, New Trials & App. p. 27; McDonald v. McConkey, 57 Cal. 325; Naglee v. Spencer, 60 Cal. 10; Knowles v. Thompson (Cal.; in bank; filed June 14, 1901) 65 Pac. 468. There is no showing in this case why the judge of department 2 could not hear the motion for a new trial as well as the judge of department 5 of that county, and the cause may have been transferred for the reason that the judge of department 5 at the time was engaged in the trial of other causes. Nothing appearing to the contrary, the presumption will be in favor of the regularity of the proceeding.

The other points presented by appellant are not of sufficient importance to receive special consideration. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

133 Cal. 485

BANNING v. MARLEAU. (L. A. 864.)

(Supreme Court of California. July 30, 1901.)
 REPLEVIN—FINDINGS—RIGHT OF POSSESSION—OWNERSHIP—AFFIDAVITS OF ATTACHMENT—ENTRY ON JUSTICE'S DOCKET—EVIDENCE—FRAUDULENT CONVEYANCE—SUBSEQUENT CREDITORS—STATEMENTS OF VENDOR—APPEAL AND ERROR.

1. Where plaintiff claimed title and right to possession of personalty under a bill of sale in an action to recover the property from an officer who attached it as the property of the former owner, a finding that plaintiff acquired no title, and that it belonged to and was in the possession of the defendant in the writ, is sufficient to support a judgment against plaintiff, without an express finding that plaintiff was not entitled to possession.

2. Where affidavits on which an attachment was issued were lost, and the contents proved by parol, and the judgment received in evidence without objection, an objection on appeal that the evidence does not support a finding that an attachment issued, because the docket does not show that affidavits were filed, should be overruled, since Code Civ. Proc. § 911, does not require the entry in the justice's minutes of this fact.

3. Where the bill of exceptions contains a statement that writs of attachment and their returns were received in evidence, an objection that the record does not show a formal attachment of the goods in controversy should be overruled.

4. Where plaintiff, who claimed property under a bill of sale, testified that she was aware that the vendor was insolvent, and he testified that his object in giving the bill of sale was to keep the property on the ranch; that it was not a drop in the bucket towards paying his debts,—the evidence is sufficient to support a finding that the bill of sale was fraudulent as to his creditors.

5. Where actual fraud in a sale of property is established, the sale is void as to subsequent creditors of the vendor, as well as to prior creditors.

6. Where there has been a colorable transfer of personal property, with no visible change of possession, and there is satisfactory proof of a conspiracy to defraud the creditors of the vendor, his declarations, both antecedent and subsequent to the transfer, are competent to establish the fraud.

7. Where, before a cause is submitted for

decision, the court orders all of certain evidence stricken from the case, error, if any, in its reception of such evidence, should not be considered.

Department 2. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Action by Mary H. Banning against W. F. Marleau. From a judgment for defendant, plaintiff appeals. Affirmed.

W. S. Wright and J. L. Murphy, for appellant. Dunnigan & Dunnigan and J. R. Dupuy, for respondent.

HENSHAW, J. The facts concerning this action and the law of the case will be found in the opinions of this court upon former appeals, reported in 101 Cal. 238, 35 Pac. 772, and 121 Cal. 240, 53 Pac. 692. This trial was without a jury. The value of the property was stipulated. The court found against the plaintiff, and gave judgment for defendant for the return of the property, or its value, \$600. Plaintiff appeals.

The property had been seized under writs of attachment issued by the justice's court in an action in which one Dr. Hannon was defendant. It was taken from the possession of Dr. Hannon while upon a ranch which was the property of the plaintiff. The plaintiff claimed title to the property under a bill of sale from Dr. Hannon. Dr. Hannon's testimony, which was accepted by the court, showed the sale was colorable merely, was not intended by the parties to be a transfer of the title, but was designed as a fraud against the creditors of Dr. Hannon, to save the property from attachments and execution levies which he feared. Hannon was at the time, according to his own testimony, overwhelmingly in debt. The findings are supported by the evidence.

The numerous technical points urged by appellant have been given due consideration, but for the most part they do not merit discussion. It is contended, for example, that the judgment is not supported by the findings, because of the absence of a finding as to the right of possession at the time of the commencement of the action; and the cases of Cooke v. Aguirre, 86 Cal. 479, 25 Pac. 5, and Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750, are relied on. In those cases the plaintiff had recovery. The basis of plaintiff's right of recovery was his right of possession at the time of the commencement of the action, and the cases were properly reversed because of the absence of a finding as to the value of the property, and an absence of a finding as to the amount of plaintiff's damage. What application they can have to this case, where the value is stipulated, where the findings of the court are wholly against the ownership of the plaintiff, and declare that at the time of the attachments levied by the constable Hannon was the owner and in possession of the property, we fail to perceive, and upon it we are not en-

lightened. Again, the affidavits upon which the attachments had been issued from the justice's court were lost, and it thereby became necessary by secondary evidence to prove these papers and their contents. This was done, and the judgments in the cases admitted in evidence, without objection; but the objection is here made to the sufficiency of the evidence supporting the findings that the docket of the justice does not show that affidavits upon attachment were filed. The law does not require the entry in the justice's minutes of this fact. Code Civ. Proc. § 911. Again, it is said that there is no evidence in the record to show any formal attachment or any return by the officer. The writs and their returns were offered and admitted in evidence, and the bill of exceptions contains a statement of this fact. Again, it is said that there is no evidence to show that Hannon was indebted to any person at the time he gave the bill of sale. The plaintiff herself testifies that she had become aware of the fact that Dr. Hannon had become insolvent, and unable to pay his proportion of the debt of the ranch. Hannon testified to the same effect, and, explaining how he gave the fraudulent bill of sale, says that the object was to keep the property on the ranch. "I did not want it attached for my debts, and thought it might be. It was not a drop in the bucket towards paying them." Again, it is said that the attaching creditor was a creditor subsequent to the giving of the bill of sale, and that the sale was valid, therefore, as to him. There is no evidence in the record to this effect, saving the evidence that the promissory notes, which were the foundation of the action in the justice's court, were dated subsequent to the date of the bill of sale. But the testimony is that the notes were given by Hannon on account of a long-existing debt; and even in the case of subsequent creditors, where actual fraud is established, the sale is void as to them as well as to prior creditors. Bump, Fraud. Conv. § 295; Brown v. O'Neal, 95 Cal. 262, 30 Pac. 538, 29 Am. St. Rep. 111.

Appellant further complains of the rulings of the court in permitting evidence as to the statement of Dr. Hannon concerning the ownership of the property after he had made the bill of sale. The answer to this is twofold: (1) Where there has been a colorable transfer of personal property, with no visible change of possession or control, and where there has been satisfactory proof of conspiracy to defraud, hinder, or delay the creditors of the vendor, his declarations, both antecedent and subsequent to the transfer, are competent to establish the fraud. "They are admissible, not because any peculiar credit is due to the party in possession, but because they qualify and characterize the very fact to be investigated." Bump, Fraud. Conv. §§ 598-600. (2) Before the submission of the cause for decision, the court ordered

all the declarations of Dr. Hannon made by him after the sale stricken from the case.

No other of appellant's points seem to call for discussion, and for the foregoing reasons the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

6 Cal. Unrep. 756

In re COURSEN'S ESTATE. (S. F. 2,004.)
(Supreme Court of California. July 27, 1901.)

ESTATES—DISTRIBUTION—PETITION—JURISDICTION—FINAL DECREE—APPEAL—LEGATEE—INTEREST—EXECUTOR'S ACCOUNT—ALLOWANCE—COMPENSATION—SERVICES AS ATTORNEY—TAXES.

1. Under Code Civ. Proc. § 1665, providing that on the final settlement of the accounts of the executor, or at any subsequent time, the court may proceed to distribute the residue of the estate, the court has not jurisdiction to decree distribution of the estate on a petition filed after the final account was filed, but before it was settled; nor is such decree authorized by section 1663, which relates only to partial distribution.

2. Where testatrix devised to her son all her interest in the estate owned by his father, her first husband, and the remainder of her property to her second husband and his children, a final decree distributing certain specific property to the latter "and any other property not now known or discovered which may belong to said estate, or in which it may be interested," is erroneous, since such provision might carry any after-discovered property belonging to her first husband.

3. A legatee is not prejudiced because property in which he has no interest is improperly distributed by the final decree.

4. An executor cannot appeal from a final decree on the ground that the property is improperly distributed.

5. Where an executor, in his final account, stated that all the money of deceased went into the hands of his co-executor, and was used in settlement of the estate, and all the legatees interested stipulate that the account of the latter is correct, it is not error to allow the latter's account without vouchers.

6. Where the evidence warrants a finding that an executor did not pay certain taxes charged in his account, and for which he produced receipts, the order disallowing such charges should not be reversed.

7. Where, during the settlement of an estate, the property was occupied by the family, including the executor, he should not be allowed extra compensation for his services in excess of his commissions.

8. In fixing the commissions of an executor, the inventory value of the property is not conclusive, but the actual market value may be shown, and used as the basis.

9. Where a small sum of money left by testatrix was received and used by appellant's co-executor for the benefit of the estate, it was not error to exclude such sum from the computation in fixing appellant's commissions.

10. Where an executor acts also as attorney for the estate, such services do not necessarily entitle him to extra compensation.

11. Pol. Code, § 3752, providing that decree of distribution of an estate shall not be made until the taxes are paid, is to protect the revenues of the state, and has no application where the tax has in fact been paid, though the one who made the payment has a tax title to the property therefor.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal by William P. Stout from a decree allowing the account of G. A. Coursen as an executor of the will of Jeanie A. Coursen, deceased, and disallowing the account of appellant as co-executor, and from a decree of distribution of her estate. Decree settling accounts affirmed, and decree distributing the estate reversed.

G. Gunzendorfer, for appellant. Martin Stevens, for respondents.

CHIPMAN, C. Jeanie A. Coursen died testate in 1877, naming William P. Stout and G. A. Coursen as executors, and her will was shortly after duly probated, and letters issued to the executors. An inventory was filed, and notice to creditors published. No claims have been presented against the estate. The property consisted of \$180 in money and certain real property on Fulton street, in San Francisco, which was occupied by the family of deceased. Respondent Coursen was the second husband of deceased, and appellant, Stout, was her son by her first husband. She left seven children of the second marriage, all of whom had reached majority before the final accounts and the petition for distribution were filed. It appeared by executor Coursen's final account that he received all the money, and he testified that he disbursed it in expenses of administration; but he filed no vouchers. By the will of deceased, appellant was left all the interest she had in the estate of her deceased first husband, Jacob W. Stout, father of appellant. To her children by the second marriage, of whom there were seven, the testatrix devised her real estate, being her separate property, share and share alike. There was a provision of the will that the land should remain a residence for her sons and daughters until the youngest of them should become of age, and "until that time should not be sold, incumbered, mortgaged, or otherwise disposed of"; and when that period arrived the land was to be divided among the children equally, or sold, and the proceeds thus divided, "as the majority of my said sons and daughters may then elect." It was also provided that, if any of her sons or daughters should die without lawful issue, his or her portion should go to such of her children as may survive. She requested that the real property described in the will should remain as a home and place of residence for her husband until the time for its disposition should arrive. Two of the seven children died in the city of San Francisco after attaining their majority, and pending administration, namely, Grant, a son, and Geraldine, a daughter; and there was evidence that they were never married. On October 29, 1898, the five surviving children and the co-exec-

utor, Coursen, filed their petition asking that the administration be brought to a close, and for distribution of the estate remaining in the hands of the executors to the five surviving children. Executor Coursen filed his first and final account and accompanying report September 28, 1898, and executor Stout filed his first and final account and report on October 7, 1898. On October 19, 1898, executor Coursen and the five children filed their objections to the account of executor Stout, and on November 15, 1898, the latter filed objections to the allowance of his co-executor's account. Thereafter, and on November 15, 1898, the separate final accounts came on to be heard, the hearing was continued to November 18th, and, after being partly heard, the hearing was again continued to December 1, 1898, when executor Stout filed a demurrer to the petition for distribution on the ground that it did not state sufficient facts, and at the same time he filed objections and exceptions by way of answer to the petition for distribution on various grounds. One ground was that there had been no administration of the estates of the two deceased children, and that the court cannot now determine the proportions of the assets of the estate to be distributed to the heirs thereof. Another ground was that his co-executor, Coursen, had suffered a tax title to become a lien on the premises. Most of the allegations of the petition were specifically denied. The hearing of the accounts was had on December 1, 1898, testimony taken, and evidence, documentary and other, heard, and "the matter of said accounts was submitted to the court for consideration and decision; and thereafter, on the 30th day of December, 1898, the said court rendered and made its decision and decree approving and settling the account of said G. A. Coursen, and disapproving and disallowing the account of said William P. Stout, to which said William P. Stout duly excepted; and thereafter, on December 31, 1898, the said decision and decree of said court was filed." It appears from the record that on the 30th of December, 1898, the court overruled the demurrer to the petition for distribution, and "also denied and overruled and disregarded the answer of said Stout to said petition for distribution, to all of which said Wm. P. Stout duly excepted; and thereupon said court made its judgment and decree distributing the estate of said Jeanie A. Coursen, deceased, which said judgment and decree was filed * * * on the 31st day of December, 1898." The decree makes distribution of all the estate,—two-sevenths to co-executor Coursen, husband of testatrix, and one-seventh each to the five surviving children of the second marriage. No distribution was made of the interest of deceased in the estate of her first husband, father of executor Stout, to whom this interest was bequeathed. The appeal is by

executor Stout from the decree allowing the account of executor Coursen, and disallowing the accounts of executor Stout, and from the decree of distribution.

1. In the specifications of errors of law appellant makes the objection that the court was without jurisdiction to make distribution for the reason that the petition for final distribution was not filed with the final account, but was filed afterwards, and before the final account was settled. The point was before the court in *Re Sheid's Estate*, 122 Cal. 528, 55 Pac. 328, and directly decided, and it was held that the court in such case did not acquire jurisdiction. The statutory provisions were fully pointed out in the opinion, and the question clearly elucidated, and the decision must rule this case. Respondents reply that the petition need not be considered under section 1665, Code Civ. Proc., but may be regarded as filed under section 1663 of that Code. The latter section relates wholly to partial distribution, and contains provisions with which there was no pretense of complying in the present matter. The petition here was brought under the provisions relating to final distribution, and the decree was for final distribution. Apparently it was just such a case as in *re Sheid's Estate*. The decree was without authority, and must be reversed.

There are some other questions connected with the decree of distribution which should be noticed. In the will of the testatrix she devises to her son William P. Stout all her right and interest in and to the estate owned by his father, her first husband, at his death. The decree distributes the residue of said estate "hereinafter particularly described" to the second husband of the testatrix and to her surviving children by him, describing the property, "and any other property not now known or discovered, which may belong to the said estate, or in which the said estate may have any interest." There is at least a question whether this provision would not carry any after-discovered property belonging to the testatrix's first husband at his death, and would bind her legatee, Stout, as he is a party to the proceeding. And this doubt is strengthened by the fact that the decree makes no mention of his right to any such property. We think the decree should have made some disposition of this asset of the estate.

It is objected by appellant that under the terms of the will the court could not decree any of the property to the testatrix's surviving husband. This question might have importance if legatee Stout claimed any interest in the property; but, as he makes no claim to any property except that specifically devised to him, and as the other devisees could consent to distribution to their father, as they seem to have done, the decree in this respect was not prejudicial to appellant.

Appellant makes the objection that there could be no distribution of the interest of the deceased children, Grant and Geraldine, in the estate, until after separate administration of their several estates. We see no objection to the decree in this regard. Moreover, appellant, as executor, cannot be heard as to the distribution made. *Bates v. Ryberg*, 40 Cal. 463. See, also, *In re Welch's Estate*, 106 Cal. 427, 39 Pac. 805, where certain limitations of the rule are pointed out, within which appellant does not bring himself. As legatee he is not aggrieved, because he makes no claim to any share of the deceased children's property.

2. All the legatees, except appellant, filed written consent to the approval of the account as rendered by executor Coursen. In appellant's account, which is verified, he states that the only money left by deceased, to wit, \$180, was taken possession of by his co-executor, "and by him used in paying necessary expenses incurred during the administration of the affairs and business of said estate." All parties agreeing that the money was properly expended, and executor Stout not being interested as a legatee of and making no claim on the money, there was no error prejudicial to appellant in allowing the account without vouchers. Appellant was secured for any commissions to be allowed him and for attorney's fees by the real property to be distributed, and petitioners offered in their petition to pay all commissions and charges.

3. Appellant's account consisted of sundry charges for moneys alleged to have been paid out by him for taxes on the real property of the estate and for improving the street in front of the property, aggregating \$956.32. He produced certain tax receipts, showing that the taxes had been paid to and received by the tax collector; but they do not show on their face who paid the money. Appellant testified that he paid a considerable portion of it. There is evidence contradictory of his testimony, however, and on the question of payment by him the evidence is conflicting. From the testimony in the case the court was warranted in disallowing appellant's claim for the disbursements alleged in his account.

4. The court allowed one-half the commissions to appellant on the basis of \$20,000 as the value of the estate accounted for by executor Stout, being one-half of \$920, and the court also allowed to executor Stout \$50 as attorney's fees. It is claimed by appellant that he should have been allowed extra compensation for services as executor, and also should have been allowed a larger attorney's fee. We can discover no grounds for any greater allowance. The real property was in the possession of the family all the time, and during much of which appellant was an inmate of the family, and occupied a room in the dwelling. Appellant

claims that the estate was of greater value than \$20,000. The inventory returned the value of the estate at \$35,180. But a recent reappraisal placed the value of the real property at \$18,187.50. There was evidence that the largest offer made for the property was \$20,000, and a witness familiar with real-estate values in San Francisco placed the value at \$20,000. As to the \$180, no part of this money ever came into the hands of appellant, or under his control, as co-executor, nor was it disbursed by him. His co-executor had it in his possession at the death of Mrs. Coursen, and paid it out for the benefit of the estate. We cannot see that the court erred in excluding it from the amount on which appellant was allowed commissions. *Hope v. Jones*, 24 Cal. 90. The inventory value of the property is not conclusive in fixing the compensation to the executors. In *re Simon's Estate*, 43 Cal. 543; In *re Fernandez's Estate*, 119 Cal. 579, 51 Pac. 851.

5. During the early years of the administration, appellant acted as attorney and co-executor, but this did not necessarily entitle him to extra compensation. We have examined the evidence bearing on the extra services claimed to have been performed by appellant, and are of the opinion that the court rightly refused additional compensation.

6. Appellant's attorney appeared for appellant in 1898, and the only service performed by him, as shown by the evidence, was in the preparation of appellant's account and attending at its hearing, and in opposing the co-executor's account and the petition for distribution. Under the circumstances described, we cannot say the court erred in fixing the attorney's fee at \$50.

7. Objection was made to the decree on the alleged ground that the taxes on the property were not paid. It appeared that the executors had procured the taxes to be paid by other persons, who hold tax deeds on some portion of the property, confessedly for the benefit of the owners. The object of the statute (Pol. Code, § 3752) in requiring all taxes to be paid before distribution can be made is to protect the revenues of the state. As the tax was in fact paid, it was no objection to distribution that there was an outstanding tax title in the person who paid the taxes. It is advised that the decree settling and allowing the final account of co-executor Coursen and disallowing the account of co-executor Stout be affirmed, and that the decree of distribution be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the decree settling and allowing the final account of co-executor Coursen and disallowing the account of co-executor Stout is affirmed, and the decree of distribution is reversed.

HOLZHEIER v. HAYES et al. (L. A. 863.)
(Supreme Court of California. July 25, 1901.)

DEEDS—INCUMBRANCES—IMPLIED COVENANTS—ACTION FOR BREACH.

1. Where a verbal agreement for the modification of a contract is rendered impossible of performance by the parties dismissing an action to the continuance of which the agreement relates, it must be regarded as abandoned.

2. Under Civ. Code, § 1113, providing that conveyances of realty, unless otherwise restrained, shall be subject to an implied covenant that it is free from incumbrances, which may be sued on as if expressed in the deed, a suit for breach of such implied covenant may be maintained against a mortgagee joining in the conveyance with the owner, since his obligation arises from the personal covenants implied in the deed.

3. In an action for breach of implied covenant against incumbrances, that plaintiff failed to perform his agreement as to the satisfaction of a deficiency judgment against one of the defendants is immaterial, where no damage was suffered thereby.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; J. W. Hughes, Judge.

Action by F. A. Holzheier against I. C. Hayes and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Eugene Daney, for appellants. Withington & Carter, for respondent.

SMITH, C. The defendants, by a grant deed of date November 17, 1890, conveyed to the plaintiff lots 11 and 12 of block 49 of Myers & McComber's addition to Ocean-side, and another lot. The suit was brought for breach of the covenant against prior incumbrances implied in the deed, whereby lots 11 and 12 were lost to the plaintiff. Civ. Code, § 1113. The case was submitted on an agreed statement of the facts, and judgment given for the plaintiff (now respondent) for \$500, the agreed value of the lots, with interest and costs. It is admitted, as alleged in the complaint, that at and before the date of the deed the defendant Hicks was the owner of the lots conveyed, and had mortgaged them to the defendant Hayes; who, a few days before the deed to plaintiff, had assigned the mortgage to Klauber & Levi; and that the latter foreclosed the mortgage, and became the owners of the lots in question by purchase at the foreclosure sale, and evicted the plaintiff therefrom. The defense is based upon a written agreement between Hayes and the plaintiff, of date November 14, 1890, and a concurrent oral agreement or understanding, by which, it is claimed, the agreement was modified. In the written agreement the pendency of certain actions affecting the parties is recited, namely, an action of Holzheier (the plaintiff) against Hayes in the superior court of San Diego county, an action of Hayes against Holzheier in a justice's court, a judgment in favor of the people against Holzheier for misdemeanor, and a deficiency judgment

of Holzheier against the defendant Hicks; and, referring to these, Holzheier agrees, for the considerations named in the deed, to dismiss his suit against Hayes, and to satisfy of record his deficiency judgment against the defendant Hicks, the consideration recited being the payment of \$60 by Hayes, the dismissal of his suit against Holzheier, the payment of the fine and costs due from Holzheier on the judgment against him for misdemeanor, "and the conveyance to the said * * * Holzheier, free of incumbrance, by a good and sufficient grant deed, of lots 11 and 12," and another lot, etc. But (it is stipulated) when the contract was executed "Hayes informed the plaintiff that the lots in Myers & McComber's addition were mortgaged to Klauber & Levi, and agreed to lift the mortgage, and said to him, in case he did not lift the mortgage, he would have the sixty dollars paid, and could go ahead with his case in the superior court." It was known to Holzheier at the time that Hayes was not the owner of the lots mentioned, but simply had held a mortgage thereon. In pursuance of the agreement, the case of Holzheier against Hayes was dismissed by stipulation of the attorneys for both parties, and on the 14th day of November, 1890, Holzheier executed an acknowledgment of satisfaction of the deficiency judgment against Hicks "but did not file the same, he not being requested to do so until after the commencement of this action." Afterwards two motions were made by Holzheier to reinstate his action against Hayes, which were resisted by the latter, and denied, because made more than six months after the dismissal. Hayes also dismissed his action against Holzheier, and paid him the sum of \$60, and also paid his fine and costs. The points made by the appellants are: (1) That under the contract, as modified by the oral understanding, the plaintiff took his conveyance subject to the mortgage held by Klauber & Levi; (2) that Hayes having no title to the land, and the fact being known to the plaintiff, his case does not come within the provisions of section 1113 of the Civil Code; and (3), with regard to Hicks, that plaintiff failed to perform his covenant to satisfy the deficiency judgment against him.

1. What was said by Hayes to the plaintiff when the contract was executed cannot be regarded as a modification of the contract, but rather as a proposition for its modification, to take effect upon a future contingency. Whether the silence of the plaintiff is to be taken as equivalent to an acceptance of the proposition is an immaterial question. The contract, as written, was carried into effect by the parties, and the action of Holzheier against Hayes dismissed on the written stipulation of their attorneys; and the motions of the plaintiff to set aside the dismissal were successfully resisted by the defendants. If, therefore, there was a

valid agreement for the modification of the contract, it was rendered impossible of performance by the joint act of the parties in dismissing the action, and must, therefore, be regarded as abandoned.

2. The case—both with regard to the defendant Hayes and the defendant Hicks—comes clearly within the provisions of section 1113 of the Civil Code. It makes no difference that the former defendant had no interest in the land. His obligation arises from the personal covenant implied in the deed, which is joint and several. (Civ. Code, §§ 1431, 1659), and refers expressly to the land conveyed by the deed. It is therefore immaterial from which of the grantors the title in fact passed. *Pratt v. Eaton*, 65 Mo. 165; *Foote v. Clark*, 102 Mo. 405, 14 S. W. 981; *Palmer v. Wall*, 128 Mass. 475. The incumbrance on the land was suffered, and in fact made, by Hayes. Had he still held it at the time he executed the deed, it could not have been enforced against his agreement with the plaintiff, or against his covenant in the deed. It became, therefore, an actual incumbrance only upon and by his assignment to Klauber & Levi. Nor, were it otherwise, would his liability be affected. He would still be liable, under his covenant, for the incumbrance made by Hicks.

3. With regard to the defendant Hicks, the fact that the satisfaction of the plaintiff's deficiency judgment against him was not entered of record until after it had become barred by the statute of limitations is immaterial. The defendants suffered no damage from the delay, which was probably inadvertent. I advise that the judgment be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

6 Cal. Unrep. 763

LUCHETTI et al. v. FROST et al. (Sac. 765.)

(Supreme Court of California. July 27, 1901.)

CONTRACTS—VENDOR AND PURCHASER—TENDER—FINDINGS—APPEAL AND ERROR
—CONFLICTING EVIDENCE.

1. A contract to sell land free of incumbrance, which the vendor has previously contracted to sell to another, is not in violation of Pen. Code, § 533, providing a penalty for selling land which has been bargained to another with intent to defraud previous or subsequent purchasers, where the previous contract is recognized as an incumbrance which the vendor agrees to settle.

2. Defendant contracted to convey land to plaintiff free of incumbrance on payment of the purchase price on or before a certain day. Plaintiff had the money, and offered to pay the price before the day named, and demanded a conveyance; but defendant had not removed the incumbrances, and on the day after the date named conveyed to another. *Held*, that an actual tender by plaintiff was not necessary to enable him to maintain an action for specific

performance, since defendant was then unable to perform.

3. Where there is evidence supporting a finding of fact by the trial court, the finding should not be disturbed because there is also conflicting evidence.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Action by Luigi Luchetti and another against W. R. Frost and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

Ansel Smith, Gus R. Grant, and A. H. Carpenter, for appellants. Nicol, Orr & Nutter, for respondents.

SMITH, C. Appeal from a judgment for the plaintiffs and from an order denying the defendants' motion for a new trial. The suit was for the specific performance of a contract to the plaintiffs by the defendant Frost for the sale of land. The facts, as alleged in the complaint and found by the court, are as follows: By the terms of the contract, which was executed May 26, 1898, the defendant Frost agreed to sell and the plaintiffs to buy the land in question for the sum of \$3,500, to be paid \$5 at the time of the contract, which was paid accordingly, and the balance, \$3,495, on or before June 2, 1898; Frost agreeing, on payment, to convey free of incumbrances. Time was made of the essence of the agreement. At the time of the contract the land was subject to two mortgages, the principals aggregating \$3,170; and to a written option to purchase, given by Frost to one Rhodes, which was to expire June 13, 1898. On the 31st of May, 1898, the plaintiffs offered to pay the amount due upon receiving a deed conveying to them the property free of incumbrances, as provided in the contract; but it is found the defendant then and there neglected and refused to execute such conveyance, and has ever since neglected and refused to do so. Afterwards, on the 2d day of June, 1898, the contract was recorded by the plaintiffs. The following day (June 3, 1898) Frost made a conveyance of the land to the defendant Noble, the agent of the defendant Solari, to whom on the same day the land was conveyed, and by whom the land was mortgaged to the defendant Harvey, June 7, 1898, for the sum of \$4,000. It is also found (though the fact may be regarded as immaterial) that on the 3d day of June (the day of the deed to Noble) Frost had recorded a written cancellation, or attempted cancellation, of the contract with plaintiffs. The judgment was for a conveyance of the land in question by Solari to the plaintiffs on the payment of the balance of the purchase money, \$3,495, free of incumbrances suffered by him or the defendant Frost (the latter, presumably, having been paid), and for the cancellation of

the mortgage to Harvey upon the payment thereon of the said sum.

Numerous points are urged for reversal, but they may be reduced, in effect, to the following, viz.: That the contract was in violation of section 533 of the Penal Code, that there was no tender of the purchase money by the plaintiffs, and that the findings of the plaintiff's offer to perform and the defendants' refusal were not justified by the evidence. The first point hardly requires consideration. The agreement was for the sale of the land free of incumbrances, among which the option held by Rhodes was recognized as one. It was understood that this was to be settled by Frost, and on the sale to Noble it was in fact settled for \$100. With regard to tender, none was necessary until Frost was in condition to convey as provided in the contract. The plaintiffs' offer, accompanied by the ability and will to perform, and the demand on the defendant Frost for performance on his part, was all that could be done by them at the existing stage of the transaction, and was sufficient. With regard to the sufficiency of the evidence to justify this finding, the most that can be said in favor of appellants' view is that it was conflicting. But even this can hardly be claimed. The plaintiffs and their witnesses all declare that the offer to perform was made at the interview of May 31, 1898, and that it was accompanied with no conditions, except that incumbrances should be removed. Two of the witnesses for defendants testified that the plaintiffs required the performance of another agreement, relating to certain land that it was thought desirable to have; but the date to which this testimony relates is not fixed, nor can it be inferred that it related to the particular occasion spoken of by plaintiffs' witnesses. I advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(133 Cal. 373)

GIBBS v. TALLY et al. (L. A. 746.)¹

(Supreme Court of California. July 16, 1901.)
MECHANIC'S LIEN — CONTRACTOR'S AGREEMENT—SECURITY BY OWNER—BOND—STATUTES—CONSTITUTIONAL LAW.

1. Code Civ. Proc. § 1203, directing that every contract required to be filed by the mechanic's lien law shall be accompanied with a bond, and providing that laborers or material men shall have an action thereon for the value of labor and materials, not exceeding the amount of the bond, but such action shall not affect their lien, and that a failure to file such bond renders the owner liable in damages to all entitled to liens on the property, is an attempt to compel the owner to furnish security in a matter to which he is not a party, and is invalid, as depriving the owner of his property by interfering with its use.

¹ Rehearing denied August 13, 1901.

2. Such statute is invalid as an unnecessary and unreasonable restriction on the power to contract.

3. It is in contravention of the state constitution (article 1, § 1) and the fourteenth amendment of the federal constitution.

In bank. Reversed.

For opinion in department, see 63 Pac. 168.

TEMPLE, J. This is an action for damages against Mrs. Tally, by the assignee of certain persons who had performed labor or furnished materials in the construction of a building, for failing to cause a bond to be filed with the building contract, as required by section 1203, Code Civ. Proc. A bond was in fact filed, and apparently in good faith designed to comply with the statute, but it was found defective, because it was not, "by its terms, made to inure to the benefit of any and all persons who perform labor or furnish materials to the contractor, or any person acting for him or by his authority," "in an amount equal to at least twenty-five per cent. of the contract price." The statute directs that every contract required to be filed by the provisions of the chapter relating to liens of mechanics and others shall be accompanied by a good and sufficient bond, and that any laborer or material man shall have an action to recover upon the bond for the value of labor and materials, not exceeding the amount of the bond; and such action shall not affect his lien. A failure to comply with the provisions of the section rendered "the owner and contractor jointly and severally liable in damages to any and all material men, laborers, and subcontractors entitled to liens upon property affected by said contract." The statute does not say who shall cause this bond to be executed, nor to whom it shall in form be made payable. It does not undertake that the contractor shall faithfully perform his contract. In short, there is in it nothing which can be of advantage to the owner in any possible event. On the other hand, no possible loss will accrue to the contractor by a failure to provide the bond. The declaration that he shall be severally and jointly liable with the owner is useless verbiage. The contractor is already liable for all labor or materials furnished to him or by his authority. The only person, therefore, upon whom a penalty is put for the failure is the owner. He, therefore, and he only, is required to furnish the bond; and, in effect, the bond is conditioned only that the contractor will pay "such" persons the value of labor and materials so furnished to him; and the action by a lienor does not affect his lien, or an action commenced for the foreclosure of it. The section assumes a valid contract, under which, if the contract is performed, the lienors can have the entire contract price distributed to them. But after that has been done, or even before it, a suit can be brought upon the bond,

or, if it has not been filed, against the owner, to recover an additional 25 per cent. upon the contract price, and that is this precise case. The material men and laborers could have demanded security from the contractor before furnishing materials or labor. The statute attempts to compel the owner to furnish security for them in a matter to which he is not a party, and in which he is not concerned. The cost may exceed the contract price, because material men combine to charge exorbitant prices, or through bad management of the contractor, or because prices have increased since the contract was let, or from other causes. If this can be required from the owner it lessens materially the value of his contract. In fact, so far as price is concerned, it deprives him of it. He has no assurance that his house will be built for the stipulated price. There is no more reason for requiring the owner to give this security than there would be in requiring it from any other person in the community. That the owner may be required to pay more than the contract price is not the only injustice which may result from this most unreasonable statute. The owner, or the sureties he is required to furnish, would be responsible in case the contractor failed to perform his contract. Suppose the structure failed to comply with the contract,—was in fact so defective as to be useless,—and the owner should refuse to pay for it? The very fact that he was injured by the failure of the contractor would create the liability on his part or upon his sureties. Whether the owner is not the principal on the bond, or the party for whom the sureties undertake, I will not discuss. The undertaking, in effect, certainly is that the contractor will pay certain debts if he incurs them; but he is not specially required to furnish the bond, and, as I have stated, incurs no penalty for not doing so, while the owner does.

It is perfectly manifest that this section, if valid, places an unreasonable restraint upon the owner of property in regard to the use thereof. It compels him to become responsible for liabilities he has not incurred, and which were not created for his benefit. It practically forbids him from improving his property by letting a contract unless he becomes liable, or furnishes sureties who will be so liable, for 25 per cent. above the contract price, and for the same amount in case the contractor so far fails in keeping his contract that the labor and materials are without value to him, and the contractor has no valid claim against him on account thereof. To impose this burden upon an owner is to some extent to deprive him of his property, for the value of property consists in the right to use it. Blackstone, in stating the fundamental rights of Englishmen, says: "The third absolute right inherent in every Englishman is that of

property, which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution save only by the law of the land." 1 Bl. Comm. 138. And Justice Miller said in *Pumpelly v. Canal Co.*, 13 Wall. 166, 20 L. Ed. 557: "There may be such serious interruptions to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution." It was said by Judge Comstock, in *Wynehamer v. People*, 13 N. Y. 378: "When a law annihilates the value of property, and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision, intended expressly to shield personal rights from the exercise of arbitrary power." It is also an unreasonable and unnecessary restriction upon the power to make contracts. See, upon this point, *Butchers' Union Co. v. Crescent City Live-Stock Co.*, 111 U. S. 746, 28 L. Ed. 585; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Ex parte Jentzsch*, 112 Cal. 469, 44 Pac. 803; *Cooley*, Const. Lim. 48; *In re Tie Loy*, 11 Sawy. 472, 26 Fed. 611. It clearly contravenes the provisions of section 1, art. 1, of the constitution of the state, and the fourteenth amendment to the constitution of the United States. It is not—and clearly it could not be—contended that this law is a regulation which comes within what is called the "police power." It is not calculated, nor was it intended, to conserve the safety, health, or general welfare of the community. The section does not provide for a lien, but it is contended that there is not greater interference with property rights than is found in some of the provisions in regard to liens of laborers and material men, which have been upheld, and particularly in the provision making the contract void in case it is not filed, allowing liens of laborers, material men, and subcontractors to the full value of services rendered and materials furnished, although that may exceed the contract price. The constitution directs the legislature to provide for liens of those persons upon the property to the improvement of which they have contributed. It has been held that this extends only to the contract price, which cannot be exceeded. If the contract is not filed as directed, it is void; and, there being no contract, it would follow, even though the statute had not said so, that the owner is building himself. In that case the so-called contractor is (as to other lienors) but the agent of the owner. This would be the natural result, and is not a forced conclusion made by the statute. *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588, opinion of Justice Fox. Where there is a valid contract under which the work was done, and which is performed by the owner, all that the statute attempts to do, and in fact all

that can be done, is to enable the laborers, material men, and subcontractors to cause the contract price to be applied to the payment of their demands. All that has been held upon this point is that it is not an unreasonable interference with the rights of the owner that whatever contract he makes shall be so executed and published that the constitutional policy may be carried out. No constitutional policy is back of the provision questioned here, and, it is safe to say, would not justify it if there were.

Our attention is called to the cases of *Mangrum v. Truesdale*, 128 Cal. 145, 60 Pac. 775, and *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369. In the first no question as to the validity of the statute was raised, and the only question discussed was whether a bond executed after the contract had been filed, and delivered to a loan association from whom a loan had been negotiated, and not filed with the contract, was a compliance with the law. The liability of the owner in case the bond was not furnished seems to have been admitted. In *Carpenter v. Furrey* the bond had been given, and the suit was against the sureties. They attacked the validity of the law (*Laws 1893*, p. 202) upon the grounds, only: (1) That the subject was not expressed in the title of the act; and (2) that it was a special law. These points are not raised in this case. In this case, I repeat, there was a valid contract, which was performed on both sides. Mrs. Tally has paid out to the lienors, or at least strictly under the provisions of the law, the entire contract price. There has been no technical or other obstruction which has prevented the lienors, or any of them, from getting out of this contract price all to which they were entitled. Having got from Mrs. Tally the entire contract price, they are endeavoring in this suit to compel her to pay 25 per cent. more because of a mistake made by her or her attorneys in writing the bond. It cannot be done, and the legislature has not the power to require it of her. The judgment is reversed.

We concur: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.; VAN DYKE, J.; GAROUTTE, J.

133 Cal. 405

GUERIAN v. JOYCE. (L. A. 906.)

(Supreme Court of California. July 24, 1901.)
ESTATES—CLAIMS—VERIFICATION—PLEADING
—EVIDENCE—OBJECTIONS.

1. A verification to a claim against an estate, stating that the sum is justly due to claimant, and that no payments have been made thereon which are not credited, and that there are no offsets except some small items, the exact amount of which is not known to affiant, but which she is willing to have credited upon same, is sufficient, since the exception is as definite as claimant can truthfully make it.

2. Where a complaint alleged a cause of action for services commencing more than two years prior to the death of defendant's intestate,

tate, and continuing until his death, a demurrer on the ground that the complaint did not state a cause of action because part of the claim was barred by limitations should be overruled.

3. Where no objection to the verification of a claim presented against the estate of a decedent is raised in a suit to recover thereon by demurrer or answer, the court should not allow defendant to make such objection at the trial.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Jane Guerian against Thomas F. Joyce, administrator of estate of Jane Joyce, deceased. From a judgment for defendant, plaintiff appeals. Reversed.

J. L. Murphy, for appellant. Louis Gottschalk, for respondent.

COOPER, C. When this case was called for trial, the defendant objected to all evidence offered by plaintiff, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The court sustained the objection, and, upon defendant's motion, judgment of nonsuit was entered. This appeal is from the judgment.

The defendant contended, and the court held, that the claim upon which the action was brought was not properly verified. The verification contains all the statute requires. It states that the sum is justly due the claimant, and "that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the claimant or affiant, except some small items, the exact amount of which is not known to affiant, but which she is willing to have credited upon same when same is shown by administrator herein." The defendant contends that the exception vitiates the verification; that it shows that there are certain offsets to the amount stated in the claim. We do not think the ends of justice require us to take such an extremely technical view of the verification. It substantially complies with the statute. It contains all that the statute requires, but, in addition, shows that there are some small items of set-off. As an excuse for not stating the amount, the claimant states that the amount of these items is not known to her, but that she is willing to have the same credited when shown by the administrator. If she knew there were offsets, she could not swear that there were none. If she did not know the amount, she could not state it. She did state that there were offsets, and that she did not know the amount, but that she was willing to credit the account with such offsets. She could not well have done more. It is said that she could have said the amount did not exceed a certain sum. It might have been better for her to have done so, but it may be answered that the administrator could have allowed the account, or offered to allow it, after crediting the offsets.

He did not do so, but rejected it absolutely. His action was equivalent to saying that it was not a just claim, and that there were offsets to the entire amount. A substantial compliance with the statute is sufficient. In *re Swain's Estate*, 67 Cal. 641, 8 Pac. 497; *Griffith v. Lewin*, 129 Cal. 598, 62 Pac. 172; and cases cited. But, aside from what has been said, we think the defendant waived any technical objection to the verification.

The complaint alleges that the first publication of notice to creditors was made on the 18th day of February, 1899. Plaintiff had at least four months after such publication in which to verify and present her claim. The complaint alleges:—"That on the 15th day of April, 1899, at the city of Los Angeles, the claim hereinbefore set forth, verified by the oath of the claimant, and upon which this action is founded, was duly presented in writing by the plaintiff to the defendant, as such administrator, for allowance, and that the same was by him, as such administrator, rejected on the 18th day of April, 1899."

The defendant demurred to the complaint upon the sole ground "that part of the alleged claim is barred by the statute of limitations, in this: that it is alleged that the services were rendered from October, 1895, and judgment is sought for all services rendered for more than two years prior to the presentation of the plaintiff's claim to the administrator, contrary to section 1499, Code Civ. Proc.," and "that said complaint does not state facts sufficient to constitute a cause of action against defendant as to a large part of the claim." It is thus readily seen that the demurrer went only to the part of the claim for services which had been rendered more than two years. The defendant did not then have in mind that the complaint entirely failed to state a cause of action, or, if he did, he carefully concealed it, because the demurrer really admits that the complaint is good as to the part of it that is not barred by the statute. The court properly overruled the demurrer. The complaint was verified. Defendant, in his answer, admitted that some labor and services were performed by plaintiff, but denies that they were reasonably worth the amount claimed, or any greater sum than \$30 per month, and alleges that she has been fully paid.

Defendant also pleads that all of the claim of plaintiff, except that which accrued within two years prior to the presentation thereof, is barred by the statute. There is no attempt to deny the allegation herein quoted as to the due presentation of the claim and its rejection by the administrator. While the allegation contains conclusions, yet it states enough, in the absence of special demurrer, to show that the claim was properly presented. There was therefore no issue made by the pleadings as to the proper presentation of the claim in writing, verified by the oath of plaintiff. It was not neces-

sary for plaintiff to offer in evidence the rejected claim. When offered, the defendant made objections to it that he had not raised by demurrer or answer. The court sustained the objection in regard to evidence not material under the pleadings, and granted a nonsuit. It would have saved time, delay, and expense to all parties if the court had compelled them to try the case upon the issues as they had made them. The defendant had pleaded payment and the bar of the statute. The court should have heard the evidence, and determined these matters. The estate should have been protected, and no part of the claim allowed which had been paid, or which had become barred. We desire to call the attention of the lower courts and the members of the bar to the fact that much time is wasted and expense incurred on questions that seem to be raised for the purpose of avoiding the trial of cases upon their merits. The time would be better spent in trying the cases upon vital issues. After a case is at issue, and either party has been silent as to objections that could have been raised in proper time, and the objection is raised when it is too late to amend or remedy the defect, we will not look with favor upon it. In this case, if the claim was not properly presented, the fact would not have been a bar to the right of plaintiff, unless the time for presenting the claim had expired, but would have been matter in abatement. *Hench v. Porter*, 10 Cal. 557. In the case of *Chase v. Evoy*, 58 Cal. 352, it was urged here that the complaint did not state facts sufficient to constitute a cause of action, because "it fails to show due presentation of the claim to the administratrix" of the estate of the deceased. The allegation as to the verification was that it "was duly verified by the oath of plaintiff in the form prescribed by law." This court held the objection untenable, and in the opinion said: "We think that the most serious objection that could be raised to the averment is that it is not sufficiently definite and certain, and that defect, if it be one, could not be taken advantage of by general demurrer, and, a fortiori, would not be fatal to a judgment rendered in favor of the plaintiff in the absence of any demurrer to the complaint or averment in the answer that the claim was not supported by a proper affidavit." The case at bar shows a much better allegation as to the verification and presentation of the claim than did the complaint in *Chase v. Evoy*. No question was raised as to the verification by demurrer or answer. The court, in furtherance of the ends of justice, should not have allowed defendant to raise it at the trial. The judgment should be reversed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

133 Cal. 459

FOSTER v. VEHMEYER. (Sac. 764.)

(Supreme Court of California. July 26, 1901.)

SUMMONS—SERVICE BY PUBLICATION—TIME—DEFAULT JUDGMENT—MOTION TO SET ASIDE—AFFIDAVIT OF MERITS.

1. An order for publication of summons against a nonresident of the state required that publication be made at least once a week for two months. Code Civ. Proc. § 413, provides that publication against a defendant residing out of the state must not be less than two months. The first publication was made June 14th, the last August 9th, and default taken September 11th. *Held*, the default was premature, since the service of the summons was not complete until August 13th, and the 30 days for answering had not expired when the default judgment was entered.

2. On the day a default judgment was prematurely taken against defendant, but after the default was entered, he appeared, and filed a demurrer to the complaint. *Held*, that under such circumstances no affidavit of merits was required to support a motion to set the judgment aside.

Department 1. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Action by John B. Foster against C. F. Vehmeyer. From an order setting aside a default judgment, plaintiff appeals. *Affirmed*.

L. T. Hatfield, for appellant. Bruner & Bros., for respondent.

GAROUTTE, J. This appeal is taken from an order setting aside a default judgment. The question presented is, was the default prematurely taken? Defendant was served with summons by publication. The order for publication provided: "It is ordered that service of the summons in this action be made upon the defendant * * * in the Pacific Bee, a newspaper published in said county of Sacramento; that such publication be made at least once a week for two months." The first publication was made June 14th, and the last publication August 9th. The default was taken September 11th. The default in this case could not be taken until 30 days after the completion of service of the summons. The question is then presented, when was the service completed? Section 413 of the Code of Civil Procedure, among other matters, provides: "The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months." In the present case the defendant resided out of the state. There appears to be but one rational construction to be given this statute, and that is, the defendant is entitled to the publication of the summons for a period extending over two full calendar months. It is not at all necessary that two full calendar months should intervene be-

tween the first and last publication, but it is necessary that the summons be published once each week for those two months; and it is also necessary that from the day of the first publication two calendar months should intervene before the service of the summons is complete. In other words, the first publication in this case having taken place upon June 14th, the period of two months expired upon August 13th, and the thirty days must elapse after that time before a judgment by default may be taken. In this case the two months expired upon August 13th, and, the default being taken upon September 11th, it is evident that it was prematurely taken. The aforesaid section of the Code of Civil Procedure also provides: "When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the post office, and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication." Here the time prescribed by the order of publication was two months, and therefore the service of summons was not complete until the expiration of that period of time. This is the construction given to this statute by this court in the past. *Society v. Thompson*, 32 Cal. 347. In that case, by the order of publication, a three-months publication was required, and, the first publication being made upon January 10th, it was held that the service was completed upon April 9th, inclusive. While the last publication was made upon April 9th, the court still said: "We think that the summons had been published for three calendar months at the close of the 9th day of April, and that the first day of the forty within which the defendant was required to answer was on the 10th of April. But, even if the three months for publication did not expire till the 10th day of April, there was no necessity for another publication. The 10th was in the same week with the 9th, and the summons had been published in that week. It had been published once in every one of the weeks that could, by any possibility, in whole or in part, be brought into the three calendar months." It is unnecessary to review the many cases cited by appellant from other states, for each state has its own statute bearing upon the procedure to be followed, and it is upon the construction of these various and different statutes that the contrariety of decision has arisen. Defendant appeared in the cause and filed his demurrer upon September 11th, the day the default was entered against him, but subsequent thereto. Under these circumstances, the default judgment being absolutely void, no affidavit of merits was required in order to support his motion to set it aside. For the foregoing reasons, the order is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

6 Cal. Unrep. 734

GREEN et ux. v. GRIDER et al. (L. A. 856.)
(Supreme Court of California. July 24, 1901.)

CONTRACT TO SELL LAND—PRINCIPAL AND AGENT.

Plaintiffs contracted to sell certain land to two of defendants, payment to be made at a specified time, and, if not so made, the contract to be void, at plaintiffs' option. It was also agreed that certain tracts should be conveyed on payment of the agreed price therefor, and that, if the vendees sold any of the land, they might retain one-fourth of the purchase price, and securities for the remainder should be deposited in bank to secure the performance of their contract with plaintiffs. The appellants purchased certain tracts of the vendees, paying them in part therefor, and tendered the balance to plaintiffs. *Held*, that plaintiffs were not bound by any payments made to their vendees, since such contract did not make them agents, or authorize them to receive any money for plaintiffs.

Department 1. Appeal from superior court, Los Angeles county; John L. Campbell, Judge.

Action by R. Henry Green and wife against L. M. Grider and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants Wallace F. Haas and others appeal. Affirmed.

Walter F. Haas, Chas. Cassat Davis, Cole & Cole, and S. O. Houghton, for appellants. J. L. Murphy, for respondents.

PER CURIAM. The plaintiffs are the vendors in a contract for the sale of land to defendants Grider and Dow. The suit is against the latter, and purchasers from them, to foreclose their interests under the contract. Judgment went against the vendees and some other defendants by default,—and as to the former by stipulation also,—and against the other defendants after answer and trial. The last-named defendants appeal from the judgment and from an order denying them a new trial.

The appellants, it appears, prior to the commencement of the suit, made payments, respectively, to the vendees, on account of the purchase money, for which they claim credits; and in each case tendered the balance to the plaintiffs, who refused to accept less than the whole of the purchase price. The contention of the appellants is that by the terms of the contract the vendees were authorized to sell the lands, and that the moneys paid were received by them as agents for the plaintiffs. But this contention is obviously untenable. The contract, in its terms, is an agreement of the vendors to sell and of the vendees to buy the land described in it for the sum of \$35,000,—\$5 in cash, and the balance "to be paid within one year, or as * * * provided" in the following provisions of the contract. These refer to modes of payment, and to the extension of the time in a certain contingency, and, on the happening of certain conditions, for forfeiture of the contract "at the option of" the vendors; but they leave the vendees

—in the absence of plaintiffs' election to declare a forfeiture—still bound to pay the purchase money, or the balance of the purchase money agreed upon, with the interest, as specified, after the expiration of the year. By other provisions the plaintiffs were bound to convey subdivisions of the land on the payment to them of amounts specified as the price of each, but only on such payments. The contract—which was duly recorded—is too clear to be misunderstood on these points, or to require discussion. Nor would it be profitable to review in extenso the arguments of appellants' counsel. Could it be assumed, as claimed by them, that Grider and Dow were agents for the plaintiffs to sell their lands, it would not follow that they were authorized to receive the purchase money stipulated to be paid to the plaintiffs. That would depend on the terms of the writing conferring the authority, which expressly negative any such notion. The provision that the vendees might retain one-fourth of the purchase money, etc., on sale of subdivisions, had no reference to the amounts to be paid to the plaintiffs as conditions of conveyance. The price of the land in each case was wholly an affair of the vendees, and they could have retained it all, but for the provision requiring the securities for the balance to be placed in escrow in the bank, as collateral to secure their debt to the vendors. There was, in fact, no privity between the plaintiffs and appellants, except in the agreement that the former would convey to the latter severally the subdivisions of land purchased by them upon the payment to the plaintiffs of the stipulated prices. The judgment and order appealed from are affirmed.

133 Cal. 475

BANK OF ORLAND v. FINNELL.
(Sac. 826.)¹

(Supreme Court of California. July 29, 1901.)

APPEAL—BILL OF EXCEPTIONS—SERVICE—EXTENSION OF TIME—DEPOSITIONS—READING A PART—CONTRACT—STATUTE OF FRAUDS.

1. Where the time for serving a bill of exceptions has been extended by order of the court, an objection that it was not served within the statutory time should be overruled.

2. Where a bill of exceptions is allowed and signed by the judge, an objection that it does not appear from the bill that it was served within the time fixed by the court for that purpose should be overruled, since the certificate of the judge carries with it the presumption of regularity.

3. An order extending the time for serving a bill of exceptions may properly be entered before judgment.

4. Under Code Civ. Proc. §§ 2028, 2032, 2034, providing that depositions may be taken and used, it is error to permit a party to read a portion of a deposition taken in his behalf when he has stated that he should not read it all.

5. A contract to pay the value of services which might be, and in fact were, performed within a year, is not void, under Civ. Code, § 1624, subd. 1, because not in writing.

¹ Rehearing denied August 30, 1901.

Commissioners' decision. Department 2. Appeal from superior court, Glenn county; Orval Perkey, Judge.

Action by the Bank of Orland against John Finnell. From a judgment for plaintiff, defendant appeals. Reversed.

For former opinion, see 56 Pac. 607.

F. E. Johnston and Bush Finnell, for appellant. Frank Freeman and Charles L. Donohoe, for respondent.

SMITH, C. The suit is to recover money alleged to be due on a parol contract, the terms of which are set out in the complaint. The defense is a denial of the material allegations of the complaint, and, as an affirmative defense, in effect, that by a subsequent agreement the contract was satisfied and discharged. The cause was tried by a jury, who returned a verdict for the plaintiff, and judgment was entered accordingly. The appeal is from the judgment.

The preliminary point is made by the respondent's attorneys that the bill of exceptions was not served and presented for settlement in time, and must, therefore, be disregarded. Upon the rendition of the verdict, and before the entry of judgment, an order was made by the court granting to the defendant 30 days in addition to the time required by law within which to serve and file bill of exceptions. The judgment was entered September 27, 1899. On the day fixed for the settlement of the bill, plaintiff's counsel objected to the settlement on the ground that the copy of the bill had not been served on them "within ten days after the entry of judgment." But, as the defendant's time had been extended, the objection was obviously untenable, and was rightly overruled. It is urged, however, that "it does not appear from the bill of exceptions" that it was served on the plaintiff's attorneys within the additional 30 days allowed by the order, and that the order itself was void, because made before judgment. But the making of the order in advance of the judgment was entirely unobjectionable and regular; and, with reference to the other objection, it is sufficient that the contrary does not appear. The certificate of the judge carries with it the presumption of regularity. *Sullivan v. Wallace*, 73 Cal. 307, 14 Pac. 789. The decision in *Connor v. Motor-Road Co.*, 101 Cal. 429, 35 Pac. 990, cited by the counsel, does not conflict with this familiar and well-established principle. It is, indeed, asserted by the respondent's counsel that the bill in fact was not served on them within the extended time. But the appellant's counsel (in language more vigorous than appropriate to this court) denies the fact, and this leaves the question to be decided by the certificate of the judge, and the presumption in favor of the regularity of his proceedings.

The errors complained of refer to rulings of the court in giving or refusing instructions

and in admitting or excluding evidence. Of the latter, one error specified is the ruling of the court in permitting portions of the deposition of one Mecum, a witness of the plaintiff, to be read in evidence, and in refusing to strike out the same. The reading of the deposition was prefaced with the statement of the plaintiff's attorney that he did not intend to offer the entire deposition, but part of it only; to which objection was made and overruled, and exception taken. On the completion of the reading, the defendant's attorney moved to strike out what had been read on the ground that only part of the deposition had been read; but the court overruled the motion, the defendant excepting. It is set forth in the statement that the defendant did not offer any portion of the deposition, and that no objection was made to his doing so; and portions of the evidence omitted are also inserted. But these matters we deem immaterial. The simple question involved is whether it is permissible for a party to introduce in evidence selected portions of the deposition of his own witness, omitting the rest; and clearly this question must be answered in the negative. *Kilbourne v. Jennings*, 40 Iowa, 473; *Grant v. Pendery*, 15 Kan. 236; *Hill v. Sturgeon*, 28 Mo. 323; *State v. Rayburn*, 31 Mo. App. 385; *Lanahan v. Lawton*, 50 N. J. Eq. 276, 23 Atl. 476; *Thomas v. Miller*, 151 Pa. 482, 25 Atl. 127. In this state the only authority for the use of depositions is in the provisions of the Code, which provide that "the deposition" may be used (Code Civ. Proc. §§ 2028, 2032, 2034); but it is not said that portions of them can be used, nor can it be inferred that such was the intention. It is, indeed, said in the *American and British Encyclopædia of Law*, in a passage cited by respondent's counsel (volume 9, p. 365), that "the party offering a deposition in evidence is not, as a rule, bound to offer or read the whole of it"; but (with one exception) we find no support for the proposition in the authorities cited. Of these some have apparently no bearing on the proposition. *Edgar v. McArn*, 22 Ala. 796; *Smith v. Crocker*, 3 App. Div. 471, 38 N. Y. Supp. 268; *Gellatly v. Lowery*, 6 Bosw. 113; *Williams v. Kelsey*, 6 Ga. 365; *McArdle v. Bullock*, 45 Ga. 89,—the court in the case last cited saying: "If the practice of the court permits the party bringing them in [referring to the interrogatories] to read * * * only the direct answers, it is a new practice to us." Other cases hold that parts of a deposition may be used, in certain cases, as declarations of the party testifying (Code Civ. Proc. § 1870, subd. 1; *Van Horn v. Smith*, 59 Iowa, 142, 12 N. W. 789, distinguishing *Kilbourne v. Jennings*, 40 Iowa, 473. And see, also, *Bank v. Rhutasel*, 67 Iowa, 319, 25 N. W. 261, or as declarations of a witness to contradict him (*Webster v. Caiden*, 55 Me. 165; *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899); and others that a party may read the whole or part of a deposition taken on behalf of his adversary (*Con-*

verse v. Meyer, 14 Neb. 190, 15 N. W. 340; *Hammat v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Byers v. Orensstein*, 42 Minn. 386, 44 N. W. 129; *Watson v. Race*, 46 Mo. App. 552), the decision being based, apparently, on the principle laid down in *Van Horn v. Smith*, 59 Iowa, 142, 12 N. W. 789. The excepted case referred to is *Bunzel v. Maas*, 116 Ala. 79, 22 South. 568, where the plaintiff was allowed to offer in evidence the examination in chief of a witness examined by deposition in his behalf; the court citing in support of the ruling the following cases: *Van Horn v. Smith*, 59 Iowa, 142, 12 N. W. 789; *Converse v. Meyer*, 14 Neb. 190, 15 N. W. 340; *Gellatly v. Lowery*, 6 Bosw. 113; *Bank v. Rhutasel*, 67 Iowa, 316, 25 N. W. 261; *Herring v. Skaggs*, 73 Ala. 446. But none of these decisions seem to support the position of the court. In the case last cited the deposition from which the plaintiff was permitted to read was the deposition of the defendant, and in *Bank v. Rhutasel* the deposition of a witness taken by the opposite party. The other cases are among those already commented on. It will be observed that the exceptional case does not go so far as to hold that the plaintiff could dispense with any part of the direct examination, as was held in this case.

Objection was made to the instruction given to the jury that the contract alleged in the complaint did not need to be in writing to give it validity. The contract sued on was the promise to pay the plaintiff the reasonable value of the summer-fallowing to be done by the Deveneys. This might be, and in fact was, done within the year. Civ. Code, § 1624, subd. 1. The agreement of the plaintiff with the Deveneys to furnish them the money needed for this purpose and in farming the land leased—which was in part the consideration of the defendant's performance—was in fact performed, and it is immaterial whether or not it should have been in writing.

The other points made by the appellant relate to the evidence, and may not be presented on a new trial. It will therefore serve no useful purpose to determine them. I advise that the judgment be reversed.

We concur: GRAY, C.; HAYNES, C.

PER OURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

133 Cal. 504

ALLEN v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRANCISCO. (S. F. 2,793.)

(Supreme Court of California. July 31, 1901.)
DIVORCE—SUIT MONEY—ALIMONY—INABILITY
TO PAY—STAY OF PROCEEDINGS—
MANDAMUS—COSTS.

1. In an action by petitioner against his wife to annul their marriage on the ground of fraud, petitioner was ordered to pay her certain suit

money and alimony. In proceedings against him for contempt for not making the payments, it was shown that he was unable to pay, and the proceedings were dismissed, but the court ordered all proceedings in the suit stayed until such payments were made. *Held* that, while the wife was absolutely entitled to the suit money, and petitioner should not be permitted to proceed with the suit until that was paid, the court erred in refusing him a hearing until he paid the alimony.

2. Where petitioner applied for mandamus requiring the superior court to grant him a trial in an action to annul his marriage, proceedings therein having been stayed until he complied with an order to pay suit money and alimony, he being unable to pay the alimony, and not having paid or offered to pay the suit money, the proceedings for mandamus should be dismissed, without costs.

In bank. Petition for mandamus by J. W. F. Allen against the superior court of the city and county of San Francisco. Dismissed.

Alfred P. Black, for relator. Benjamin Healey, for respondent.

BEATTY, C. J. This is a petition for a writ of mandate to the superior court to proceed to trial of an action by the petitioner against his wife to annul the marriage upon the ground of fraud. The facts of the case are that the defendant in the action referred to, after appearing therein, applied to the court for an order allowing her alimony and suit money, and the court made an order requiring the plaintiff (petitioner herein) to pay her the sum of \$50 as counsel fees, and \$20 per month for her support. The plaintiff failed to pay any part of the sums ordered to be paid, and was cited to show cause why he should not be punished for contempt for failing to obey the order of the court. After a hearing upon the citation for contempt, the court found that the failure to pay was due to inability on the part of the plaintiff to comply with the order, and the proceeding was dismissed. At the same time the court made an order staying all proceedings in the action to annul the marriage, and has ever since refused to grant the petitioner a hearing upon the merits of his case, unless he complies with the order to pay both counsel fees and alimony. We think the court is in error in refusing the petitioner a hearing until he pays the alimony. It is conceded that he is unable to pay anything, and, such being the case, he should not be debarred from a trial until he has provided for his wife's support. It is enough to stay the proceeding until he provides the defendant with the money actually necessary for her defense, independent of support,—suit money as distinguished from alimony. As to suit money, the right of the wife cannot be denied. Until her alleged fraud is established, she remains the lawful wife of the petitioner, and has the same right to defend the action to annul the marriage that he has to prosecute it; and, until she is provided with the means actually necessary to make her defense, she ought not to be forced into a trial. This conclusion is sustained by all the opinions, concurring and dissent-

ing, in the case of *Hite v. Hite*, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793. It is not clear what ought to be the judgment in a case where a court has imposed conditions too exacting upon a party demanding the trial of a cause, and where the party has not offered to comply with the conditions which the court might properly have imposed. Under the circumstances of this case, we think it will be proper to dismiss the proceeding, without costs. It is so ordered.

We concur: TEMPLE, J.; McFARLAND, J.; GAROUTTE, J.; VAN DYKE, J.

133 Cal. 319
AMERICAN TYPE-FOUNDERS' CO. et al.
v. JUSTICE'S COURT OF SAUSALITO
TP. et al. (S. F. 1,473.)

(Supreme Court of California. July 31, 1901.)

In bank. On motion for reargument. Denied.

For opinion in department, see 65 Pac. 742.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. While it is true that the department could not have decided otherwise than it did without disregarding the decision of the whole court in the case of *Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. 366,—a decision in which I concurred,—I think the court in bank should not hesitate to set aside its former ruling if satisfied that it was erroneous. I am satisfied by the argument and the authorities cited by appellant that *Heinlen v. Phillips* was incorrectly decided, and this case is an illustration of the abuses that are possible under the practice there sanctioned. A justice of the peace may hold a case under advisement for an indefinite time (it was nearly 15 months in this instance), and, unless the losing party has kept constant watch upon the proceeding, a judgment may have passed beyond the reach of review before he has any notice of its entry. There is no requirement of notice of a justice's judgment, but the law commanding him to enter judgment at the close of the trial, if held mandatory, as it is in terms, would serve all the purposes of notice. As notice is essential for the security of the losing party, I think the law cannot too soon be relieved of a construction which destroys its efficacy.

6 Cal. Unrep. 766

WILSON v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRAN-
CISCO. (S. F. 2,618.)

(Supreme Court of California. July 27, 1901.)
APPEAL AND ERROR—ORDER FOR SUBMIS-
SION—INADVERTENT DECISION—VALID-
ITY—MOTION—MANDATE.

1. Where an appeal from a judgment of the police court to the superior court had been taken, and papers filed in the superior court many months, the fact that the court decided the appeal without having first made an order submitting it to decision does not render the judgment void.

2. Where the superior court inadvertently rendered judgment on an appeal from the police court, without first making an order submitting the appeal for decision, the judgment may be set aside on motion, but cannot be treated as void, and a second review and decision of the same question be compelled by mandate.

On petition for rehearing. Denied.
For former opinion, see 65 Pac. 575.

GAROUTTE, J. By reason of the complicated facts disclosed by the record in this proceeding, possibly some erroneous statements have crept into the opinion heretofore rendered; but, as to any of those statements, they do not appear to materially affect the soundness of the conclusion to which the court arrived. In answer to the petition for a rehearing it may be further suggested that it appears, first, by the affidavit of the judge of the court, in his answer to the petition for the writ, that he decided the appeal from the judgment upon September 7th. It next appears by the entry made in the record at that time that he decided the appeal from the judgment. It next appears by the order made by the court upon December 26th that he decided the appeal from the judgment upon September 7th; for at the hearing upon December 26th the very question at issue was whether or not the order made upon December 21st was within the jurisdiction of the court, and at the hearing upon the 26th it was held that the order of the 21st was void by reason of the fact that the court had theretofore, upon September 7th, decided the question involved in the hearing of December 21st. It may, then, be said that it conclusively appears that the court upon September 7th decided the appeal from the judgment. The remaining question is then presented, was that decision absolutely void? for, if it was not absolutely void, certainly mandate will not run against the court to compel it to again decide the same question. It is insisted that such judgment was absolutely void, because at the time it was rendered there had been no order made submitting that appeal to the court. It, however, does appear by the record that the appeal from the judgment had been taken many months prior to September 7th, and that the papers on appeal from the judgment had been filed in the superior court months prior to September 7th. Under these circumstances, the mere fact that the court decided the appeal without having first made an order submitting it for decision, we think to no extent renders the judgment void. It may be said that the very fact of the court assuming jurisdiction of the question and deciding it was, in effect, an order of submission. If these be the facts, then probably it may be said that the judgment was inadvertently rendered, but the inadvertent rendition of a judgment does not necessarily render that judgment void. A judgment inadvertently rendered may be set aside upon motion, but we know of no case where it has ever been held that such a judgment may be treated as absolutely void, and mandate run against a court to compel a second review and decision of the same question. For these reasons, I think the petition for rehearing should be denied.

6 Cal. Unrep. 768

WEBB v. WINTER et al. (Sac. 815.)*

(Supreme Court of California. July 29, 1901.)

WILLS—COMMUNITY PROPERTY—LIFE ESTATE—MORTGAGE—FORECLOSURE—INTEREST CONVEYED—POWER TO SELL—ADVERSE POSSESSION—TENANT IN COMMON—EJECTMENT—DEMAND.

1. A husband owning community property died, and by his will left all his property to his wife for life, remainder to his children. She borrowed money, and mortgaged the premises as if owner in fee. *Held*, that on foreclosure the purchaser acquired the widow's undivided one half and her life estate in the other half.

2. Where property is sold on foreclosure of a mortgage executed by a widow, who owned one half thereof as community property and the other half for life under her husband's will, of which she was executrix, the remainder being devised to their children, the purchaser at such sale cannot acquire title to the interest of the children by adverse possession, pending administration of their father's estate, or without giving notice that he claimed absolute title to the whole property.

3. In an action to foreclose a mortgage given by the owner of an undivided half of the premises and life estate in the other half, the owners of the remainder after expiration of the life estate were made parties defendant and defaulted. *Held*, that the foreclosure sale conveyed only the interest of the mortgagor, and did not affect the title of the other parties.

4. Where a will authorizes the executor to sell the property, if necessary for support of the widow and children, such authority does not include power to mortgage.

5. A demand is not necessary before bringing suit to recover land, where defendants deny plaintiff's title, and set up title in themselves.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; Edward Sweeny, Judge.

Action by Earl H. Webb, administrator with the will annexed of the estate of John E. Church, deceased, against Mary Winter and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

H. P. Andrews (Grove L. Johnson, of counsel), for appellants. Webb & Espey, for respondent.

COOPER, C. This action was brought by plaintiff, as administrator with the will annexed, to recover from defendants possession of lot 22, block 12, in the town of Red Bluff. The case was tried before the court, findings filed, and judgment entered for plaintiff. Defendants made a motion for a new trial, which was denied, and this appeal is from the judgment and order denying the motion. There is practically no controversy about the facts, which are substantially as follows: John E. Church, during his lifetime, was the owner of the premises described in the complaint, the same being community property. On January 13, 1886, said Church died, leaving a will, by the terms of which he appointed his wife, Elizabeth, executrix without bonds. He left surviving him, besides his widow, two children,—Flora C. Pryor, a daughter, and E. C. Church, a son. By the terms

*Reversed in banc. See 67 Pac. 691, 135 Cal. 455.

of the will the deceased left all his property to his surviving wife during her life, and at her death to be equally divided between his children. The will authorized the executrix, if necessary for the support of herself and children, to grant, bargain, sell, and dispose of all of said estate at private sale, without any order of court therefor. Elizabeth Church qualified as executrix, letters were issued to her, and she continued executrix until her death, September 22, 1898. On February 21, 1890, the said Elizabeth Church borrowed \$2,500 from defendant Mary Winter, and also \$2,500 from George G. Winter, her husband. To secure the said loans, she, without any order of court, and in her individual capacity, executed mortgages to said defendant Mary Winter, and to her husband, George G. Winter, upon said premises, which were described in said mortgages as though said Elizabeth Church were the owner in fee thereof. George G. Winter subsequently died, and defendant Mary Winter succeeded to his title, thus becoming the owner of both mortgages. The indebtedness not having been paid, nor the interest, the defendant Mary Winter, in 1893, commenced proceedings to foreclose the said mortgages, making Elizabeth Church in her individual capacity defendant. The two surviving children, Flora C. Pryor and E. C. Church, who were then each of lawful age, were also made defendants; the complaint alleging that they had, or claimed to have, some interest in or to said premises, which interest was alleged to be subsequent to and subject to plaintiff's lien. The defendants in said foreclosure proceedings each made default, and on June 26, 1893, a decree of foreclosure was duly entered in favor of plaintiff therein and against said Elizabeth Church, E. C. Church, and Flora C. Pryor. On August 30, 1893, the premises were sold to defendant Mary Winter by virtue of the said decree and order of sale, and a certificate of sale issued and delivered to her, and she thereupon entered into, and ever since has remained in, possession by herself and her tenant, Sobel, who is made a co-defendant herein. On March 2, 1894, a deed was issued to defendant Mary Winter by the commissioner who made the sale under the foreclosure proceedings. Since her purchase on August 30, 1893, defendant Mary Winter has paid the taxes levied and assessed upon the premises, except the second installment of taxes for the year 1898, which were paid in November, 1898, by the plaintiff herein. On September 22, 1898, the said Elizabeth Church died, leaving the estate in process of settlement. At the time of her death there had been no distribution, and no final account filed or settled. On November 19, 1898, the plaintiff was appointed administrator with the will annexed of the said estate, letters were issued to him, and he ever since has been such administrator. This action was commenced July 31, 1899.

It is provided in section 1452, Code Civ.

Proc.: "The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled, or until delivered over by order of the court to the heirs or devisees; and must keep in good tenable repair all houses, buildings, and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do." And in section 1531: "The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title." The property belongs to the estate of John E. Church, deceased. The estate has not been settled, nor has the property been delivered over to the heirs or devisees. The said Elizabeth Church was the owner, subject to administration, of an undivided one-half of said property as community property, and of the whole of it during her lifetime. The mortgage was a conveyance, by way of security, of all her title, subject to the ordinary purposes of administration, to the claims of creditors, and the expenses of administration. The sale under the foreclosure of the mortgage related back to, and conveyed the title of, Elizabeth Church, as devisee and heir of her deceased husband, which she had at the time she executed the mortgage. The mortgage was of the title and right of the mortgagor; no more, no less. She could mortgage her own interest in the property. She could not mortgage the interest or title of others, except by order of court, which she did not have. The defendant Mary Winter, by purchasing at the foreclosure sale, succeeded to all the title of Elizabeth Church in and to the property, but not to the title of Flora C. Pryor or E. C. Church. They did not mortgage their interest, and Elizabeth Church did not, because she possessed no such power. Great stress is placed upon the claim that defendant Mary Winter has acquired title by adverse possession. We think the claim cannot be maintained in this action. Elizabeth Church was not the sole owner of the property, but only a tenant in common with the children, the whole thereof being subject to administration. Defendant Mary Winter, by the foreclosure, has only succeeded to the rights of her mortgagor as one of the heirs.

The law charges her with notice of the fact that her mortgagor was not the sole owner of the property, but only a tenant in common with her children. In such case as successor in interest of all of the heirs, she cannot acquire title by adverse possession pending administration. In *re Grider*, 81 Cal. 571, 22 Pac. 908; *Dunn v. Schell*, 122 Cal. 627, 55 Pac. 595. Elizabeth Church held the property in trust for the purposes of administration and for the children named in the will. Although holding the property as trustee, she also held an interest in it in her own right. By the loss of this interest, through mortgage and foreclosure, she did not destroy the interest she held as trustee. She never repudiated the trust, or gave notice of repudiation. Defendant Mary Winter took the title of Mrs. Church subject to the trust created by the will. She never gave any notice to the representative of the estate in her official character, nor to the children named in the will, of any claim to the property as absolute owner. By the foreclosure proceedings she could not affect any title of the children paramount to the mortgage. As she did not, in such foreclosure proceedings, make the executrix of the estate of Church in her official capacity defendant, we must presume she was not claiming as against the representative of the estate. The foreclosure of the mortgage, given by the executrix as an individual, is perfectly consistent with the property still retaining its trust character as to the estate and the other heirs.

It is urged that the children are estopped by the foreclosure decree, as they were of age, and made default. But this position cannot be maintained. The children did not appear and put in issue their title. It is well settled that a sale under foreclosure proceedings transfers the title as it existed at the date of the mortgage, and that any paramount title existing at the date of the mortgage in third parties is not affected by the decree of foreclosure. It only forecloses the title of the mortgagor and any rights that have accrued subsequent to the making of the mortgage. *McComb v. Spangler*, 71 Cal. 422, 12 Pac. 347; *Ord v. Bartlett*, 83 Cal. 429, 23 Pac. 705; *Sichler v. Look*, 93 Cal. 602, 29 Pac. 220.

The claim that the clause in the will authorizing the executrix to sell the property was sufficient authority to authorize the execution of the mortgage cannot be upheld. The deceased, while willing that the property might be sold, if necessary, for the support of his children and his widow, might not have been willing that it should have been mortgaged. A sale is supposed to be a transfer for full value. A mortgage is a conveyance by way of security, and may result in the loss of the property for only a small part of its value. It is said by Woerner, in his work on the American Law of Administration (2d Ed.) vol. 2, pp. 731, 732, § 345: "It may be stated, as a general proposition, that

neither executors, unless specially thereto authorized by will, nor administrators, have the power to bind the estate of the deceased by borrowing money. * * * The power to sell real estate, given in a will, does not necessarily include the power to mortgage it. Such a power must be exercised to the extent and in the manner specified. It must accomplish the purposes had in view by the testator." To the same effect are the following authorities: 2 *Perry, Trusts*, § 768, and cases cited in note 4; *Hoyt v. Jaques*, 129 Mass. 286; *Golinsky v. Allison*, 114 Cal. 460, 46 Pac. 295; *Hawxhurst v. Rathgeb*, 119 Cal. 532, 51 Pac. 846.

The eighth finding is supported by the evidence, except that the court finds that the mortgages were made to defendant Mary Winter. One of them was made to her husband; but, as she afterwards became the owner of it, the finding is wholly immaterial. The result would be the same if the fact had been found precisely as it was.

Finally, it is claimed that finding 13, to the effect that plaintiff made demand upon defendants for possession of the property November 19, 1898, is not supported by the evidence. Counsel say in their brief, "Demand was only made before the beginning of the suit, and no date is given in the evidence." The date is wholly immaterial. If demand was necessary, it could be made any time before beginning suit. In this case, as the defendants deny plaintiff's title, and affirmatively set up title in themselves, no demand was necessary. The judgment and order should be affirmed.

We concur: SMITH, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

133 Cal. 496

PERKINS v. MAIER & ZOBELIN BREWERY. (L. A. 823.)

(Supreme Court of California. July 31, 1901.)

INSOLVENCY—CHATTEL MORTGAGE—ASSIGNEE—ACTION TO RECOVER PROPERTY.

1. A mortgage of the fixtures in a saloon, though such property is not included in the list of property which may be mortgaged under Civ. Code, § 2955, is good as between the parties, and as to all other persons except creditors of the mortgagor and subsequent purchasers in good faith and for value.

2. Under Insolvent Act, § 55, providing that, if a debtor in contemplation of insolvency, within one month of filing a petition by or against him, makes any mortgage to evade the provisions of the act, his assignee may recover the property, an assignee cannot recover property mortgaged in good faith three months before insolvency proceedings were commenced, though the mortgagee took possession less than one month before such proceedings.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Action by Gregory Perkins, Jr., assignee of Charles Bauer, insolvent, against the Maier & Zobelein Brewery. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

E. T. Dunning, for appellant. Louis Gottschalk, for respondent.

COOPER, C. This action was brought by plaintiff, as assignee of the insolvent estate of Charles Bauer, who was adjudged insolvent under the insolvent act of March 26, 1895, for the purpose of recovering damages for the alleged wrongful conversion by defendant of certain counters, mirrors, desk, electric fixtures, kitchen utensils, and other articles of personal property, which had been used by, and formerly were the property of, the insolvent, Bauer. Bauer had the property in a certain saloon and restaurant known as "The Anheuser," on Spring street, in the city of Los Angeles. While he was the owner and in possession of the property, and before any question was raised as to his solvency, on the 13th day of October, 1897, he borrowed \$4,500 of defendant, and executed a chattel mortgage upon all the property described in the complaint to secure the said loan. This mortgage was properly verified, and recorded on the day of its execution. It was given to secure a note of \$500, due 30 days after date (October 13, 1897), and four notes of \$1,000 each, due in 6, 12, 18, and 24 months, respectively. The mortgage contained an express provision that, "if the mortgagor shall fail to make any payment as in the said promissory notes provided, the mortgagee may take possession of the said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount in said notes specified." On December 31, 1897, the first note not having been paid, and no interest having been paid, defendant, to secure itself, and to collect the money due it, took possession of said property under the terms of said mortgage, and had it sold under foreclosure proceedings. Defendant became the purchaser at the foreclosure sale. On January 6, 1898, the creditors of Bauer filed a petition to have him adjudged insolvent, and, after due notice given, an order was made adjudging him insolvent, and appointing plaintiff assignee. It is claimed by the plaintiff that the property was transferred to defendant on the 31st day of December, 1897, at the time it took possession, and that said transfer was fraudulently made with a view to give a preference to defendant, and to prevent the property from coming into the hands of the assignee in insolvency, and to prevent the same from being ratably distributed among the creditors of said insolvent. It is said that the portion of the property described in defendant's mortgage, and sought to be recovered, is not of the class of personal prop-

erty enumerated in section 2955, Civ. Code, and that for this reason the mortgage was and is void, and created no lien against plaintiff, as assignee of the insolvent. This is the main point in the case. Conceding that the mortgage was of personal property not enumerated in the section of the Code cited, it was good as between the parties, and as to all other persons except creditors of the mortgagee and subsequent purchasers in good faith and for value. *Bank v. Moore*, 106 Cal. 680, 39 Pac. 1071; *Bank v. Gibson*, 109 Cal. 198, 41 Pac. 1008; *Tomlinson v. Ayres*, 117 Cal. 572, 49 Pac. 717; *McLeod v. Barnum* (Cal.; Feb. 18, 1901) 63 Pac. 924. The plaintiff only represents the creditors of the insolvent. He is not a subsequent purchaser or mortgagee in good faith, and for value. *Bank v. Purdy*, 130 Cal. 458, 62 Pac. 738. As the representative of the creditors, he derives his power to maintain actions to set aside conveyances from the statute alone.

Section 55 of the insolvent act of 1880, under which plaintiff was appointed, provides that if any debtor, in contemplation of insolvency, within one month before filing a petition by or against him, with a view to giving a preference, makes any "pledge, mortgage, assignment, transfer, sale or conveyance * * * with a view to prevent his property from coming to his assignee in insolvency, * * * or to evade any of the provisions of this act, * * * such pledge, mortgage, transfer, sale, assignment, or conveyance is void, and the assignee or the receiver may recover the property or the value thereof, as assets of such insolvent debtor." In this case the mortgage was made more than one month before the petition was filed. It was made in good faith, and for value. There is no evidence in the record that it was made with any view to give a preference, or to prevent the property from coming into the hands of the assignee. There is therefore no authority in the statute authorizing the assignee to maintain this action. The plaintiff was evidently of this view when he drew his complaint, because he alleges the transfer to have been made on December 31, 1897, the date the defendant took possession of the property. He claims that the fact that defendant took possession on the last-named date shows a transfer on said date, but we do not think so. The defendant had the right to take possession of the mortgaged property any time after condition broken. Such possession, when taken, is a full protection to the mortgagee, and relates back to the date of the mortgage, if no intervening rights have accrued. *Jones, Chat. Mortg.* § 243; *Cobbey, Chat. Mortg.* §§ 794, 795; *Sawyer v. Turpin*, 91 U. S. 120, 23 L. Ed. 235; *Broughton v. Vasquez*, 73 Cal. 325, 11 Pac. 806, 14 Pac. 885. If the views above expressed are correct, it is not necessary to discuss the question as to whether or not the defendant had reasonable cause to believe Bauer insolvent on the 31st day of December,

1897, when it took possession of the said property. If its mortgage was valid, and authorized it to take possession, it had the right to do so, for the purpose of preventing creditors from taking or attaching the property. It follows that the judgment and order should be affirmed.

We concur: SMITH, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(133 Cal. 479)

OLSEN v. BIRCH et al. (S. F. 1,801.)

(Supreme Court of California. July 30, 1901.)
MARITIME CONTRACT—JURISDICTION—CONFLICT OF LAWS—VESSELS—PERSONAL ACTION—ACTIONS IN REM—COMPLAINT—AMBIGUITY—DEMURRER—APPEAL AND ERROR.

1. Code Civ. Proc. § 813 et seq., providing that all vessels are liable for certain services; that actions therefor must be brought against the owners by name, if known, and the plaintiff may have the vessel attached as security, —is not, as applied to contracts not maritime, in conflict with Const. U. S. art. 3, § 2, declaring that the jurisdiction of the federal courts shall extend to all cases of admiralty and maritime jurisdiction, or Rev. St. U. S. § 711, providing that "the jurisdiction of the federal courts in cases of admiralty and maritime jurisdiction is exclusive, saving to suitors in all cases the rights of a common-law remedy where the common law is competent to give it."

2. Where an action is brought against the owner of a vessel by name to recover for services rendered on such vessel, and summons served on such owner, and a personal judgment demanded against him, the action is in personam, and not in rem, though the vessel may be attached to secure the claim.

3. Contracts for services rendered in the construction of a vessel and thereon before it has ever been engaged in navigation are not maritime contracts.

4. Where an ambiguity in the complaint could easily have been remedied by amendment, the judgment should not be reversed because a special demurrer on that ground was improperly overruled.

5. Allegations in a complaint that the services sued for were rendered on board a vessel, and as members of her crew, do not necessarily imply that the vessel was engaged in commerce, and that the contracts were maritime, since they may refer to a force put on board a vessel to care for it, before the vessel has been enrolled or in commission.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by C. S. Olsen against W. H. Birch & Co. and the Yukon & Northwestern Dredging & Transportation Company. From a judgment for plaintiff and other defendants, the defendant corporation appeals. Affirmed.

E. L. Campbell, J. S. Spilman, and Reddy, Campbell & Metson, for appellant. H. W. Hutton, for respondent.

TEMPLE, J. This action was brought to foreclose liens upon the steamship City of Dawson, which was constructed at San Fran-

cisco in 1898, by the appellant, as owner. The complaint contains three causes of action. The first is for \$200, due plaintiff for services in the construction of the ship. The other two are upon assigned claims. One is a claim of Frank Green for services as chief engineer, rendered on board said steamship, and "as a member of her crew." The third is the claim of A. R. F. Brandes, a freight clerk, rendered on board said steamship as a member of her crew. It was found that the services of plaintiff were rendered in building a house on the steamship, and the services of Green were rendered while the steamship was "not engaged in active operation, and was not in commission." It was found that Brandes performed services as freight clerk for the Yukon & Northwestern Dredging Company, but the service was not performed on said steamship, nor as a member of her crew, or for her. The other defendant was found to have a claim against the ship for constructing the same, but no judgment was rendered in favor of said defendant.

The first two points raised by the appellant may be considered together, and practically they are that the law is invalid, as in conflict with section 2, art. 3, of the constitution of the United States, which declares that the jurisdiction of the federal courts shall extend to all cases of admiralty and maritime jurisdiction; and, second, that jurisdiction of the state courts is forbidden by section 711, Rev. St. U. S. This statute declares that "the jurisdiction of the federal courts of cases of admiralty and maritime jurisdiction is exclusive, saving to suitors in all cases the rights of a common-law remedy where the common law is competent to give it." The statutes here called in question are certain sections of the Code of Civil Procedure (section 813 et seq.). The matter is the more interesting because (as is well known to the writer of this opinion) these sections were carefully revised by the late Stephen J. Field after, and in view of, the decisions in *The Moses Taylor*, 4 Wall. 431, 18 L. Ed. 397, and the *Hine v. Trevor*, 4 Wall. 571, 18 L. Ed. 451; and in the report of the so-called "Code Revisors," which was written by Judge Field, the claim was made that for the first time these sections had been made valid. But I think we need not enter very fully into this discussion. The code provisions are certainly not invalid, although a suit might be brought under them of which the courts of the state would have no jurisdiction. If the claim sued upon was one arising from a maritime contract, and the owners were unknown, or if the owner could not be found, and the summons was only served upon the master, mate, or other person in charge of the vessel, a serious question would be presented. But here the owner has appeared and answered, and the action is against him by name, and the claim asserted did not arise upon a maritime contract; and it may be

added the suit is not a proceeding in rem. And, of course, the statute giving the right to a lien would be perfectly valid, although no action could be brought under it in the state courts. The claim did not arise from a maritime contract. The vessel had never been in commission, or in active use in navigation. Maritime contracts have reference to navigation upon the sea, and in some way to vessels actually being used in commerce, or at least in navigation. Counsel agree that liens to secure claims of those who have contributed to the construction of vessels are nonmaritime, but appellants seem to contend that, because the findings state that the labor of plaintiff was performed in the construction of a house upon the City of Dawson, and the assignors of the other claims rendered their services as members of the crew on board the vessel, the vessel was complete before the services were rendered, and therefore the liens are for securing maritime contracts. It is found that the vessel had not been used in navigation. It seems true that, if the vessel was employed in navigation, it would still have been at least doubtful whether the contract for the construction of the house was a maritime contract; but, the vessel not being at the time employed in navigation, and never having been so engaged, the contract was not maritime. This is completely settled by the case of *Williams v. The Sirius* (D. C.) 65 Fed. 226, and by the authorities quoted by the learned judge in that case. The libellant there claimed a lien, under these provisions of our Code for services rendered as watchman or ship-keeper. The vessel had been engaged in commerce, but was sold in San Francisco under a venditioni exponas issued from the district court. It was a British ship, but had not been enrolled as an American vessel after the sale, and was not in commission. After reviewing the authorities, the court was unable to hold that the services were of a maritime character, and therefore there was no lien under our state law cognizable in a court of admiralty. The *Sirius* had been engaged in navigation, but was laid up in her home port, and was unregistered, and out of commission. The point of the decision seems to be that the services, though rendered on the vessel, were not in furtherance of navigation, but were to preserve the vessel. A few authorities apparently holding a contrary doctrine are cited by appellants. The *Eliza Ladd*, 5 Sawy. 519, Fed. Cas. No. 4,364; *Revenue Cutter No. 2*, 3 Sawy. 143, Fed. Cas. No. 11,714; *The Manhattan* (D. C.) 46 Fed. 797. The reasoning in the cases is similar, but *The Manhattan* is the more elaborate, and apparently most relied upon. In that case the hull was first built under contract, and then floated to a different point, where the ship was completed under a new contract. Proceedings in rem were instituted to recover upon this contract, and the jurisdiction of the district

court was challenged on the ground that the contract was not of a maritime character. Judge Hanford referred to the fact that contracts for building ships are not maritime, while contracts for repairing and rebuilding ships are; and he said (correctly, I think) that it could make no difference whether the same work was done upon a new hull or an old hulk, and then added: "After a new ship has been launched, and embraced by the element upon which she is intended to float, and been christened, and become an entity fully capable of being identified, she is as much a subject of admiralty and maritime jurisdiction as she can be at any later period of her history; and contracts then entered into relating to her completion, equipment, or employment are maritime, and cognizable in admiralty." Evidently there is here a misapprehension as to the basis of admiralty jurisdiction. It does not extend to ships merely because they are ships, but to commerce and navigation, and to ships only because they are, and while they are, used in commerce and navigation. A ship, while building, is not an instrument of commerce; nor is she while out of commission, and being cared for to preserve her for possible future use. A ship injured by use, and only temporarily laid up for repairs, or being refitted that she may resume her voyage, is considered still engaged in commerce.

But this suit is not a proceeding in rem. Had the contract been maritime, a proceeding in rem could have been had in the district court. Nevertheless, if a common-law remedy could have been made available, such remedy could have been afforded by the state court. Here the action is against the owner, and such owner has appeared and answered. The vessel was not seized, and there was actual service of summons. The main difference between an action in rem and an action in personam is indicated by the two phrases. One is against the thing as the defendant, and the judgment is that the thing is indebted. And, furthermore, the res is taken possession of and held by the court, and its jurisdiction depends upon such possession and holding. Here the judgment is against the owner, and the sale of the property, if one is had, will be like an ordinary sale under execution. Such proceedings are said to be quasi in rem, which phrase has become quite common since *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. It is there said that such proceedings are not strictly in rem, because they are not against the thing as debtor. The subject is discussed by Wap. Proc. Rem. c. 56. And the right to maintain such suits in the state courts has been upheld by the supreme court of the United States. *Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74; *Johnson v. Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447; *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296. In the last case the jurisdiction of courts of admiralty was sustained, but the law required

the suit to be against the vessel, and provided for a seizure of the ship through attachment. The court says of the proceeding in rem: "While the proceeding differs thus from a common-law remedy, it is also essentially different from what are in the West called 'suits by attachment,' and in some of the older states 'foreign attachments.' In these cases there is a suit against a personal defendant by name, and because of inability to serve process on him on account of non-residence, or for some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to a sale in a common-law court of the state." The foreign attachment suits here referred to are the proceedings quasi in rem, elsewhere alluded to. In such case, when the defendant is personally served, or appears in the case, the suit is really an ordinary action in personam. The act of congress did not have the effect of denying to state courts jurisdiction except to enforce the action in rem, as that action was known to courts of admiralty. An action to foreclose a lien against the defendant personally, unaccompanied by seizure or constructive service of process, was not the action in rem in use in courts of admiralty. The objection special to the judgment upon the assigned claims is that the allegation is that such services were rendered on board the vessel, and as members of her crew, which, it is said, is an allegation that the vessel was engaged in commerce. That may be admitted to be the most obvious and ordinary meaning of the language. But the words may be also applied—as the findings show they were here—to a force put on board a vessel to care for it, before the ship has been enrolled or in commission, merely for the preservation of the ship. Perhaps there was an ambiguity which was reached by special demurrer, but the complaint could easily have been amended. And if the court improperly refused to sustain such demurrer, and the complaint was therefore not amended, it is perfectly obvious, in this case, that the defendants were not, and could not have been, injured. Judgment affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

133 Cal. 524

In re RICHARDS' ESTATE. (Sac. 848.)
(Supreme Court of California. Aug. 3, 1901.)
ESTATES—ASSIGNMENT TO WIDOW—MARRIAGE
—PROOF—LAWS OF ANOTHER STATE
—PRESUMPTION.

1. Under Civ. Code, § 55, defining marriage; section 71, declaring that no particular form is required, but the parties must declare in

the presence of the person solemnizing the marriage that they take each other as husband and wife; and section 57, that consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases,—testimony by one claiming to be a widow that a marriage was performed between deceased and her, and that they went before a justice of the peace, and each answered "I do," to his question, "Do you take one another to be your lawfully wedded husband and wife?" and that thereafter they lived together as husband and wife for several years, and had one child, justifies a finding that they were lawfully married.

2. Where, on an issue of marriage, it is claimed to have taken place in another state, but the laws of such state are not shown, such laws will be presumed to be the same as in the state where the action is tried, and proof of facts sufficient to establish a marriage in the latter state will support a finding that the marriage was valid.

3. Under Civ. Code, § 61, providing that a marriage contract during the life of a former spouse is void unless the former spouse is absent and not known to be living for five years, where a husband deserted his wife in Missouri, and remarried in California 12 years thereafter, while the first wife was alive, the latter marriage is void.

4. The fact that there is a controversy as to the ownership of a lot, the legal title to which was in deceased, does not affect the jurisdiction of the probate court to enter an order assigning the whole estate, amounting to less than \$1,500, to the widow, as required by Code Civ. Proc. § 1469, since such order cannot affect an outstanding title.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Petitions of Lydia Richards and Elizabeth Richards, each claiming to be widow of D. E. Richards, deceased, for an order assigning the estate to her as widow. From an order in favor of Lydia, Elizabeth appeals. Affirmed.

J. H. Magoffey, for appellant. L. F. Coburn and J. W. Parker, for respondent.

COOPER, C. Appeal from order setting aside the whole of the estate to the widow of deceased. There is no question as to the value of the estate being less than \$1,500, and that it was the duty of the court to set it aside to the widow. The principal question to be determined is as to which of the contending parties is the widow. A petition was filed by one Lydia, claiming to be Lydia Richards, the surviving widow. An opposition to this petition was filed, and also a petition by one Elizabeth, claiming to be Elizabeth Richards, the surviving widow. Upon the issue thus made, the court heard evidence and filed findings, of which finding 1 is as follows: "The court finds that the petitioner Lydia Richards on the 17th day of September, 1880, in the state of Missouri, intermarried with said deceased, and from that time down to the time of his death she and the deceased were husband and wife, and that she is now the surviving widow of said deceased." And finding 4 is as follows: "The court finds that the petitioner Eliza-

both Richards never at any time or place intermarried with said deceased, the said deceased being at the time of the alleged marriage to said Elizabeth Richards the husband of said Lydia Richards, as before found, and the said Elizabeth Richards is not the surviving widow of said deceased, although the court finds that she believed in good faith that she was legally married to and was the lawful wife of said deceased, as alleged in her said petition." These findings are challenged, as being without support in the evidence, and upon this the case must be determined.

In support of the first finding the contradicted testimony of Lydia Richards is as follows: "There was a solemnization of marriage performed between me and deceased on the 17th day of September, 1880, in the state of Missouri, by a justice of the peace. The justice of the peace said, 'Do you take one another to be your lawfully wedded husband and wife?' and we answered, 'I do,' in each case. I was standing at the side of Mr. Richards at that time. That was in the justice's office in the town of Butler, Bates county, Missouri. It was the county seat. Immediately after that we went home to Rich Hill, and lived together from that time on for four years, until he came away and left me. * * * During that four years Mr. Richards provided for me the necessities of life, and I kept house for him and lived with him, and slept in the same bed with him, and went among his and my friends as husband and wife. * * * I continually cohabited with him. I had one child by him. It is dead." This evidence supports the finding. The record fails to show that any proof was made as to the laws of the state of Missouri relative to the solemnization of marriage on the 17th day of September, 1880, or at any other time. The question as to whether or not the evidence shows a valid marriage will therefore have to be determined according to the laws of our own state, as, without proof to the contrary, the law in the state of Missouri is presumed to be the same as in this state. *Marsters v. Lash*, 61 Cal. 624; *Shumway v. Leakey*, 67 Cal. 460, 8 Pac. 12. The Civil Code of this state, which went into effect on the 1st day of January, 1873, provided in section 55: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations." And in section 71: "No particular form for the ceremony of marriage is required, but the parties must declare in the presence of the person solemnizing the marriage that they take each other as husband and wife." And in section 57: "Consent to and subsequent consummation of marriage may be manifested in any form and may be proved under the same general

rules of evidence as facts in other cases." These sections, as herein quoted, continued to be the law of this state until May, 1895, when amendments to said sections 55 and 57 went into effect. They were in force as originally enacted on September 17, 1880, when the marriage of deceased to Lydia took place. They contained, while in force, provisions similar to the laws in many other states. That a marriage may be inferred from cohabitation seems to be the settled law in most countries. The cohabitation as husband and wife is a manifestation of the parties having consented to contract such marriage inter se. It has been held by this court in numerous cases that under the sections quoted no particular form of ceremony was required, and that mutual consent followed by consummation was sufficient to constitute marriage: *In re McCausland's Estate*, 52 Cal. 569; *Sharon v. Sharon*, 75 Cal. 9, 16 Pac. 345; *White v. White*, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799. Sections 55 and 68, as amended in March, 1895, have no application. They are not retroactive. *Civ. Code*, § 3; *Railroad Co. v. Shackelford*, 63 Cal. 261; *Sharp v. Blankenship*, 59 Cal. 288. Finding 1 being supported by the evidence, it follows that finding 4 is correct. The deceased while the lawful husband of Lydia could not intermarry with Elizabeth, and therefore, as he left Lydia as his widow, he could not leave two widows.

The court did not err in admitting in evidence the testimony of Lydia Richards as to her residence and cohabitation with deceased, and the solemnization of the marriage. It was competent to prove the facts and circumstances tending to show a contract of marriage. It is claimed that the marriage of deceased with Elizabeth in March, 1896, was valid, under *Civ. Code*, § 61. That section expressly provides that a subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person, other than such former husband or wife, is illegal and void from the beginning, unless: "(1) The former marriage has been annulled or dissolved. * * * (2) Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage or was generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal." It is not claimed that the marriage of deceased with Lydia was ever annulled or dissolved. It is therefore self-evident that the first subdivision has no application. It is, however, urged that the second subdivision of the section applies, and that the former wife of deceased was absent and not known by deceased to have been living for the space of five years immediately preceding the subsequent marriage to

Elizabeth. There is no evidence in the record to support this contention. It cannot be said that the former wife of deceased was absent, when the record shows that deceased left her in the state of Missouri, and came to California. Deceased was the absent one, and was absent of his own volition. We cannot indulge in the presumption that deceased believed his former wife to be dead. On the other hand, the presumption is that, having married her and left her in the state of Missouri, he did not believe her to be dead. There is no evidence as to any belief or repute in any manner concerning the death of the former wife. As she was not dead, it would be folly for the court to presume a belief on the part of deceased as to a fact that did not exist, and that was never reputed to exist.

Finally, it is claimed that the court had no power to make the order for the reason that a suit was pending by appellant, Elizabeth, against the administrator to recover lot 25 of block 26, in the town of Sisson, being part of the premises described in the order. It is sufficient to say that the order was made subject to the pending suit. In any event, it is the duty of the court, under section 1469 of the Code of Civil Procedure, to set apart the estate, where the whole thereof does not exceed the value of \$1,500. The order only sets apart the title and interest of deceased. It can do no more. It is not the purpose of the statute to have the court examine the title, and set apart such property on condition that the title is perfect. It is evident that the order cannot affect an outstanding title in the hands of a third person. It follows that the order should be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(133 Cal. 510)

EMERSON et al. v. McWHIRTER et al.
(Sac. 754.)¹

(Supreme Court of California. Aug. 2, 1901.)
MINES AND MINING—CLAIM—FORFEITURE—
RELOCATION—RESUMPTION OF
WORK—EVIDENCE.

1. Where a local regulation required a notice of a mining claim to be posted at each end thereof, and notice was posted at only one end, all other regulations being complied with, the failure to post at both ends did not work a forfeiture, in the absence of a rule so providing.

2. Under Rev. St. U. S. § 2324, providing that, on the failure of a claimant to perform the requisite amount of work on a mine, it shall be open to relocation, unless the original locators have resumed work on the claim before such relocation, where plaintiff in good faith resumed work on a mine previously located by him the day before defendant's location thereof, plaintiff has the superior right thereto.

3. Plaintiff's employé testified that he went on the mining claim December 30th, and commenced work thereon on the 31st. The merchant of whom he purchased supplies testified

that they were delivered on the claim to such employé on the 30th. Defendant and another testified that they went on the claim and around its boundaries on the 31st, and saw no one working there, but did not go where the employé said he was at work. Held, that the testimony of the employé that he worked there on the 31st was uncontradicted.

4. Where a valid location of a mining claim has been made, and work done thereon in good faith, possession maintained, and no intention to abandon is shown, the law should be construed liberally, to prevent a forfeiture.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by E. L. Emerson and others against R. S. McWhirter and others. From a judgment for defendant McWhirter, and from an order denying a new trial, plaintiffs appeal. Reversed.

For former opinion, see 60 Pac. 774.

Crittenden Hampton and J. P. O'Brien, for appellants. F. W. Street and W. C. Kennedy, for respondent.

CHIPMAN, C. Action to quiet title to a mining claim in Tuolumne county, called the "Slapjack Mine." The court found the following facts: That one Coyle on January 1, 1896, made a location of the claim in question, posted notice of his claim at one end of the claim, marked out the boundaries, and placed monuments at each of the four corners and at each end of the lode, and caused his notice to be recorded. By mesne conveyances plaintiffs and certain defendants, other than McWhirter, became the owners of Coyle's interest. A regulation of the mining district in which the claim in question is situated required two notices to be posted on the claim, "one of which shall be posted in a conspicuous place at each end of the claim." The court further found that plaintiffs did not do \$100 worth of labor or improvements on the claim for the year 1898; that on January 1, 1899, the claim was public mineral land and open to location; and that defendant McWhirter on that day located the same as the "Jim Blaine Quartz Mine." Judgment passed for defendant McWhirter, and the appeal is from this judgment, and from an order denying plaintiffs' motion for a new trial.

1. Defendant contends that Coyle's location was forfeited because he posted but one notice on the claim, whereas the local regulation required two to be posted. We waive the question whether defendant in this case can be heard to dispute the validity of Coyle's location. This court at an early day said: "The failure to comply with any one of the mining rules and regulations of the camp is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a noncompliance with such of them as make noncompliance a cause of forfeiture." McGarrity v. Byington, 12 Cal. 426, approved in Bell v. Mining Co., 36 Cal. 214, where it was stated: "The failure of a party to com-

¹ Rehearing denied August 30, 1901.

ply with a mining rule or regulation cannot work a forfeiture unless the rule so provides." Approved by the Arizona supreme court in *Rush v. French*, 1 Ariz. 99, 25 Pac. 816; *Johnson v. McLaughlin*, 4 Pac. 130; also by Judge Sawyer in *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 7 Sawy. 96, 11 Fed. 666. See, also, *Flaherty v. Gwinn*, 1 Dak. Appnd. 509. The Montana court declined to follow the California cases. *King v. Edwards*, 1 Mont. 235. We think, however, as was said by the Arizona court, that the cases cited announce "a safe and conservative rule of decision, tending to the permanency and security of mining titles," and we see no reason for deviating from the decisions heretofore rendered on the point.

2. The remaining questions relate to the amount of the work done by plaintiffs during the year 1898, and to their resuming work in 1899. More than the requisite work was done for the period ending December 31, 1897, and it was found by the court that Coyle made a valid location. It appears from the evidence that one of the plaintiffs (E. L. Emerson) went to the mine in March, 1898, with five men, for the purpose of taking the water out of the principal shaft. This shaft was 65 feet deep, near the bottom of which was a drift or tunnel running off west from the shaft. The mine was unwatered down to the drift. Witness Emerson states in detail what he paid for the labor of the men, etc., amounting in all, including his own labor at \$30, to \$111.93. On cross-examination he stated: "I went there to take that water out. An expert was coming to examine the mine. Therefore I took out the water. To clean it up so he could see it." It took three days and nights to get the water out, and the balance of the time was spent in keeping it out. He testified that he took the water out "solely that the expert could see the mine, and if he reported it favorably the mine was sold." Whether the expert came does not appear. The witness did not see him if he came. It does not appear that any work was done in the shaft or drifts, except to pump the water out. In June following, plaintiff Britton, one of the owners, visited the mine, but did no work at that time. About October 11, 1898, he went to the mine with his partner, Emerson, and remained nearly one month, and lived in a house on the mine. One Elwell and his family were living in part of the same house. Witness and Emerson worked about three days in a shaft that had been previously started, not the one formerly unwatered. Witness testified that they "sunk probably about three feet. It was picking ground, but hard, so we stopped it." This work was on the ledge, and, with the exception of looking up the corners and cutting some brush, it was all the work that was done at that time. When they left they posted a notice on the house, and left one copy with Mrs. Elwell. On December 27, 1898,

they filed with the county recorder an affidavit that they had done at least \$100 worth of work on the mine, stating, among other things: "Said labor consisted of taking water out of the shaft, and work upon shaft and upon ledge. Said labor was performed during the year ending December 31st, 1898." Witness Boynton testified that he went to the mine December 30, 1898, under employment by the plaintiffs, and "worked there continuously, excepting Sundays," until January 25th, on which day he came away. He testified positively that he worked Saturday, December 31st. He bought his tools and supplies at Groveland, from a merchant named Cornwell, who testified that on Friday, December 30th, he sent them to the mine, which was 2½ miles distant. He was certain of the date, from circumstances which he related. January 1, 1899, fell upon Sunday, and Boynton testified that he did not work on that day, but resumed work on Monday morning, January 2d, and worked that day. He testified: "Excepting one stormy part of day, I worked. I worked the following days of the week. * * * Mr. Britton, here, worked with me twelve days. No one else. I was paid \$3 per day. I used an ax and shovel cutting brush; and in drift, pick and shovel." His wages amounted to \$63, of which \$40 was paid, and \$23 was still due. Most of his work was in clearing away brush. Britton testified that he came on the 10th or 11th of January, 1899, and worked from that time on with Boynton; that Boynton was instructed to clear away the brush, the purpose being to fix the ground for a mill site; they worked together 12½ days. He testified: "When he worked with me the character of the work was an open cut made over the ledge, near the shaft, and another open cut on the east end." He further testified that he examined the corners of the claim closely in January before they quit work. On January 26, 1899, Britton made and filed with the county recorder an affidavit of labor performed, "consisting of excavating two open cuts, and draining tunnel, and clearing off brush. One cut about average width of about five feet, by fifty feet long on vein and seven feet deep; also an open cut on vein about six feet wide by two feet in depth by twenty feet long * * * for the year ending December 31st, 1898. Such expenditure was made by or at the expense of F. F. Britton and E. L. Emerson, for the owners of said claim, for the purpose of holding said claim." Appellant's evidence consisted of his own testimony, that of one Paul, and the man Elwell, who lived on the mine. Defendant testified that he and Paul went to the mine on December 31, 1898, about 2 o'clock p. m., and that he "did not see any one at work. Did not see any evidence of work being done." They went around the boundaries, to the corners, and also to shaft Nos. 1 and 2, but saw no one working. He testified: "I was over a great portion of the

location. There was a portion of that I would not want to go over. Mr. Paul told me this ground was open for location." Paul testified: "We went to corners, shafts, and all over it; went round boundary lines; examined monuments and posts; was there about one and one-half hours. * * * I did not see anybody at work on the Slapjack mine during December 31st. If there had been any one there, we would have seen them." They returned between 11 and 12 o'clock that night, and sat around until a few minutes after 12, when McWhirter posted his notice. Paul testified: "We waited for an hour or more, bid each other good-by, and each went our way." Elwell testified that he first saw Boynton at the mine "the night of December 31st." Again: "Mr. Boynton came there December 31st. I don't know at what time he came. I don't know if he did any work. I wasn't there. I got home about seven o'clock on the evening of the 31st." Again he testified that he (witness) was not there on the 30th; that he was there only at nights, and not days, and usually came home about 6 or 7 o'clock. Elwell's testimony cannot be received as in any degree contradicting Boynton on the point that the latter was at work on the mine December 31st. Nor do we think that the testimony of McWhirter and Paul necessarily raises a substantial conflict with Boynton's testimony on this point. Neither of them testified to having been at the place where Boynton said he was cutting out the brush, and where Britton said Boynton was clearing away for a mill site. This point was at a part of the mine not visited by McWhirter or Paul, and it is quite reasonable to suppose that Boynton worked as he testified positively he did, and yet not be seen by these men. They testified that they were there about an hour and a half, and that they hunted out all the corners and monuments of the claim, and ran around the boundaries, which must have occupied most of this time. The negative fact that they did not see Boynton at work is not sufficient to raise a conflict in his positive testimony that he went there on December 30th, and worked cutting out brush on the 31st, corroborated as he is by the testimony of the merchant who sold and delivered supplies to him on the mine on December 30th. The evidence is undisputed that Boynton worked on Monday, January 2d, and thenceforward until Britton came, and thereafter the two worked together. The two worked in all 33½ days, which, at \$3 per day (the wages paid Boynton), would make over \$100. Respondent contends that the work done in unwatering the mine for the sole purpose of its examination with a view of sale was in no sense the annual assessment work contemplated by the statute.

It is unnecessary to decide whether respondent is correct in this view of the law. The case may be disposed of on other points. See, on the question, 2 Lindl. Mines, § 629, and cases cited.

3. Appellants contend that, if it be held that their work in unwatering the mine cannot avail, they resumed work in good faith, and thus prevented forfeiture. The act provides that, upon a failure to comply with the conditions as to doing the requisite work, the mine "shall be open to relocation in the same manner as if no location of the same had ever been made; provided the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." Rev. St. U. S. § 2324. Plaintiffs Emerson and Britton worked for three days each in October, 1898, remaining at the mine nearly a month. Boynton went to the mine on December 30th, under instructions to resume work and continue it, and worked there on the 31st for plaintiffs. He rested the next day (Sunday), worked on Monday, January 2d, and thenceforward until joined by Britton, and they two worked together, completing the requisite \$100 worth of labor. The evidence shows entire good faith on plaintiffs' part in working the mine in 1898, and in resuming labor in 1899. Defendant McWhirter made his location on Sunday morning at about 12:15 of the clock. Plaintiffs were then in possession. They were in possession on Sunday, but rested from labor, as they had a right to do. They worked on Monday, and continuously thereafter, until their labor amounted in value to over \$100. We think these facts show resumption of work, within the meaning of the statute, and prevented forfeiture. Where a valid location of a mining claim has been made, and work done thereon in good faith, possession maintained, and no evidence appears from which an intention to abandon may be inferred, the courts should construe the law liberally, to prevent forfeiture. Indeed, this is the rule generally as to forfeitures. The courts are reluctant to enforce a forfeiture, deeming this class of penalties odious in law; and it is well settled by decisions that forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have performed the labor to the amount required by law, the burden of proving which rests with the party asserting it. 2 Lindl. Mines, § 643 et seq. It is advised that the judgment and order be reversed.

We concur: GRAY, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

133 Cal. 506

GREENLEAF v. JACKS et al. (L. A. 863.)

(Supreme Court of California. Aug. 2, 1901.)

VENUE—CIVIL ACTIONS—RESIDENCE OF PARTIES—MOTIONS—SUFFICIENCY.

Under Code Civ. Proc. § 395, providing for the trial of actions in the county in which the defendants or some of them reside at the commencement of a suit, a defendant in an action against him jointly with others is not entitled to a change of venue to the place of its residence without showing that none of the defendants reside in the county where the action is commenced.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

Action by T. E. Greenleaf against Nellie Jacks and others. From an order denying defendant Goldtree Bros. Company's motion for change of venue, it appeals. Affirmed.

Lester H. Jacobs, for appellant. William Shipsey, W. H. Spencer, and Max Blum, for respondent.

GRAY, C. This action is brought in San Luis Obispo county, and is based upon several certificates of deposit issued by the County Bank of San Luis Obispo County. This bank is alleged to have been located, as to its principal place of business, in the county of San Luis Obispo; and the certificates of deposit are dated at San Luis Obispo, Cal., and provide for the repayment to plaintiff of the several amounts deposited by her, with interest thereon at "five per cent. per annum until due." It is further alleged in the complaint that the said several amounts were "loaned to and deposited with said bank at said city of San Luis Obispo." It is also alleged that on a certain date the said bank closed its doors and ceased doing business. The plaintiff brings this action against the defendants jointly on account of their liability as stockholders in said bank. The Goldtree Bros. Company appeared by demurrer, and at the same time filed an affidavit and demand for a change of venue to San Francisco on the ground that their residence and principal place of business was there, and they had incurred no liability in San Luis Obispo. The motion based on said demand and affidavit was denied by the court, and said Goldtree Bros. Company appeal from the order.

There is nothing either in the affidavit for a change of venue or elsewhere in the record to show in what county the defendants other than appellant reside. Under the provisions of Civ. Code, § 322, the defendants were properly joined in one action. Section 395, Code Civ. Proc., provides, "In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action." An examination of the three sections immediately preceding this in the same Code shows us that this action comes under the section from which we quote. The appellant being the

moving party, the burden was upon it to show that it was entitled to a change of venue; and to show this, under said section 395, it must be made to appear that none of the defendants resided in San Luis Obispo county. *Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108. Having failed to establish this essential fact, its motion was properly denied. Appellant cites several cases to show that, notwithstanding the several defendants might be and were properly joined in the action, still this appellant is entitled to a change of venue to the place of its residence, notwithstanding the other defendants may happen to reside in the county where the action was brought; but we do not think the cases go to the extent claimed for them by appellant. The first case on the subject is *Sayward v. Houghton*, 82 Cal. 628, 23 Pac. 120, and in that case there were two parties defendant, and it is expressly stated therein, "If the complaint states no cause of action against the corporation defendant, the right of Houghton to have the place of trial changed is not affected by making said corporation a defendant in the action;" and further: "There is nothing in the complaint showing or tending to show that the corporation defendant is in any sense interested in this action." It plainly appears in the case that the corporation defendant was not only an unnecessary party to the action, but that the plaintiff might obtain all the relief he demanded without making it a party. This case is not analogous to the case now before us, for here all the defendants are not only proper parties defendant, and properly joined as such under the statute cited, but they are all necessary parties defendant if the plaintiff would obtain the entire relief which he seeks in the action. The other cases cited by appellant upon the point are entirely inapplicable. We advise that the order appealed from be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

133 Cal. 321

In re HUGHSTON'S ESTATE. (S. F. 2,720.)

(Supreme Court of California. Aug. 2, 1901.)

In bank. Dissenting opinion. For majority opinion, see 65 Pac. 742.

BEATTY, C. J. I dissent. A statute giving the right of appeal from a judgment or order which has not become final and irrevocable impairs no vested rights, and is not retroactive. From the opinion of this court in *Re Scott's Estate*, 124 Cal. 676, 57 Pac. 656, I quote the following statement of the law as to the finality of judgments: "The action of the superior court does not become

definite and certain until it is entered at length in its records. Prior to that time it is in the breast of the judge, and until it shall be so entered his decision may be changed from time to time according to his views. It is only when his decision has become the judgment of the court, and thus passed beyond his recall, that the appellate jurisdiction of this court may be invoked." In this case, when the orders appealed from were entered—when they first became final and irrevocable—there was a statute in force giving the right of appeal, and I can see no reason why this appellant should be deprived of its benefits.

(133 Cal. 500)

SPITLER v. KAEDING et al. (L. A. 853.)

(Supreme Court of California. July 31, 1901.)

PARENT AND CHILD—GIFT—MORTGAGE—APPEAL AND ERROR—EVIDENCE—REPETITION—CROSS-EXAMINATION.

1. On substantial conflict in the evidence, the judgment of the trial court will not be disturbed.

2. The act of a father in loaning his money and taking a note and mortgage therefor in the name of his daughter is prima facie evidence of a gift to the daughter, even though the father retains possession of the note and mortgage.

3. Where a witness has answered a question, it is not error to refuse to require him to answer a substantial repetition thereof.

4. Where a father, in a suit with his daughter involving the issue whether a mortgage and note taken in the name of the latter for money loaned by the former belongs to the father or daughter, introduces evidence of the execution of deeds to another daughter and granddaughter, it is not error to permit the first daughter to introduce such deeds in connection with the cross-examination of the witnesses testifying to the execution thereof.

Department 1. Appeal from superior court, Santa Barbara county; B. T. Williams, Judge.

Suit to foreclose a mortgage by William Spitler against Otto Kaeding and Kate S. Williams and J. W. Casebeer. From the decree, and from an order denying a motion for new trial, the defendant J. W. Casebeer appeals. Affirmed.

B. F. Thomas, for appellant. J. W. Taggart, for respondent Spitler. W. J. Hunsaker, for respondent Williams. H. C. Booth and J. J. Boyce, for other respondents.

VAN DYKE, J. This action was brought to foreclose a mortgage, dated January 30, 1897, made by the defendant Kaeding to the plaintiff Spitler and defendant Kate S. Williams, to secure the payment of a promissory note of even date for the sum of \$2,500. The note was made payable to said Spitler and Kate S. Williams, and the mortgage to secure the same recites that "the interest of said Kate S. Williams in the aforesaid note and mortgage is \$1,500, and the interest of said William Spitler is \$1,000." The \$1,500 belonged to appellant, J. W. Casebeer, and the \$1,000 belonged to plaintiff Spitler, and they

two united in loaning said money, to secure which the note and mortgage were given; and it was by direction of appellant, Casebeer, that the note and mortgage, as to the amount loaned by him, were made payable to said Kate S. Williams, who is his daughter. In his answer appellant, Casebeer, states that he did not give the said \$1,500 to Kate S. Williams, nor his interest in the said note and mortgage; that the only purpose of having said note and mortgage made in the name of said Kate S. Williams was to apparently invest her with the ownership of the three-fifths interest therein, in order to give her some financial standing; and that said Kate S. Williams at the time promised and agreed that, whenever he should desire, she would assign to him the said three-fifths interest in said note and mortgage. On the other hand, the respondent Kate S. Williams, in her answer and cross complaint, alleges that the note and mortgage, as to the three-fifths interest, were made and executed to her by the direction of appellant, her father, for the purpose of making the said \$1,500 as a gift to her, and the same was then and there given to her by the said appellant, and she denies that she ever promised to assign the said note and mortgage when requested. The court finds "that said J. W. Casebeer did give said sum of \$1,500 to said Kate S. Williams, and did give her said note and mortgage; that it was not the only purpose, nor any purpose, of having said promissory note and mortgage in the name of said Kate S. Williams to apparently invest her with the ownership of the three-fifths interest in said note and mortgage, in order to give her some or any financial standing; that said note and mortgage were not made in her name for the purpose of apparently, or otherwise, giving her some financial or any financial standing; that she did not immediately before the execution of said note and mortgage, or any time or at all, promise and agree, or promise or agree, with the said J. W. Casebeer, that she would, whenever he should desire, or at all, assign said three-fifths interest in said note and mortgage, or in said note or in said mortgage, to him." The appeal is taken from an order denying defendant Casebeer's motion for a new trial.

The main contention on the part of appellant is that the evidence does not support the findings. The testimony of the witnesses to the effect that it was intended as a gift by appellant, Casebeer, to his daughter, if credited, is sufficient to overcome the testimony in behalf of appellant on that point. The judge of the trial court, before whom the witnesses testify, has the opportunity of noting their manner and appearance while under examination, and therefore is in a better position to judge of their credibility than the appellate court. Hence the rule that wherever there is a substantial conflict in the testimony the finding of the trial court will not be disturbed. Aside from the parol testimony, the fact

of the taking of the note and mortgage in the name of his daughter is prima facie evidence that the appellant intended to make a gift of it, as no implication of a trust arises upon a purchase of property by a parent in the name of a child. Prima facie such a purchase is to be regarded as a gift or advancement. *Russ v. Mebius*, 16 Cal. 355; 2 Pom. Eq. Jur. § 1041; *Bennet v. Bennet*, 10 Ch. Div. 474-476. In this last case it is said: "The doctrine of equity, as regards presumptions of gifts, is this: that where one person stands in such a relation to another that there is an obligation on that person to make a provision for the other, and we find either a purchase or investment in the name of the other, * * * of an amount which would constitute a provision for the other, the presumption arises of an intention on the part of the person to discharge the obligation to the other; and, therefore, in the absence of evidence to the contrary, that purchase or investment is held to be in itself evidence of a gift. In other words, the presumption of gift arises from the moral obligation to give." The appellant lays great stress upon the fact that he retained the actual custody of the note and mortgage until produced in court at the trial. This might be explained from the fact that, as there was but one note made payable to Spitler and Mrs. Williams, and one mortgage to secure the same, naming Spitler and Mrs. Williams as mortgagees, the instruments could not be in the possession of both interested parties at the same time, to wit, Spitler and Mrs. Williams; and it seems quite natural that Mr. Casebeer, acting for his daughter in the premises, should retain possession of the same for her. Besides, it appears at that time the father and daughter were upon the most friendly terms, although subsequently they had a falling out, resulting in litigation between them. The loaning of the money to Kaeding and taking of the note and mortgage in the name of Mrs. Williams perfected the gift, if intended as such at the time, and the court finds that such was the intention. That being so, the mere retention of the manual custody of the note and mortgage could make no difference. The title and right to control the same had become vested in Mrs. Williams. *Calkins v. Association* (Cal.) 59 Pac. 30; *Hart v. Ketchum*, 121 Cal. 426-429, 53 Pac. 931.

The court sustained an objection made on behalf of Mrs. Williams, to a question put to Mr. Kaeding, in reference to the length of time Williams was employed by him; and the appellant contends that this was error inasmuch as it was material in explanation of appellant's statement that the note was made in the name of his daughter for the purpose of securing employment for her husband, Williams. But the witness had just answered a direct question by appellant's counsel, as follows: "How long did you keep Mr. Williams there?" So that the question to which the court sustained an objection was a mere

repetition of the one which had already been asked and answered.

Appellant also contends that the court erred in admitting, over his objections, a deed from him to his daughter Isabel Tucker, and granddaughter Adrienne Dowell, to certain property, and a letter in relation thereto. Appellant's witness Bowton on direct examination testified that he drew the papers, to wit, the note and mortgage in suit, at the dictation of Mr. Casebeer, and had before that drawn up for him some deeds to his daughter and granddaughter; and respondent's attorney offered in evidence, in connection with the cross-examination of this witness, the deeds which he had referred to and identified, so that the matter objected to was really in cross-examination of what the witness testified to in chief. The other rulings of the court alleged to be erroneous by appellant are either harmless or quite immaterial, and require no special consideration. The order appealed from is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

133 Cal. 462

In re CUDWORTH'S ESTATE. (S. F. 2,578, 2,579.)

(Supreme Court of California. July 27, 1901.)

ESTATES—EXECUTORS—FEES—DISTRIBUTION—
COMMUNITY PROPERTY—GIFT FROM
WIFE—COMMINGLING OF FUNDS.

1. Where the court found that the property of an estate could not be distributed in kind, and had required from the administrator labor beyond the mere custody and distribution thereof, he should be allowed full fees on the amount over \$20,000, under Code Civ. Proc. § 1618, fixing executors' fees.

2. Where during coverture decedent was engaged in no business except looking after his property acquired before marriage, and left no real estate not owned by him before marriage or derived from investments of his personal estate, and his personal property was greatly decreased, and nearly all of it was directly traced to that possessed before marriage, his widow had no interest therein as community property.

3. Where during coverture decedent's income from his property possessed before marriage averaged \$570 per month, and his wife gave him from the income of her property sums amounting to an average of \$15 per month, and at his decease his property had greatly decreased, the fact that he had commingled the small amount secured from his wife with his other property did not convert it all into community property.

4. Where during coverture a wife gave small sums derived from the income of her separate property to her husband, "to do what he pleased with" the money, the gift made it his separate property, and not community property.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

From an order settling the final account of the executor of the will of James W. Cudworth, deceased, and the decree of final distribution of his estate, Royal Wallace Cud-

worth appeals. Order affirmed, and decree reversed.

Knight & Heggerty, for appellant. A. N. Drown, Drown, Leicester & Drown, and Henley & Costello, for respondents.

HENSHAW, J. The two appeals taken to this court in the matter of the estate of Cudworth, deceased, may be considered together. Both are prosecuted by the son, a devisee under the will. The one is from that part of the decree settling the final account of the executor, wherein he is allowed full commissions upon the amount of the estate accounted for by him. The other is from that part of the decree of final distribution which adjudges certain property left by the deceased to be community property instead of separate property, and distributes it accordingly.

1. The estate of deceased consisted of real property valued at \$79,000; stocks, bonds, notes, and mortgages valued at \$38,567. The executor accounted for \$145,579; the increase being made up of rents, interest, and dividends collected by him. It is contended that the property of the estate was distributed in kind, involved no labor beyond the custody and distribution of it, and that, therefore, under section 1618 of the Code of Civil Procedure, commissions should have been computed upon all of the estate above the value of \$20,000 at one-half of the ordinary rate fixed by law. But the court in probate found "that all of the property belonging to said decedent at the time of his death, and then forming part of his estate, and which has not since been disposed of by said executor, is not now in the same form or condition in which the same was in at the time of the death of said decedent, or at the time when it first came to the possession of said executor, and that all of the same cannot now be, and is not, distributed in kind; that the property of the estate of said decedent, and the care, management, and administration thereof by said executor, has necessarily involved, and the said executor has properly bestowed and expended thereon, labor beyond the mere custody and distribution of the same." This finding derives sufficient support from the evidence. The only witness upon the question was the executor himself, and no effort was made to impeach or impugn his testimony. He testified that he took personal charge and possession of all the property described in the inventory, and protected, managed, and cared for the same during administration; that it became necessary for him to surrender certain stock and bonds in exchange for new issues; that before doing so it became incumbent upon him to make, and he did make, a thorough and careful investigation of the affairs of the corporations; that he collected and realized on many of the promissory notes belonging to the estate, made diligent efforts to collect debts due, gave much personal time and attention to

the condition and protection of 20 or more tenements belonging to the estate, bestowed labor upon their repairs and in efforts to rent and keep them rented, and protected the estate against suit to quiet title brought against him in his official capacity. The administration lasted for more than two years, during which time large sums of money were collected and disbursed in the preservation, protection, and care of the property of the estate; in the collection of rents; in the making of repairs, pursuit of tenants, and in the following up of debtors; in the examination and settlement of street assessments, payment of taxes and insurance premiums and water rates; in the making of contracts with laborers, carpenters, plumbers, and painters, and the necessary repairs for tenants; in the prosecution of a foreclosure suit. Besides all this, owing to the peculiar nature of the properties of the estate, it was necessary to keep an elaborate system of accounts with the tenants and other debtors of the estate, executing satisfactions of mortgages, indorsing upon numerous notes the many small payments made thereon; and finally, a contest of the will having been instituted, it became the duty of the executor to take due precautions to protect the will and make preparations for the contest, which in fact he did, though the contest was finally dismissed. Under this showing, the court was justified in its allowance of full commissions.

2. Upon the second appeal—that from a part of the decree for final distribution—the facts are that after the filing by the executor of his final account, with his petition for distribution, the appellant, a son of deceased, filed his answer, alleging that all the property in the estate, of which his father died seised and possessed was separate property, and prayed that it be distributed to him and his brother Emery under the will. The widow, Johanna Cudworth, in due time filed her answer and petition, alleging her marriage to the deceased, and praying distribution under the law of the land and the proofs to be adduced. Upon the hearing the following facts were shown: At the time of Cudworth's marriage he owned real and personal property as follows: Cash in bank, \$5,029; stock of the savings and loan society of the value of \$22,500; and 62 parcels of real estate. Of this real estate 45 pieces were sold after marriage for \$91,292.54, and 17 were still owned at the time of his death, and appraised at \$74,850. The total value of the real and personal property thus owned by Cudworth at the time of his marriage was \$193,671. After his marriage and before his death rents were collected to the aggregate amount of \$29,453, and dividends on this identical stock to the amount of \$7,109. When he died his estate was in the following condition: There were 18 parcels of real estate,—17 owned at the time of his marriage, and 1 acquired after marriage by foreclosure of a mortgage given to secure moneys loaned.

The total value of the real estate thus owned at the time of his death was \$79,850. The personal property consisted of stocks, promissory notes, and bonds, and was of the value of \$58,467. The total value of the separate property of Cudworth then, at the time of his marriage, was \$193,671, whereas the total value of his estate at the time of his death, notwithstanding the large sum of over \$36,000 derived from rents and dividends after his marriage, was only \$138,317. From the time of his marriage until the time of his death the deceased had no trade, occupation, or employment whatsoever, excepting that during that period he employed his time in attending to looking after and caring for his separate property, in collecting the rents therefrom, in making sales thereof, and collecting interest on his mortgages, notes, and bonds, and dividends on his stock, and in making repairs and improvements upon his properties. The only property that he received or earned from any other source during all this time was the sum of \$2,080, which he earned as an appraiser for the savings and loan society in the two years between September, 1876, and September, 1878. The widow testified that she had an income from her own separate property at the time she married the deceased. For the first six years after the marriage that income amounted to \$68 per month. After that, until 1888, it was \$90.58 per month, from 1888 until 1892 it was \$48 per month, and from 1892 until October, 1893, it was \$70.50 per month, and after that, until Mr. Cudworth's death, in May, 1898, it was \$32.50 per month. "All the money that I received as income from my property was turned over by me to my husband, to be used for household purposes and as he wanted to." After her marriage she expended \$1,500 to put a building upon the property that she owned. She also bought a lot, and paid for it \$1,500, and another for which she paid \$1,000. She paid taxes and insurance and repairs on her own property; paid for the maintenance, education, clothing, and music for her two daughters from her marriage until Cudworth's death; traveled with her daughters to Europe and South America, paying all expenses of both. Cudworth gave her \$500 for expenses. She had in the German Savings & Loan Society, over and above all of these payments, in January, 1898, some \$3,500. Her income she "gave Cudworth to pay the household expenses of their family of six persons, and to spend as he wanted to"; that she kept no account, and could not tell how much went into the common fund or was turned over. Cudworth gave her \$40 a month until 1892, and \$60 a month from that on until his death. It was shown that certain notes and mortgages, the property of the estate, were notes and mortgages given by the purchasers of parcels of Cudworth's land, owned by him at the time of his marriage, and thereafter sold. These notes and mortgages, with substantially all the rest of

the personal property of the estate, were by the court decreed to be the community property of the decedent, and Johanna, his widow, and the one-half of it was distributed to her accordingly.

These facts then establish that Cudworth was engaged in no employment, other than the care and preservation of his own property; that he received no property except from rents and incomes of that which he owned at the time of his marriage, and from the sales of it, except the trifling sum of \$2,000, which he received in the course of two years as an appraiser for the loan society. At the time of his death his estate is worth \$55,000 less than at the time of his marriage, and more than \$90,000 less than the value of his estate at the time of his marriage, together with the rents and dividends which he received from his separate property during his marriage. When the computation is made as to the difference between the amounts which the wife gave to Cudworth monthly, as the income of her property, and the amount which monthly he gave back to her in the form of an allowance, it will be seen that she gave him a total of \$15,847, and received back \$11,880, leaving the net amount which she gave him \$3,967, or the equivalent of a monthly gift to him of \$15 for the period of 21 years. Upon the other hand, during that same time the actual cash which Cudworth received from his separate property, derived from income and sales, was \$150,000, or an average of \$570 per month. Notwithstanding this, the court decrees, in effect, that all of the personal property left by Cudworth at the time of his death was community property, and distributes it accordingly. Yet when Cudworth died his personal property was of the value of only \$58,000, or nearly two-thirds less than the amount of actual cash that he had received from his separate estate during coverture. In support of this decree respondent relies upon the principle thus enunciated by Ballinger in his work on Community Property: "When the separate property or funds of either spouse is intermixed or commingled with community property, so that the separate property has lost its identity and cannot be clearly traced or segregated, the community, being the paramount estate, draws the whole mass to it, and it becomes community property. The general rule laid down by the courts is that such confusion works a forfeiture of the separate character of the property so commingled." This principle, it may be said, is well supported by authority; but there is a modification of it equally important, and peculiarly apposite to this case, and the same learned author thus expresses it: "But, where the community interest is inconsiderable in the property with which it has been intermingled, the community will not draw to it the separate estate." It does not appear that there was here any commingling of community funds with the separate estate of the de-

ceased; nor yet does it appear that there was any commingling of funds of the separate property of the wife with the separate property of the husband, such as could justify a decree that all must be considered community property. As to community funds, it is shown that there were none, saving the trifling amount of \$2,000, earned by Cudworth as an appraiser. Where a husband, charged with the support of a family, has some income derived from his separate property, and some from his earnings which are community property, there is no presumption that he has supported the family out of the separate property and preserve intact the community funds. He is at perfect liberty to devote all that is necessary of the community earnings to the family support, and to preserve his separate property intact. But if it be conceded, though it is not shown, that there was any commingling of the separate funds of the wife with the separate funds of the husband, it was commingling of such a trifling sum with such a large amount as to make it to the last degree inequitable to hold that the husband's property thereby lost its separate character and became community. Clearly, under every principle of law and justice, where the separate property of the husband can be traced, as here it distinctly can, when it passes into his estate the original capital and its transmutations are still separate property, equal with the rents, income, and profits derived therefrom,—those profits, that is to say, which have arisen naturally and without the active engagement by the husband of his capital in some business or employment. In this case all of the income of the property was derived from rents, interest, and dividends, and was as wholly and purely separate property as was the real estate, the stocks, bonds, and notes from which it flowed. But, applying this principle, there were not only no profits from the transactions of Cudworth during his lifetime which could be accounted community property, but the actual value of his personal property had shrunken greatly. Finally, Mrs. Cudworth testifies that she gave the money to her husband to pay household expenses, or do what he pleased with. There was nothing unnatural in her thus contributing from her separate funds this small proportionate amount towards family maintenance, and if, as she states, she did give this money to him to do as he pleased with, the gift itself made the property his separate property as much as any gift of property by him to her would have effectuated the same result. But if it should still be said that the property remained the property of the wife, and was given over merely to the custody of the husband, the utmost of her right would be a claim and demand upon his estate for this sum of \$3,000. The order and decree settling the final account of the executor is therefore affirmed, while upon the appeal from that part of the decree of distribution judging the personal property of the deceased

to be community property, and distributing it according to law, the decree is reversed, with directions to the trial court, upon the evidence adduced and the facts found, to adjudge and decree that the personal property in the estate of said decedent is separate property.

I concur: TEMPLE, J.

McFARLAND, J. I concur in the judgment; but I do so most reluctantly, and only because I see no legal way to escape the harsh treatment of respondent which our law on the subject of husband and wife allows. In nearly all other civilized countries marriage immediately vests in the wife some estate in the property owned by the husband at the time of the marriage; but such is not the law here, and if he chooses, as in the case at bar, to afterwards do nothing except to collect his rents and profits, he may after a long period of faithful wifehood leave her penniless. Her only chance to acquire by marriage any interest in property is to marry a man who has nothing, with the hope that he may afterwards earn something in which she will have a community right. The case at bar is one of peculiar hardship; for here the wife, having a slender income from a little separate property which she owned, allowed the husband to take that income and gets nothing back from it. The monthly allowance which he let her have—and whether for personal or domestic purposes does not appear—was very small for a man of his means. But the conclusion reached in the opinion cannot, under the law, be avoided.

(133 Cal. 489)

MORE et al. v. MORE et al. (L. A. 836.)¹
(Supreme Court of California. July 31, 1901.)
DEED—RESCISSION FOR FRAUD—TRUSTS—RETURN OF CONSIDERATION—RATIFICATION—HEIRSHIP—DECREE—RES JUDICATA.

1. Where the grantee in a deed procured it by fraud and undue influence from his brother, the grantor, while he was, by reason of weak mind and intoxication, incompetent to transact any business, such grantee became a trustee for the grantor, under Civ. Code, § 2224, providing that one who gains a thing by fraud or undue influence is an involuntary trustee of the thing gained, and section 2219, providing that any one who voluntarily assumes a relation of personal confidence with another is deemed a trustee to the person over whose affairs he thereby obtains any control.

2. Where a deed is procured by fraud from a grantor who is incompetent and a spendthrift, some money being paid as consideration, the court should not refuse to decree a rescission until such money is repaid, since the inability of such grantor to pay back the money is the natural result of defendant's act in advancing money to one so irresponsible.

3. Defendant by fraud and undue influence procured a deed from his brother, who was then incompetent to transact business, giving a note as part consideration, and afterwards, without payment, had possession of the note. The brother assigned the note to his wife, who obtained a judgment for recovery thereof. Her husband also executed a deed to her of the land covered by the deed to defendant, and

¹ Rehearing denied August 30, 1901.

she sued to recover the land from defendant, *Held*, that she was not estopped by the judgment in her action to recover the note, since she was entitled to possession of the note until she received the relief due to her, and her recovery of the note was not a ratification of the deed.

4. When, in proceedings, under Code Civ. Proc. § 1664, to determine the persons entitled to distributive shares in an estate, a decree is entered on a written stipulation obtained by fraud from the grantor in a deed procured by the same fraud, such decree does not determine any question relating to such fraud, as the judgment is conclusive only as to the matter actually litigated.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. S. Day, Judge.

Action by Louisa J. More and husband, Wallace H. More, against Thomas R. More and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

C. A. Stork, for appellants. C. F. Carrier, Richards & Carrier, Boyce, Taggart & Kellogg, and Thos. McNulty, for respondents.

SMITH, C. The plaintiff Wallace More is one of the heirs of A. P. More, deceased; his interest in the estate being $\frac{1}{27}$ of the whole, and of the value of \$10,000. The plaintiff Louisa is his wife, and by virtue of a deed made to her by him January 5, 1895, has succeeded to whatever interest he had in the estate at that date. The defendant Thomas More is the grantee in three several deeds executed to him by Wallace More, purporting to convey to him the whole interest of the grantor in the estate,—one of date October 21, 1893, one of date October 30th (in fact executed November 4, 1893), and the other of date April 27, 1894. The defendant Den is grantee in a deed from Thomas More of date November 17, 1893, purporting to convey to him one-half of the interest of Wallace in the estate. The other defendants, Money and Finger, are bona fide mortgagees under mortgages made by Thomas More to secure to the former a note for \$1,000, now owned by Finger, and to the latter a note for \$3,400, and their interests are not involved in this appeal. The suit was brought to annul the above deeds from Wallace to Thomas More. The plaintiffs recovered judgment, from which the defendants More and Den appeal on the judgment roll.

The case presented by the findings, briefly stated, is as follows: The plaintiff Wallace, it is found, was at the time of the death of A. P. More addicted to the use of intoxicating drinks to such an extent as to seriously interfere with his mental capacity to transact business, and at times to deprive him of reason and judgment, rendering him unable to properly manage his business and to take care of his property. He was otherwise a man of weak and pliable character, shrewd in procuring funds for present needs, but reckless as to future results; and his condition,

habits, character, and susceptibility were well known to the defendant Thomas More, his elder brother, who for a long period has exercised great influence over him. Under these circumstances the defendants Den and More conspired together "to fraudulently acquire the interest of Wallace" in the estate of the deceased, and presumably the deeds in question were procured by Thomas More in pursuance of this conspiracy. At the time of the execution of the deed of October 21, 1893, and of the deed of October 30th, "the plaintiff Wallace [it is found] * * * was not competent to transact business." The former of these deeds, which was executed on the day of the death of the deceased, and duly recorded, purports to be "in trust * * * to collect any interest or bequest coming to [the grantor] from the estate, etc., and then to pay to [the grantor] a sum not to exceed \$20 per month * * * until the same, with necessary costs and disbursements in caring for his estate so recovered, consume the whole amount." The deed of October 30, 1893, executed November 4th, which purports to be "in consideration of one dollar and other considerations," is absolute on its face, but was accompanied by an instrument in writing, signed by the grantee, Thomas More, in which, after reciting the conveyance, and that it was made in order that the grantor, Wallace, might "have a steady and determined income and have the means to provide for his immediate wants," the grantee Thomas agrees to pay Wallace, "during his natural life, the sum of fifty dollars, payable on the first of each and every month," etc., with proviso for the termination of the obligation at any time by the payment of \$5,000 and back payments, and further agrees within 30 days to pay Wallace "the further sum of \$1,000, to the end that said Wallace * * * may have some immediate money with which to relieve his immediate wants, and to provide him with the necessary means to take the Gatten or Keeley cure." The deed of April 27, 1894, is also an absolute conveyance, with release of all trusts, obligations, etc., and purports to be in consideration of \$9,358.75 in hand paid, etc. The actual consideration consisted of a note of defendant More for \$3,500, a note of defendant Den for \$3,500, a draft of \$490, with \$10 cash, and payments previously made by Thomas to Wallace under former deeds, amounting to \$2,358.75; the total aggregating \$9,858.75, being \$500 in excess of the consideration named in the deed. There was also paid at the same time \$500 on the note of Thomas More. The deed was accompanied by a written order signed by Wallace, addressed to Hon. J. V. Coffee, judge, etc., and John F. More, administrator of the estate of A. P. More, deceased, notifying them of the conveyance, and authorizing and directing them to distribute his interest in the estate at the proper time to Thomas More, the grantee. And accordingly, in a proceeding in the

matter of said estate to determine the rights of parties therein, under section 1664, Code Civ. Proc., a judgment was entered September 5, 1895, declaring the estate to be owned by the parties and in the proportions named in the judgment, and (among other allotments) an undivided twenty-seventh interest by Thomas More "as assignee of Wallace H. More." There are some other facts found, on which points are made by the appellants, which will be briefly stated. The \$1,000 referred to in the deed of October 30, 1893, presumably advanced by Den, was paid to Wallace More, who then went to the Gärten cure at Ontario, and was temporarily cured of the liquor habit. In November, 1893, after he was discharged, "he received and receipted for to Thomas More on account of the agreement * * * the further sum of \$1,208.75, a sum in excess of the agreement," etc. Of the notes given as consideration of the deed of April 27, 1894, Den's note was afterwards sold to him by Wallace, when in a state of intoxication, for \$2,000, which was received by Wallace and not returned. The note of Thomas More seems in some way to have come into his own possession; and January 25, 1895, the plaintiff Louisa, to whom it had been assigned, recovered a judgment against him for its return or value. There was no attempt on the part of the plaintiffs, prior to the filing of the complaint, to rescind the deeds in question; nor did they restore or offer to restore, otherwise than in the complaint, the consideration received. But the judgment requires the surrender of the notes from Thomas More and from Den, and the payment to the latter of the sum of \$3,000, as conditions of their conveyance to the plaintiff Louisa, and also affirms the validity of the mortgages of Finger, amounting to \$4,400 and interest.

On the facts found, there can be no doubt that the deed of April 27, 1894, from Wallace to Thomas More, as was the case with the previous deeds, was procured by fraud and undue influence, or that there arose upon its execution a constructive trust in favor of the former. Civ. Code, §§ 2219, 2224, and cases cited in note in annotated edition, section 2228 et seq.; *Olivas v. Olivas*, 61 Cal. 382; *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. 521. This is not disputed by the appellants' counsel, but it is contended, in effect, (1) that plaintiffs, having received the consideration, and having failed to rescind or to offer to rescind, have lost their right; (2) that the judgment recovered by the plaintiff Louisa against Thomas More for the recovery of his note was a ratification of the deed, and thus operates as an estoppel in pais; and (3) that the plaintiffs are estopped by the judgment rendered in the matter of the estate of A. P. More, deceased, under section 1664, Code Civ. Proc. None of these points can be sustained.

1. With regard to the first, rescission is only one of the remedies in cases of fraud.

Field v. Austin (Cal.) 63 Pac. 693, and cases cited. And, in cases where real or personal property is thus obtained, the most common and familiar relief granted by a court of equity is to convert the party guilty of the fraud into a trustee. 1 *Perry, Trusts*, § 166 et seq., and authorities cited supra. The relief granted by the court, namely, reconveyance on the terms imposed by the judgment, was appropriate to the case, and was justified by the facts alleged in the complaint, and by the prayer for general relief. Code Civ. Proc. § 580. The rigid rules appealed to by the counsel apply only to rescission to be effected by the acts of the parties. The power of a court of equity to cancel a contract is of much wider scope, and its exercise is governed by other principles. The court may refuse to exercise the power, in certain cases, for failure of the injured party to avail himself of his right to rescind, but not in a case like this, where the injured party was unable to pay back the money, and his inability was the natural, and, as such, to be anticipated, result of the act of the defendants in advancing money to a person so irresponsible; where, also, the same influences that made it practicable to defraud him would deter him from seeking relief from the fraud; and where, at the time the plaintiff Louisa became interested, the property had been incumbered by Thomas More by valid mortgages to an amount in excess of the money that had been received by Wallace, and there was therefore nothing to be returned.

2. The suit and judgment of the plaintiff Louisa against Thomas More for the recovery of the note, which must have been, if not fraudulently, at least wrongly, obtained by him, cannot be regarded as a ratification of the deed. At that time the property had been heavily incumbered by the Finger mortgages, and she was entitled, for her security, to the possession of the note until she had received the relief due to her.

3. Nor can the judgment in the superior court in the matter of the estate of A. P. More, under section 1664, Code Civ. Proc., operate as an estoppel. It is not clear that the court could have entertained jurisdiction of the equitable rights of Wallace arising out of the deed. In such proceedings, the court has jurisdiction of the claims of assignees of the heir, but it has not been held that its jurisdiction extends to claims of an equitable nature against the legal owner, or, in other words, to trusts. In *re Burton*, 93 Cal. 461, 462, 29 Pac. 36. It cannot, indeed, be said that the court in matters of probate has no equity jurisdiction; but it does not follow that it has general equity jurisdiction, or any equitable jurisdiction beyond what is involved in the exercise of its peculiar functions, which are to administer and distribute the estate. Where a trust has been created by will, the validity of the trust is necessarily involved in the question of distribution; for, if invalid, the

bequest fails. Estate of Walkerly, 108 Cal. 660, 41 Pac. 772. Hence, as necessary to distribution, "it is within the province of the probate court to define the rights of all who have legally or equitably any interest in the property of the estate derived from the will." Estate of Hinckley, 58 Cal. 518; Siddall v. Harrison, 73 Cal. 563, 564, 15 Pac. 130; Crew v. Pratt, 119 Cal. 139, 51 Pac. 38; Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681. But prior to the enactment of sections 1699-1703, Code Civ. Proc., "conferring a limited jurisdiction over testamentary trustees on the probate side of the superior court," the court after distribution to the trustee had no further control over the trust. Morffew v. Railroad Co., 107 Cal. 594, 595, 40 Pac. 810. By parity of reasoning, it would seem, it would have no jurisdiction over trusts not derived from the will; and this view is confirmed by considering the purpose of the proceeding under section 1664, Code Civ. Proc., which is to determine the parties to whom the estate is to be distributed. It is therefore subsidiary to the proceeding for distribution, and the jurisdiction of the court in the two cases is co-extensive. Hence, if in the matter of distribution its jurisdiction does not extend to the determination or administration of trusts, other than those above specified, neither does it in the proceeding under section 1664. In either case, therefore, it would seem, its jurisdiction is merely to determine "the persons entitled under the will or by succession, or their grantees." In re Crooks' Estate, 125 Cal. 461, 58 Pac. 89; Estate of Burdick, 112 Cal. 392, 393, 44 Pac. 734. And in neither case are the equitable claims of parties against the heirs or assignees of heirs a proper subject for its consideration. And this is in accord with the language of the act in declaring the effect of the judgment in the latter proceeding, which is that it "shall be final and conclusive in the distribution of said estate, and in regard to the title to all property of the estate," or, in other words, it "is conclusive only as to the succession or testamentary rights." Estate of Burdick, 112 Cal. 392, 393, 44 Pac. 734. It is, however, not necessary to determine finally this question. Assuming the court to have jurisdiction, its judgment would be conclusive only as to the matter actually litigated. Olivas v. Olivas, 61 Cal. 387; Chever v. Ching Hong Poy, 82 Cal. 71, 22 Pac. 1081; Estate of Vaughn, 92 Cal. 193, 28 Pac. 221; William Hill Co. v. Lawler, 116 Cal. 363, 48 Pac. 323; In re Crooks' Estate, 125 Cal. 462, 58 Pac. 89; Code Civ. Proc. § 1908. In the case at bar the matter now involved was not before the court. The judgment was entered on the written order or stipulation of Wallace More, obtained along with the deed of April 27, 1894, and tainted with the same fraud. It added nothing to the force of that document and the accompanying deed. Hence it is immaterial whether the court had or had not jurisdiction to determine the questions now under consideration. It is sufficient that those questions

were not submitted to it. I advise that the judgment be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

6 Cal. Unrep. 736

BORCHARD v. EASTWOOD. (L. A. 869.)

(Supreme Court of California. July 24, 1901.)

DEEDS—DESCRIPTION—MISTAKES—ADVERSE POSSESSION—BURDEN OF PROOF.

1. Where, in a deed, land is described as commencing at the corner of certain sections "in the Chapman tract in the Rancho Santiago de Santa Ana in the county of Orange," the description is sufficient, though the township and range are not stated.

2. Where, in a deed, the land is fully and correctly described, except the number of the township is given as "45" instead of "4," and the land can be identified by the rest of the description, such mistake will not vitiate the conveyance.

3. Where the description in a deed is all "the lands owned by the grantor" in a certain county, with certain exceptions, it is sufficient to convey all his lands in such county not included within the exceptions.

4. Statements of a former owner of land, and his acts in putting in stakes on an alleged boundary line, are unavailing to establish the boundary, where the adjoining owner was not present, nor had any knowledge of such acts.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Ballard, Judge.

Action by Carl A. Borchard against John Eastwood. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

McKelvey & Bowers, for appellant. Williams & Jackson, for respondent.

COOPER, C. Action to quiet title. Plaintiff recovered judgment, and defendant appeals therefrom, and from an order denying his motion for a new trial.

The premises are described in the complaint as "lying and being in the Rancho Santiago de Santa Ana, county of Orange, state of California, bounded and particularly described as follows, to wit: Beginning at a point 15.825 chains east from the corner of sections 28, 29, 32, and 33, township 4 S., R. 9 W., S. B. M.; thence north 16.93 chains; thence east 5.905 chains; thence south 16.93 chains; thence west 5.905 chains, to point of beginning,—containing ten acres. The same being a portion of lots 13 and 14, block F, of the A. B. Chapman tract, as per map made by Frank Lecouvereur in December, 1870." At the close of plaintiff's evidence the defendant made a motion for a nonsuit, which was denied, and it is claimed that the court erred in denying the motion. The argument is that the description contained in certain deeds offered in evidence by the plaintiff, marked Exhibits A, B, C, D, and E, does not identify

the land described in the complaint. The land is described in Exhibit A as "commencing at a stake 9.92 chains east from the corner of sections 28, 29, 32, and 33, which is the southwest corner of the east one-half of lot No. 13, block F, on the Chapman tract of the Rancho Santiago de Santa Ana, and running thence north 16.93 chains to a redwood post; thence east 16.81 chains to a redwood post; thence south 16.93 chains to iron pin 18 inches long; thence west 11.81 chains to the southwest corner, the place of beginning." The same description is contained in Exhibits C and D. It is admitted that the description in the three deeds is the same, if the lands are in the same township and range as the land described in the complaint; but it is said that, as the deeds mention no township or range, they do not describe the same land. The description in the deeds was sufficient to identify the land without mentioning the township and range. We will not presume that there is another similar description of a tract of land in a different township and range commencing at the common corner to sections 28, 29, 32, and 33 in the Chapman tract in the Rancho Santiago de Santa Ana in the county of Orange. The description was sufficient to identify and locate the land. It has been held that, even if the deed describes the land as being in the southeast quarter, instead of the southwest quarter, of a named quarter section, the description is good if the land can be identified by monuments actually fixed upon the grounds. *Helm v. Wilson*, 76 Cal. 476, 18 Pac. 604. So it was held that, where a deed did not name the state, county, or city in which the land was situated, the description was not void, because without it the property could still be located and identified. *McCullough v. Olds*, 108 Cal. 532, 41 Pac. 420. The land was identified by Findley, a surveyor. He said he knew the stake at the common corner to sections 28, 29, 32, and 33, and that the land in question is a part of the Chapman tract. The description in Exhibit E describes the land as "beginning at a point 15.825 chains east from the corner of sections 28, 29, 32, and 33, township 45, range 9 west, S. B. M." Then follows a correct description of the 10 acres as in the complaint. It is said that this deed is void because the township is described as "45" instead of "4." This was evidently a mistake. The description identifies the land without the number of the township. It describes the land as being a "portion of lots 13 and 14, block F, of the A. B. Chapman tract, as made by Frank Lecouvereur in December, 1870." The number of the township in this deed may, therefore, be regarded as surplusage. Exhibit B conveyed all the land owned by the grantor in Los Angeles county on the 14th day of March, 1881, with certain exceptions. It is not claimed that the land described in the complaint here comes within the exceptions, and the description was therefore sufficient. *Pettigrew v. Dobbelaar*, 63 Cal. 396. It was not error to admit the

said deeds in evidence, and the nonsuit was properly denied.

The answer, among other defenses, alleges that the defendant, Eastwood, and his predecessors in interest, have been in possession of the lands described in the complaint for more than five years before the commencement of this action, and that the division line between the lands of plaintiff and defendant has been established by consent of the parties for more than five years before the commencement of the action. The court found against defendant upon this allegation, and found the allegation "to be untrue, and without any foundation or basis whatever except as to the boundary line on the east side of the strip of land described in the plaintiff's complaint." The finding is challenged as being contrary to the evidence. We have examined the evidence, and find that it not only supports the finding, but that no other proper finding could have been made therefrom. When either party comes into court, claiming to be the owner of land, the paper title of which is in his adversary, and claims to be such owner by a parol agreement, or by conduct which estops the other party from claiming the true line, the burden is upon him to prove clearly such agreement or acquiescence as will comply with the rules of law as herein stated. The evidence shows that one Edward F. Wright owned the land in dispute from 1882 up to December, 1898, the date of the conveyance to plaintiff. His brother, Charles L. Wright, owned the land on the east until about 1892 or 1893, when he sold to one Bancroft. After the sale to Bancroft, he leased the property for several years, and occupied it and farmed it as a tenant of Bancroft. During these years the brothers farmed the two places together, cultivating them and plowing from east to west across the division line. There is no evidence that any boundary line was agreed upon while Charles L. Wright was the owner on the east. There is no evidence that after Bancroft became the owner there was any agreement as to the boundary line, or any claim by Bancroft that he owned any more than the land called for in his deed. In the fall of 1896 the defendant purchased the land on the east from Bancroft, taking only the property described in Bancroft's deed, which did not include the land in dispute. Defendant testified that after he bought from Bancroft about the 1st of January, 1897, Charles L. Wright put in stakes "where he [Wright] said the line was between the two places; that they had always called that the line." At this time Charles L. Wright was not the owner of the land on either side of the disputed line, and hence his statement and acts in putting in stakes can bind no one, as neither plaintiff nor his grantor was present, nor had either of them any knowledge of it. Defendant testified, "When I bought the place, I was given to understand that the line was where it was staked out by Charley Wright." He does not say who gave him such under-

standing, except what was said by Charley Wright. Certainly it cannot be said what Bancroft, or any one else, stated to him, in the presence of plaintiff or his grantor, as to the location of the boundary line. Charles L. Wright testified that when he set the stakes he never told defendant that the line he marked off was an acquiesced line or an agreed line, but that he distinctly told defendant that there would have to be a survey made before the true line could be determined. Plaintiff's grantor testified that he never was present when any line was staked out, and never at any time agreed or acquiesced in the line claimed by defendant. Defendant at the time, or about the time, Edward F. Wright was going to sell to plaintiff, said to Charles L. and Edward F. Wright that he would be satisfied with the county surveyor's survey, and would abide by it. He did not then claim any boundary line, or at least he did not say anything about it in his conversation. When plaintiff was about to buy, he asked defendant about the boundary line, and defendant replied that he did not know where it was; and, when plaintiff told him that he would not buy without a survey, defendant replied: "Very well, have a survey made, and I will stand by it; and if it comes my way it will be all right, and if it should go yours, why, I will get more land." In the conversations with plaintiff defendant never mentioned such a thing as an agreed boundary line. Defendant, in his answer, claimed title by adverse possession, but, as the evidence fails to support the claim, it seems to be abandoned, as it is not argued in the appellant's brief. We advise that the judgment and order be affirmed.

We concur: SMITH, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(133 Cal. 529)

CITY OF LOS ANGELES v. POMEROY et al.
(L. A. 831.)¹

(Supreme Court of California. Aug. 3, 1901.)

APPEAL—JUDGMENT—REVERSAL—IRREGULARITY IN PROCEEDINGS—MUNICIPAL CORPORATION—CONDEMNATION PROCEEDINGS—DISQUALIFICATION OF JUDGE—TAXPAYER—DEPOSIT OF MONEY IN COURT.

1. Where, in condemnation proceedings, affidavits in opposition to a motion for final judgment which were on file could not affect the merits of the controversy, a refusal to permit the reading thereof is a mere irregularity of proceeding, for which the judgment, which is right, will not be reversed.

2. The fact that a judge owned real property within a city did not disqualify him to hear and determine condemnation proceedings of land for municipal purposes by the city.

3. In condemnation proceedings by a city the money awarded to the property owners was actually deposited with the clerk of the court within the proper time, but the clerk, because of their refusal to take it, deposited it with

the county treasurer, in accordance with the provisions of Code Civ. Proc. § 2104, providing that, whenever moneys are paid into or deposited in court, they shall be delivered to the clerk in person, which he must, unless otherwise directed by the law, deposit with the county treasurer, subject to the order of the court. It appeared that the money was in the county treasury, but that the property owners would not receive it. *Held*, that the final judgment of condemnation will not be reversed on the technical point that the money was not actually carried from the treasurer's room to the court room.

In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Condemnation proceedings by the city of Los Angeles against A. E. Pomeroy and J. D. Hooker. From a final judgment of condemnation, defendants appeal. Affirmed.

See 64 Pac. 477.

J. S. Chapman, R. H. F. Variel, and John G. North, for appellants. Walter F. Haas, City Atty., and Lee & Scott, for respondent.

McFARLAND, J. This is an appeal by defendants from a final judgment of condemnation. The action was commenced in June, 1893; and after a full hearing of the merits of the case, and a verdict of a jury establishing the compensation to be paid defendants, and findings of the court, an interlocutory judgment was rendered and entered on June 2, 1898, which determined all the issues in the case, and provided for a final decree of condemnation upon the deposit by plaintiff in court of the amount of the verdict, \$25,000, and certain costs and disbursements, within 30 days after the entry of the interlocutory judgment. The said amount of money was so deposited in court by plaintiff within the 30 days. The defendants appealed to this court from the interlocutory judgment, and from an order denying a motion for a new trial; and the judgment and order were here affirmed on June 3, 1899. See *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585. Upon the going down of the remittitur the plaintiff gave notice of the motion for the entry of a final judgment of condemnation. Defendants presented a written objection and opposition to the motion, in which reference was made to two affidavits which they had filed with the clerk,—one made by J. D. Hooker, and the other by R. H. F. Variel. In the affidavit of Hooker the only facts stated were that the judge of the superior court before whom the case had been tried was at the time of the trial, and still is, the owner of certain real property of the value of more than \$5,000 within the city of Los Angeles, plaintiff in the case, and was a water-rate payer within said city; and it was declared in the affidavit that for the reason of the existence of these facts the said judge was disqualified to sit in that case, and that the interlocutory judgment was void, and no further proceeding should be had in the cause. In the affidavit of said Variel these facts were stated, viz.: That on April 29, 1896,

¹ Rehearing denied August 30, 1901.

which was within 30 days after the date of the interlocutory judgment, plaintiff deposited with the clerk the amount of money above stated; that the court made a minute order reciting such deposit; that afterwards, on August 27, 1896, the clerk deposited said money with the county treasurer, and that the money was deposited "subject, as such treasurer has stated to affiant, and as affiant is informed and believes, to the order of the superior court, and not subject to the order of said defendants." The only other facts stated in this affidavit are the dates of the notices of appeal from the interlocutory judgment and from the order denying a new trial. No other evidence was offered by defendants at the hearing of the motion for final judgment of condemnation.

It appears from the bill of exceptions that at the hearing counsel for defendants started to read the said affidavit of Hooker, when the court refused to hear the reading of the same, or the said affidavit of Variel. We do not see that the case occupies any different position from that which it would have occupied if counsel had been allowed to read the affidavits, which were on file. The question is whether or not the affidavits show any valid objection to the entry of the final judgment, and the judgment, if right, will not be reversed on account of any question as to mere irregularity of proceeding which does not change the merits of the controversy.

The appeal presents the question whether or not the judge was disqualified to try the case on account of interest; and the only fact upon which the disqualification is asserted is undisputed, viz. that he owned some real property within the city limits. This fact did not disqualify him. The mere contingency of a possible future increase or decrease of taxation within a municipality is too remote and indistinct to disqualify a judge from trying a case to which the municipality is a party upon the sole ground that he owns taxable property within its limits, and this is the sole ground of the alleged disqualification in the case at bar. The legal aspect of the question is not changed by the suggestions of counsel that the value of the property sought to be condemned was alleged by defendants to be over a million and a half dollars (found by the jury to be only \$25,000), and that, if the alleged value had been established, then municipal bonds to provide for the amount would have been necessary, unless the city should abandon the proceedings, etc. The suggestions are themselves only of remote contingencies. The case at bar is within the rule declared in *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 249, 50 Pac. 268, and *Higgins v. City of San Diego*, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209, and not within *Meyer v. City of San Diego*, 121 Cal. 102, 53 Pac. 434, 41 L. R. A. 762, where the interest of the judge was direct, immediate, and precise; it being a case, as stated in the opinion therein rendered, "where the judge, in a case

directly involving the validity of a tax imposed and to be imposed on his land, does by his ipse dixit declare whether the burden shall remain or be removed."

Appellants contend here, although it is not clear that they so contended in the court below, that the final judgment of condemnation was erroneous because the money was not deposited in court in accordance with the provision of the Code on the subject. It is not disputed that the money was actually deposited with the clerk within the proper time, but it is contended that the deposit was not kept good, because some months afterwards, the appellants having refused to take it, the clerk deposited it with the county treasurer. This seems to have been done under section 2104, Code Civ. Proc., which provides that: "Whenever moneys are paid into or deposited in court, the same shall be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it with the county treasurer, to be held by him subject to the order of the court." This seems to be a general provision applicable in all cases, and it is not inconsistent with section 1254, which provides that where, in a condemnation suit, the plaintiff may be authorized to take possession of the premises involved before trial, upon the payment into court of a sum of money to be fixed by the judge, the court "may" order that money to be deposited in the state treasury. In the case at bar the court in the final judgment ordered that the county treasurer forthwith pay the money to the defendants, and "that this be his warrant therefor." There is no pretense that the money was not in the county treasury, or that appellants could not have immediately taken it. It is apparent that appellants would not have received the money under any circumstances, and, these being the facts, we do not think that the judgment should be reversed on the technical point that the money—quite a large sum—was not actually carried from the treasurer's room to the court room. The judgment appealed from is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.; HARRISON, J.; HENSHAW, J.; TEMPLE, J.

BEATTY, C. J. I concur in the judgment, and only desire to add a brief statement of the ground upon which I distinguish the case of *Meyer v. City of San Diego*, 121 Cal. 102, 53 Pac. 434, 41 L. R. A. 762, from this and all similar cases. *Meyer v. City of San Diego* was an action which could be maintained by any taxpayer, and it was only in that capacity that the plaintiff sued. The judge was also a taxpayer. He could have instituted the action himself, or made himself a party by intervention, and to hold that he could try the case would have been to hold that one who has interest enough in a cause of action to

maintain it as plaintiff has not enough interest in it to disqualify him from deciding it as judge,—a proposition to which I should think any court would hesitate to subscribe. In this case and in the cases cited by appellants, although the judge was a taxpayer of the corporation (plaintiff or defendant), he could not as such have brought the action or defended it; and, his interest being too remote and contingent for that purpose, it may be held, without any impeachment of Meyer v. City of San Diego, that it was too remote and contingent to disqualify him as judge.

133 Cal. 589

MCGRAW v. FRIEND & TERRY LUMBER CO. (Sac. 788.)

(Supreme Court of California. Aug. 2, 1901.)

APPEAL AND ERROR—NONSUIT—RETRIAL—LAW OF THE CASE—DANGEROUS PREMISES—EVIDENCE—WITNESSES—CONTRADICTION—DEPOSITION—INTRODUCTION—CROSS-EXAMINATION.

1. Where a judgment in favor of plaintiff was reversed on an appeal from the judgment and from an order denying a new trial, on an assignment that the court erred in refusing defendant's motion for a nonsuit made at the conclusion of plaintiff's evidence, and on a retrial of the case a like motion was made and granted, and a second appeal taken from the nonsuit, the error, if any, in the court's granting such nonsuit, was an error of law, and not of fact; and if there was nothing in the evidence produced on the second trial to strengthen plaintiff's case, or to require a different conclusion, the decision on the first appeal that it was error to deny the nonsuit became the law of the case, and was decisive of the propriety of granting such nonsuit on the second trial.

2. In an action for injuries caused by dangerous premises along a city sidewalk, a question asked of plaintiff on cross-examination, if he had not testified by deposition that he was in the habit of going to a hotel situated in the vicinity of the accident nearly every day, etc., was not irrelevant, as it tended to show that plaintiff was familiar with the place of the accident.

3. Where the witness' answer showed that he was not misled as to the time to which the question related, his answer being limited to the time prior to the accident, the question was not objectionable on the ground that it was uncertain as to time.

4. Where defendant, on cross-examination of the plaintiff for the purpose of laying the foundation for contradicting him, asks if he did not testify to certain things by deposition, reading from the deposition the questions and answers, it is not incumbent on the defendant to introduce the deposition or the questions and answers referred to in evidence; it being proper for plaintiff to re-examine the witness as to any portions of the deposition material to the matters called out on the cross-examination, and thus correct any possible misapprehension.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by Peter McGraw against the Friend & Terry Lumber Company. From a judgment in favor of defendant entered on a motion for nonsuit at the close of plaintiff's case, he appeals. Affirmed.

A. L. Hart, for appellant. Hall & Dunn, for respondent.

HAYNES, C. Action to recover damages for personal injuries. At the conclusion of plaintiff's evidence the defendant moved for a nonsuit, its motion was granted, and from the judgment entered thereon the plaintiff has taken his appeal. Upon a former trial the plaintiff had a verdict and judgment, but that judgment was reversed, upon defendant's appeal, upon the ground that the court erred in denying defendant's motion for a nonsuit made then, as now, at the conclusion of plaintiff's evidence in chief. The injury complained of was sustained November 18, 1894, and the first trial was had in December, 1895. The trial, from the result of which the present appeal is taken was had in March, 1899. For a statement of the case, see the opinion upon the former appeal, reported in 120 Cal. 574, 52 Pac. 1004. As to the attending circumstances under which the accident occurred, the case now, as then, depends wholly upon the testimony of the plaintiff; and upon the former appeal it was said by this court: "Conceding that the defendant was negligent in not erecting some barrier to prevent accidents, the plaintiff was so clearly guilty of contributory negligence as to prevent a recovery." No facts or circumstances appear in his evidence upon the second trial that were not disclosed by his evidence upon the former trial, though there were certain minor discrepancies between the evidence given on the second, but none that would require or justify a different conclusion from that announced upon the former appeal.

It is, however, urged by appellant "that a decision of this court upon appeal as to a question of fact does not become the law of the case"; citing *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200. In that case the appeal was from an order denying a new trial. Upon the first trial of that case in the superior court the defendant had judgment, and the plaintiff appealed from an order denying his motion for a new trial, upon the ground that the evidence was not sufficient to justify the verdict, and this court reversed the judgment. Upon a second trial the verdict was for the plaintiff, and upon appeal by the defendant it was contended that the evidence was substantially the same as upon the former trial, and that the decision upon the first appeal upon the question of the sufficiency of the evidence became the law of the case. Here, however, the appeal is from a nonsuit granted by the trial court, and, if the court erred in granting it, it is an error of law. *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737. The fact that a jury has been impaneled and has heard the evidence does not prevent the defendant from making the motion, nor the court from deciding it, though in deciding it the court necessarily considers the evidence and every inference of fact that may be properly drawn from it. The former appeal in the case at bar

was from the judgment and from an order denying a new trial, and among the errors of law it was specified that the court erred in not granting the defendant's motion for a nonsuit, made, as here, at the conclusion of plaintiff's evidence, and that error was the one principally considered; and it was held that the court erred in not granting it, and that, as there was nothing in the subsequent evidence which in any manner strengthened the plaintiff's case, the subsequent decision of the jury did not cure the error. The decision upon the former appeal therefore became the law of the case, unless the evidence upon the second trial was so far different as to require a different conclusion. The court below thought it did not, and in that we agree.

Some exceptions to rulings upon the cross-examination of the plaintiff were taken, which remain to be noticed: Prior to the first trial of the case the deposition of the plaintiff was taken, and what was said by counsel for defendant to be such deposition was used upon the last trial upon cross-examination of the plaintiff, but the alleged deposition was not put in evidence. The plaintiff, however, admitted the signature to be his, and that he recollected "appearing before a notary public and giving his testimony." No objection was made upon the ground that the paper was not, or was not shown to be, the deposition of the witness. The examination consisted of reading from the deposition certain questions and answers, and asking whether he so testified, and whether such answers were true; whether his recollection of the matters testified to in the deposition was better at that time than at the present. To some of these questions the objection was made that the time to which the questions were directed was uncertain, and to one the additional objection that it was irrelevant and immaterial. The general purpose of the examination here referred to was to show that plaintiff was familiar with the condition of the sidewalk in question at and prior to the accident. The American Eagle Hotel was situated in the vicinity of the place of the accident, and (reading from the deposition) he was asked: "Were you in the habit of going to the American Eagle Hotel frequently? Answer. Every day, nearly,—frequently every day." And after reading said question and answer he was asked, "Was that true?" and thereupon said objection was made. It was clearly relevant to show that plaintiff was familiar with the place where the accident occurred, and knew of any danger that might exist which was open to observation, as the danger in question undoubtedly was. As to the supposed uncertainty as to the time to which the question related, his answer shows that he was not misled. It was as follows: "I do not recollect going there after the accident. I was not able to go out around. After the accident occurred I took my meals down at my room,"—thus showing clearly that his answer, as read from the deposition, that he went to the hotel

frequently,—every day, nearly,—related to the time before the accident; nor do we find any answer of the witness that indicates that he was misled, or misunderstood the time to which the question related. It is also called to our attention by counsel that the deposition was not introduced in evidence. It was not incumbent upon the defendant to introduce it in evidence. It was competent for the plaintiff to re-examine the witness as to any portions of the deposition material to the matters called out by the cross-examination, and thus to correct any possible misapprehension of the witness. We find no error requiring a reversal of the judgment, and advise that it be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

131 Cal. 614

SANCHEZ v. FORSTER et al. (L. A. 872.)

(Supreme Court of California. Aug. 10, 1901.)

ADMINISTRATORS—DEBT TO ESTATE—LIABILITY ON BOND—TENDER.

1. Under Code Civ. Proc. § 1615, providing that no administrator is accountable for any debt due the decedent which remains uncollected without his fault, the sureties on an administrator's bond are liable for only so much of a debt which he owed deceased as could have been collected from him, since section 1447, requiring an executor to inventory and account for any debt which he owed deceased as for so much money in his hands, applies only to executors.

2. Where an administrator, who is also an heir, owes the estate more than the value of his distributive share, he should account for such share as a payment on the debt, and, if he fails to do so, the amount may be collected of his bondsmen.

3. An administrator, who was also an heir, owed the deceased more than the value of his distributive share of the estate. Without paying his debt, he conveyed his share to his bondsmen, and also failed to account for money which he had received. At the trial of the action on his bond, the sureties offered to convey to his successor the property so conveyed to them in full settlement of their liability. *Held*, that the offer was properly refused, since it did not include an offer to pay the sum received by their principal, for which he had failed to account.

Department 1. Appeal from superior court, Orange county; J. W. Bullard, Judge.

Action by Francisco Sanchez, administrator of the estate of Thomas A. Yorba, deceased, against M. A. Forster and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Scarborough, Matthews & Forgy and F. O. Daniel, for appellants. Geo. D. Blake, Vic-

tor Montgomery, and Mr. Brousseau, for respondent.

GAROUTTE, J. Defendants, who are appellants, prosecute this appeal from the judgment and order denying their motion for a new trial. The plaintiff, as administrator of the estate of Thomas A. Yorba, deceased, brings this action against appellants, who are sureties upon the bond of Felipe Yorba, the former administrator of said estate, to recover money alleged to be due the estate from said former administrator. These appellants were sureties upon his bond in the sum of \$2,000, and judgment has been rendered against them in that sum. At the time of the appointment of Felipe Yorba as administrator he was indebted to the estate of Thomas Yorba, deceased, in the sum of \$6,000. It is also conceded that he failed to account to the present administrator in the sum of \$685.95 coming to his hands as administrator. No part of these debts has ever been paid. The court is well satisfied that the sureties upon an administrator's bond are in no sense guarantors of a debt owed by the administrator to the deceased in his lifetime. In view of the provisions of section 1447 of the Code of Civil Procedure, taken in connection with principles of equitable estoppel presented by the facts of that particular case, a contrary rule was held as to executors in *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20. But neither the aforesaid section of the Code nor any other section applies the same restrictions to administrators. This court is not called upon to declare what the common-law rule is in such a case, for section 1615 of the Code of Civil Procedure declares: "No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault." This rule of law applies to the debt of an administrator equally with that of any other person, and, as before suggested, the special restrictions upon executors, as declared in said section 1447, are not made applicable to administrators. The true rule governing the liability of sureties of administrators in such cases is declared in *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5; and that decision has been approved by this court in the late case of *In re Walker's Estate*, 125 Cal. 242, 57 Pac. 991.

The liability of these appellants for the debt of the administrator depends upon the fact as to whether or not the debt was uncollected through his fault. Or, bringing the question directly to the door of the administrator, it may be said his sureties are liable if, during his administration of the estate, he had the financial ability to pay the debt and failed to do so. As to his financial ability to pay the debt, the trial court found as a fact that his interest in the estate, of which he was administrator, was of the value of \$2,000. In support of the judgment rendered it must be assumed that his net interest in the estate of deceased was of the value of \$2,000. As

we have seen, these sureties, aside from the financial ability of the administrator, were liable for about \$700, for unaccounted money coming into his hands. Thus, as to them, this interest of the administrator in the estate was only required to satisfy about \$1,300 of his debt; and, this being so, it will be held that, through the medium of his interest in the estate, he should have paid at least \$1,300 of the debt, and, having failed to do so, his sureties are responsible for his failure. In view of the findings of the court as to the net value of his interest in the estate, no importance is attached to the fact that his assets consisted of an undistributed share thereof. The case stands the same as though he owned in entirety the fee to a tract of land of the same value.

Previous to the trial in the superior court the former administrator by conveyance transferred his interest in the estate to these appellants; and the point is now made that, during the progress of the trial, they offered to deed the interest acquired by them from their principal to plaintiff in consideration of a full release of their liability upon the bond. As to this offer it is only necessary to say that appellants, beyond this question of the administrator's interest in the estate, admit a liability of about \$700, and this of itself justified plaintiff in declining the offer. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

133 Cal. 611

PEOPLE ex rel. ATTORNEY GENERAL v.
STOCKTON SAVINGS & LOAN
SOC. (Sac. 768.)

(Supreme Court of California. Aug. 10, 1901.)
CORPORATIONS—REAL ESTATE—HOLDING
FIVE YEARS—ESCHEAT.

Under Const. art. 12, § 9, providing that no corporation shall hold for a longer period than five years any real estate not necessary for carrying on its business, and Civ. Code, § 574, that savings and loan associations may purchase real estate at sales under mortgages made for their benefit, but must sell such real estate within five years, real estate so purchased does not escheat to the state at the expiration of five years, if not then sold.

Department 1. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Action by the people of the state of California, on the information of the attorney general, against the Stockton Savings & Loan Society. From a judgment for defendant, plaintiff appeals. Affirmed.

Tirey L. Ford, Atty. Gen., and J. F. Ramage, for appellant. Nicol, Orr & Nutter, for respondent.

GAROUTTE, J. The object of this action is to escheat to the state certain lands in San Joaquin county, alleged to be held by defendant, a corporation. The complaint alleges

that the defendant acquired at trustee's sale, made pursuant to the provisions of a certain deed of trust, these lands; that more than five years have elapsed since defendant acquired title thereto, and said lands have not been sold. The sufficiency of the complaint is the only question before the court.

The action is based upon section 9, art. 12, of the constitution of the state, which provides: "No corporation shall engage in any business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized; nor shall it hold for a longer period than five years any real estate, except such as may be necessary for carrying on its business." It is asserted by appellant that, this provision of the constitution being mandatory and prohibitory, it follows therefrom that defendant's title to these lands was cut off instantaneously upon the expiration of the five-year period, and, as a necessary result therefrom, the land escheated to the state. The court fails to see how the declaration of the constitution, to the effect that this provision is mandatory and prohibitory, accomplishes an escheat under the facts of this case. The provision of the instrument says nothing whatever about escheats. Escheats and forfeitures are not favored by the law, and why some penalty other than an escheat should not be declared to follow a violation of this provision of the constitution is not made plain. The provision itself wholly fails to declare what results follow if it be violated, and for this reason it would seem that the legislature has the power to prescribe penalties for its violation. There appears nothing in the provision so self-executing as to deny that power. A provision of the Pennsylvania constitution, similar in principle to that here involved, was before the appellate court of that state in *Com. v. New York, L. E. & W. R. Co.*, 132 Pa. 605, 19 Atl. 291, and the court there said: "It will be noticed that this clause in the constitution affixes no penalty for its violation. It is conceded that for a violation of the organic law a Pennsylvania corporation, or a foreign corporation having or exercising corporate franchises within this commonwealth, would forfeit such franchises. This, however, would not involve an escheat or confiscation of its property. For present purposes we must regard this constitutional provision as out of the case. The question here is whether the real estate in controversy is liable to escheat. This is not a proceeding to forfeit the company's franchises, but to escheat its lands."

As to savings and loan societies, this provision of the constitution is given a legislative construction by section 574 of the Civil Code, wherein it is provided: "Savings and loan corporations may purchase, hold and convey real and personal property as follows: * * * (4) No such corporation must purchase, hold or convey real estate in any other case or for any other purpose; and all real estate described in subdivision 3 of this sec-

tion must be sold by the corporation within five years after the title thereto is vested in it by purchase or otherwise." Subdivision 3 relates to real estate purchased by the corporation under pledges, mortgages, or deeds of trust made for its benefit. It is here provided that the lands must be sold within five years after title has vested; and the court feels satisfied that such is the purpose and tenor of the constitutional provision, when it declares that a corporation shall not hold certain classes of real estate for a longer period than five years. In other words, the constitutional provision declares that this character of real estate shall be sold within the five-year period. If the corporation does not sell, as commanded by the constitution, penalties may be provided by the legislature for its failure so to do, or possibly some judicial procedure might be invoked, compelling a sale of the land, or a forfeiture of its franchise might possibly be judicially declared. For the foregoing reasons the judgment is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

133 Cal. 601

HUNTER v. MILAM. (L. A. 742.)

(Supreme Court of California. Aug. 8, 1901.)

APPEAL—QUESTIONS CONSIDERED—FINDINGS
—EVIDENCE—IMMATERIAL ERROR.

1. On an appeal from an order denying a new trial, the court cannot inquire whether the findings support the judgment, but can consider only attacks made on the findings as not supported by the evidence and alleged errors of law occurring during the trial to which exceptions were taken.

2. A finding that on a certain day a marriage was solemnized between the parties and a certificate of marriage recorded is not in conflict with evidence that defendant was then the wife of another man.

3. A finding that for more than ten years after plaintiff had deeded land to defendant he suffered the legal title and exclusive possession to remain in her is not objectionable, as not supported by the evidence, because, as another finding shows, for the first five years they occupied the land together, since a consideration of both findings shows that the ten years of exclusive possession referred to were after such five years.

4. Where judgment is rendered against plaintiff on the ground of his laches and limitations, a new trial should not be granted for error in the admission of evidence which does not affect such grounds.

5. Where, both before and after the court erroneously sustained an objection to a question as to plaintiff's intention in executing a deed, he fully explained his reasons for executing it, the error was cured, and a new trial should not be granted on that ground.

Department 2. Appeal from the superior court. Los Angeles county; M. T. Allen, Judge.

Action by Jesse Hunter against Jane Elizabeth Milam. Judgment in favor of defendant. From an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Knight & Harpham and Works & Lee, for appellant. Goodrich & McCutchen, Ben Goodrich, and S. A. Carver, for respondent.

PER CURIAM. This is an action to have set aside and declared void two deeds executed by plaintiff to defendant conveying to the latter a certain lot of land, and to quiet plaintiff's title thereto. Judgment went for defendant, and plaintiff appeals from an order denying his motion for a new trial. He also attempted to appeal from the judgment, but such attempted appeal was taken too late and cannot be considered. The first deed was executed and delivered to respondent on December 28, 1878, and was on that day recorded, and by it the land was conveyed to respondent in fee simple. The second deed was executed and delivered April 4, 1884, and conveyed the same land to respondent during her natural life, "and, in case she survives said party of the first part, then to her and her heirs and assigns, forever," and was also on the day of its execution duly recorded. This action was commenced on February 14, 1896, which was nearly 18 years after the execution and recordation of the first deed, and over 12 years after the execution and recordation of the second deed. The decision of the court below was based, among other things, on the laches of plaintiff and the bar of the statute of limitations under subdivision 4 of section 338, Code Civ. Proc. A marriage was solemnized between plaintiff and respondent on July 3, 1862, and they lived together as husband and wife from that time until the year 1883, when they separated. It may be briefly stated, for a general understanding of the case, that appellant contends that the marriage was not valid for the alleged reason that some 4 or 5 years before its solemnization respondent had been married to one Joseph Milam, who was then still alive, and she had not been divorced from him; that appellant did not know these facts, and supposed that his marriage to respondent was valid, until some time in the year 1883; that he made the first deed supposing that respondent was his legal wife, and would not otherwise have made it; and that he made the second deed with the understanding that respondent would destroy the first deed. All these alleged facts respondent denied.

A great deal of appellant's argument is directed to the point that the judgment is erroneous as a matter of law; but, as there is no appeal from the judgment, we can only consider attacks made upon the findings as not supported by the evidence, and alleged errors of law occurring during the trial to which exceptions were taken. We cannot inquire whether or not the findings support the judgment. There are only two attempted specifications of the particulars in which the findings are not sustained by the evidence. It is specified, first, as follows: "The evidence is insufficient to justify the first finding, because the evidence shows that on the 3d day

of July, 1862, the defendant was the wife of one Joseph Milam and was incompetent to enter into a marriage with plaintiff." Assuming that this is a sufficient specification, the said first finding is merely to the effect that on July 3, 1862, a marriage was solemnized between the parties and the certificate of marriage recorded, which facts were proven and not disputed. The second specification is that "the evidence is insufficient to justify the tenth finding, because the evidence shows," etc. The only part of the tenth finding which is vulnerable to this attack is that in which it is found that plaintiff "for more than 10 years thereafter suffered the legal title and exclusive possession to remain in defendant"; and this part of it is certainly supported by the evidence, with the exception, perhaps, of the expression "and exclusive possession." It is not quite clear as to which 10 years are referred to; but it is clear that the court did not mean that during the 10 years immediately following the date of the first deed defendant was in the exclusive possession, in the sense that plaintiff did not live with her on the premises, for in the fifth finding the court finds that "soon after the execution of this deed [the first one] plaintiff and defendant moved upon the premises described in the complaint as their home, and continued to occupy the same as a family residence until 1883." It is therefore immaterial how the said expression used in the tenth finding should be construed. The two findings taken together show the real facts.

As to errors of law occurring at the trial, the main one is the alleged error in admitting in evidence the judgment roll in a former case of the present plaintiff against the present defendant, described as "Jane Elizabeth Milam, sometimes known as Jane Elizabeth Hunter." That action was brought in August, 1892, to have annulled the marriage between plaintiff and defendant. The case was tried in the superior court, and judgment was rendered for defendant,—the court holding that the marriage was valid; and upon appeal to this court the judgment was affirmed. See 111 Cal. 261, 43 Pac. 756, 31 L. R. A. 411. The objection urged is that the judgment in that case does not estop appellant from again asserting the invalidity of the marriage; but, if that be admitted, it does not follow that the judgment roll was not admissible for any purpose. But, even if erroneously admitted, it would not affect the ground of laches and statute of limitations on which the judgment was based; neither, in this view, is it of consequence that the court found as a matter of law that the judgment was an estoppel as to the validity of the marriage. The only other exception to the rulings upon admissibility of evidence is to the sustaining of an objection of respondent to a question asked appellant on the witness stand as to his intention in executing the second deed. This ruling could have done no harm, for appellant, both before and after

this question, fully explained what his reasons were for making the second deed. The foregoing are all the matters of any consequence which are presented on the appeal from the order denying a new trial. It may be noticed, however, that the finding "that by said deed of December 28, 1878, defendant became vested with an absolute title in fee simple to said premises" is clearly one of the conclusions of law among which it properly appears in the record. No doubt a finding of title is in some connections a finding of fact, but not so in the case at bar, where it is a mere conclusion from the facts already found. *Society v. Burnett*, 106 Cal. 514, 39 Pac. 922.

The appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

133 Cal. 584

In re FRANKLIN'S ESTATE. (S. F. 2,629.)¹

(Supreme Court of California. Aug. 7, 1901.)

APPEAL—FILING TRANSCRIPT—MOTION FOR
NEW TRIAL—EXECUTOR'S ACCOUNT
—PROBATE ORDER.

1. Where, on appeal from an order of the superior court sitting in probate, settling the annual account of an executor, no transcript is filed in 40 days, the appeal should be dismissed, though appellant moved for a new trial, and filed a statement on such motion, which was not settled during the 40 days, since the provisions of Code Civ. Proc. §§ 1713, 1714, 1716, 1717, relating to new trials, apply only where issues are formed, and to cases not otherwise provided for; and no issue is formed by objections to an account.

2. Under Code Civ. Proc. § 950, providing that a statement on motion for new trial may be used on appeal from a final judgment, such statement cannot be used on appeal from an order settling an account of an executor, since such order is not a final judgment.

In bank. Appeal from superior court, Santa Barbara county; B. T. Williams, Judge.

Appeal from an order settling an annual account of the executor of the will of William A. Franklin, deceased. Dismissed.

Canfield & Starbuck, for appellants. B. F. Thomas, for respondent.

McFARLAND, J. This case is before us on a motion of respondent to dismiss the appeal taken by appellants from an order of the superior court sitting in probate, settling the first annual account of the executrix. The motion is on the ground that no transcript on appeal has been filed within the 40 days allowed by the rule of this court.

It is admitted by appellants that the transcript has not been filed within the 40 days; but they set up as their answer to the motion that, after the order settling the account had been made, they moved for a new trial, and filed a statement on their motion for a new trial; that the statement has not yet been settled; and that, therefore, their time has not expired under the rule. We think that the proceeding of a motion for a new trial does not apply to a probate order settling the annual account of an executrix. It was so

declared in *Re Sanderson's Estate*, 74 Cal. 199, 15 Pac. 753, and it has never since been directly held otherwise. That case was an appeal from an order settling the accounts of the executor; and Mr. Justice McKinstry, in delivering the opinion of the court, after reviewing the subject quite fully, with reference to sections 1716 and 1717 of the Code of Civil Procedure, and alluding to *In re Moore's Estate*, 72 Cal. 335, 13 Pac. 880, and to remarks made in *re Herteman's Estate*, 73 Cal. 545, 15 Pac. 121, says: "By sections 1713 and 1714, the provisions of part 2 of the Code (relating to proceedings in ordinary actions) do not constitute the rules of practice in probate proceedings when 'it is otherwise provided'; and the provisions of part 2 (relating to new trials and appeals) are not applicable when 'inconsistent' with the provisions of the title in which the sections are found. A mode and manner of settling accounts of executors and administrators is specially provided, which, if followed, is inconsistent with the provisions relating to new trials." And, again, he says: "Are sections 1716 and 1717 to be read as commanding the proceedings set forth in section 1312, Code Civ. Proc., and those which immediately follow it, to be resorted to whenever an account is settled? In *Re Moore's Estate*, supra, the question was fully considered and discussed by Justice Temple, and the question above stated was answered in the negative." The case of *In re Moore*, supra, was substantially to the same effect; for, while the decision there went directly only to the point that there is no right to a jury trial in the matter of settling an administrator's account, yet the reasoning clearly included motions for a new trial. The court called attention to the opportunity which an opposite construction would give a litigious person to indefinitely postpone the settlement of an estate, and concluded that the operation of sections 1716 and 1717 should be confined "to those cases in which the Code has expressly authorized issues of fact to be framed"; and, of course, necessarily held that settling the account of an executor or administrator was not one of those cases. In *Re Sanderson's Estate*, supra, the court said that under sections 1716 and 1717 "exceptions to an account do not create 'issues of fact joined,' such as must be submitted to a jury"; and, if not, then such exceptions do not, under said sections, give the right to a motion for a new trial. The point here in question was not involved in either *In re Bauquier's Estate*, 88 Cal. 302, 26 Pac. 178, 532, or *Leach v. Pierce*, 93 Cal. 624, 29 Pac. 233. In the *Bauquier Case* the only question involved was whether a motion for a new trial was proper in a proceeding inaugurated by the written petition of appellant therein for the probate of a certain will, and her appointment as executrix thereunder, and written opposition to her appointment on the ground of incompetency; and it was held that, as the action of the court was invoked

¹ Rehearing denied September 7, 1901.

as to matters of fact which were "presented to it for determination in the form of pleadings" a motion for a new trial was the proper proceeding. But it was said in that case, "It would be impossible to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings." In *Leach v. Pierce* it was held that a motion for a new trial was proper where the contest was over a petition for the sale of real property of an estate, because under the provisions of the Code on that subject, as in the *Bauquier Case*, there were issues of fact presented in the form of pleadings. But in another appeal in the same case, reported in the same volume (93 Cal.) at page 614, 29 Pac. 235, the decision being subsequent to that in the *Bauquier Case*, it was held that a motion for new trial was not allowable on a contest for family allowance. The court there said that "it was evidently the intention of those who framed and adopted the provisions of the Code relative to probate proceedings to curtail dilatory proceedings in the settlement of estates." The court further said: "It is not necessary, however, in this case to lay down a rule of universal application, and all we decide is that in the matter before us proceedings for a new trial were not authorized. It is better, perhaps, to follow the suggestion of Mr. Justice Miller in *Davidson v. City of New Orleans*, 96 U. S. 104, 24 L. Ed. 616, to ascertain the intent and proper application of the provisions bearing upon the subject 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require.'" Reference is made in the opinion to *In re Moore's Estate*, supra, and *In re Herteman's Estate*, 73 Cal. 545, 15 Pac. 121. In the *Herteman Case* the appeal was from an order settling an administrator's account, and the court below had refused to settle the statement on motion for a new trial on the ground that such a proceeding was not allowable; but it was held that such action of the lower court could not be reviewed here on a general appeal of the case, but could be reached only on mandamus; and thus the question of the right to move for a new trial was not directly determined. But the court said: "It may be remarked, however, that it is doubtful if the true construction of that part of the Code of Civil Procedure relating to probate matters is that every contested motion in probate proceedings assumes the character of a civil action, with all the attendants of a right to a jury trial, motion for new trial, etc. Such a construction would greatly confuse and prolong the settlement of estates,—a matter already sufficiently complicated. The subject is discussed to some extent in the opinion of Mr. Justice Temple in the case of *In re Moore's Estate*, 72 Cal. 335, 13 Pac. 880, and there are reasons for holding that the suggestions there made should be adopted as expressive of the true meaning of the Code." And so, while the right to move for a new trial on an order settling an

account has never been directly passed upon since the decisions in *Re Moore's Estate* and in *Re Sanderson's Estate*, the tendency has been to prevent that unnecessary delay in the administration of estates which would be caused by allowing all the machinery of a civil action to be used in ordinary probate proceedings. Of course, the Code expressly provides for a jury trial, and motion for new trial, in contests of wills; but, in addition to that, the right to move for a new trial has been extended in probate matters to only two cases, to wit, a contest over a petition for letters testamentary in the *Bauquier Case*, and a petition for the sale of land in *Leach v. Pierce*. While it is not necessary to inquire here whether there is any other probate proceeding in which a motion for a new trial would be allowable, it is sufficient to say that we do not think it applicable to an order settling an account. As was pointed out in the *Sanderson* and *Moore Cases*, above cited, it is the duty of the court of its own motion to carefully scrutinize all accounts, and to reject all claims of the executor which are illegal or unjust. In the *Sanderson Case* it was said: "The court might possibly overlook particular objections which were not called to its attention, and the exceptions are permitted in aid of the court when performing its duty of making the account correct." The mere fact that parties may file such exception does not bring the right here claimed within the cases of *Bauquier* and *Leach v. Pierce*.

2. Moreover, a statement on motion for a new trial can be used on another appeal only when such appeal is "from a final judgment" (Code Civ. Proc. § 950); and an order settling a final account is not a final judgment, within the meaning of section 963, which prescribes the judgments and orders from which appeals may be taken. That section has three subdivisions. The first provides that an appeal may be taken "from a final judgment entered in an action or special proceeding commenced in a superior court, or brought into a superior court from another court"; the second provides for appeals from various orders and interlocutory judgments rendered in ordinary civil actions; and the third, from judgments and orders in probate proceedings, including an appeal from an order "settling an account of an executor." And the general rule is well established that appeals can only be taken from such judgments or orders in probate matters as are mentioned in this subdivision. In *re Walkerly's Estate*, 94 Cal. 352, 29 Pac. 719, and cases there cited. The "appeal from a final judgment" mentioned in section 950 clearly means only the appeal "from a final judgment" mentioned in subdivision 1 of section 963, and does not include appeals in probate matters, which are provided for in a different category by subdivision 3. In *Re Callaghan's Estate*, 60 Cal. 232, an appeal had been taken from a probate order, which was not appealable under subdivision 3, and it was sought to maintain the

appeal as one taken from a "special order made after final judgment," under subdivision 2; but the court said: "We think that the final judgment there referred to is the one mentioned in subdivision 1, to wit, 'a final judgment in an action or special proceeding commenced in a superior court, or brought into a superior court from another court.'" The motion is granted, and the appeal is dismissed.

We concur: HENSHAW, J.; VAN DYKE, J.; GAROUTTE, J.; HARRISON, J.; TEMPLE, J.

133 Cal. 605

SPENCER v. TROUTT, Judge. (S. F. 2,795.)
(Supreme Court of California. Aug. 8, 1901.)

JUDGMENT—PREMATURE APPEAL—SECOND
APPEAL—MANDAMUS.

Petitioner was one of defendants in an action in which judgment was entered for plaintiff, from which all defendants appealed. After affirmance of the judgment and remittitur, it was discovered that petitioner's name was accidentally omitted from the judgment, and on motion the judgment was amended *nunc pro tunc* by inserting his name. On refusal of the judge to fix the amount of a stay bond on appeal from the judgment as so amended, he applied for mandamus to compel such action. *Held*, that the writ should issue, since, the judgment being incomplete as to petitioner when the first appeal was taken, such proceedings were void as to him, and did not affect his right to appeal when the judgment was finally completed.

McFarland, J., dissenting.

In bank. Proceedings for mandamus by David J. Spencer against James M. Troutt, judge of the superior court of the city and county of San Francisco. Writ issued.

T. M. Osmont, for petitioner. Naphtaly, Freidenrich & Ackerman and W. B. Kollmeyer, for respondent.

TEMPLE, J. This is a proceeding for a writ of mandate to require the respondent to determine the amount of a stay bond on an appeal from a judgment for the possession of land rendered against the petitioner. The judgment was rendered in an action brought by Julius Baum, now deceased, against petitioner and Edward Roper and Kate Roper, wife of said Edward Roper. Respondent's answer, which was admitted to be in all respects true, shows that on the 6th day of February, 1897, a decision was rendered in said cause as follows: "That plaintiff is entitled to a judgment that plaintiff do have and recover of and from the defendants, Edward Roper, John W. Roberts, as administrator of Kate Roper, deceased, and David Spencer, the possession of all the lands described in the amended and supplemental complaint," etc. At the same time findings were filed, and judgment therein was entered in the judgment book February 10, 1897. Subsequently the defendants, including the petitioner, prepared, had settled, and engrossed, a statement on motion for a new trial,

and took all the proceedings required to enable them to submit the motion for decision. The motion was so submitted, and was denied. Thereupon petitioner, with his co-defendants, appealed from the order to this court. In the same mode he took an appeal from the judgment, and bonds were given by petitioner and the other defendants on each appeal. The appeals were duly presented to the court by the appellants, and, having been decided adversely to petitioner, he asked for a rehearing in bank. The rehearing was denied. After filing the remittitur in the court below, it was discovered that in the judgment as entered the name of petitioner was omitted. Application was then made to amend the entry by inserting the name of petitioner. This was done by what is called a "nunc pro tunc order," giving the amended record the date of the former record. Petitioner then took steps for a new appeal from the judgment, claiming that the former appeal was, as to him, void, as prematurely taken. In that view he applied to respondent to fix the amount of a stay bond on appeal from the judgment, which application was denied, and hence this proceeding.

It may be taken for granted that, if petitioner then had a right to appeal, it was the duty of respondent to grant the application. Several points are made here in justification of the refusal to determine the amount of the stay bond.

1. If the judgment was properly entered at the time of the first imperfect record, the time allowed by statute for taking an appeal had expired. It is contended that the amendment was the correction of a clerical misprision, and did not extend the time to appeal. But, if the petitioner could not have taken an appeal from the judgment as first entered, the amendment was quite material. It would hardly be contended that the judgment could be so entered, and the record amended after the time for appeal had expired, and thereby a party be deprived of the right to appeal altogether. The time allowed for an appeal commences to run from the time of the actual entry of the judgment. The order amending the record shows that judgment was not actually entered against the petitioner until May 29, 1901. It hardly requires argument or authority to establish the proposition that a court cannot, by antedating an order, or the entry of it, cut off the right of a party to move for a new trial, to move to set the judgment aside, or to appeal. These rights given by the Code of Civil Procedure cannot be lost to a party by such action, whether the effect was designed or not. The test as to whether the period in which the party must act in order to get relief from an order or judgment against him must be whether he could have obtained the desired relief (on a proper showing) before the *nunc pro tunc* order was made. Could he have made his application, as the judgment, order, or record was?

2. And this brings us to the next point, that petitioner has had his appeal. He has been heard as fully as he could have been had the judgment been entered against him in the first instance, as evidently he assumed it had been; and, having had all the advantages of an appeal, and the time and attention of the trial and appellate courts in the consideration of his alleged grievances, it is contended he is estopped thereby. If it were a new question, this contention would deserve very serious consideration. The judgment had been rendered, and, unless stayed, might have been enforced. The cause was within the appellate jurisdiction of this court, but the steps prescribed by statute for bringing it to the cognizance of the court had not been taken. It might well have been said that an objection to an appeal before the judgment was actually entered was in the nature of a plea in abatement, an objection which could be waived, and which would be conclusively held to have been waived unless promptly raised. In such case the proceedings on appeal and the judgment rendered by this court could not be questioned. But a different view has been taken in several cases, and it has been held that an appeal taken before the entry of the judgment is a nullity, and the judgment entered here on such appeal is void. This conclusion seems to have been based largely upon the necessity of a rule by which it can be determined whether the trial court still retains jurisdiction of the case. In the case of *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52, an appeal was in form taken from a decree foreclosing a street assessment lien. The appeal was taken after a decree had been signed and filed, but before it had been entered. After the attempted appeal, and while, conceding the validity of the appeal, it was pending in the supreme court, the lower court made and caused to be entered a new decree essentially different from the first. A sale was had under the last decree, and the purchaser brought suit to quiet his title. Objection was made that the decree under which the sale was made was void, because an appeal had been taken, and was pending when the last decree was made and entered, and therefore the lower court had lost jurisdiction. This would have been the case had the appeal been valid. But it was held that "the appeal was futile, and the case remained in the lower court undisturbed." In *Re Devincenzi's Estate* (Cal.) 63 Pac. 723, an appeal was taken from an order refusing to confirm an administrator's sale, and declaring it to be null and void. The supreme court reversed the order, and directed the probate court to enter an order confirming the sale, which the probate court did. An appeal was also taken from this order or judgment, and it was contended that the first appeal was ineffectual for any purpose, because taken before the order vacating the sale had been entered. Therefore the first order of the probate court vacating the

sale still stood in full force, and the court had no jurisdiction to enter the order confirming the sale, even though expressly ordered to do so by this court by its judgment entered on the attempted appeal. The contention was sustained here, this court saying that, the appeal being unauthorized, "the order was not vacated by such direction, but remained in as full force as if no appeal therefrom had ever been attempted." According to these decisions, the want of jurisdiction in this court over a premature appeal is absolute, and, as consent cannot confer jurisdiction, the defect cannot be waived. It is argued, however, that this case may be differentiated from those cases, because here a judgment was entered, and the only question which could have been presented would have been that petitioner was not an aggrieved party, and that could be waived. That seems to be a case of *petitio principii*. If the record on appeal showed that the appellant was not entitled to appeal, the judgment here would have no validity. But the test is, I believe, as stated under the first point, could petitioner, against objection, have maintained an appeal from the judgment as first entered? Certainly, I think, he could not. No judgment against him had been entered. I fail to see how the fact that it was entered against his co-defendants is of importance. Such fact would not have prevented a dismissal of his appeal on motion of respondent. He was not aggrieved by the judgment against his co-defendants. The cases of *Society v. Horton*, 63 Cal. 310, and *Fallon v. Brittan*, 84 Cal. 511, 24 Pac. 381, do not help respondent. In neither case was there a jurisdictional question, and in both a judgment had been entered from which an appeal could have been taken, and the modifications made by the *nunc pro tunc* orders were immaterial so far as the appeals were concerned. The case of *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515, does not touch this question. There was no appeal from the judgment, and the record was not, as counsel suppose, corrected after an appeal taken. The appeal was from the *nunc pro tunc* order. Let the writ issue as prayed.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN DYKE, J.; HENSHAW, J.

McFARLAND, J. I dissent. Of course, after petitioner has had the advantage of one appeal, in which all the merits of his case were fully presented, there is no justice in allowing him another appeal of the identical same kind, and I think that the law does not imperatively demand a ruling which allows him such double appeal. I think that the case at bar is distinguishable from *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52, and *In re Devincenzi's Estate* (Cal.) 63 Pac. 723. They present the naked case of a notice of appeal before any pretense of the entry of the judgment or order attempted to be appealed from.

In the case at bar the judgment appealed from had been entered before the appeal was taken. The findings and decision of the court show what the judgment should be, and direct it to be so entered. The clerk entered the judgment in accordance with the decision in all respects except this one; when writing the names of the defendants against whom the judgment was ordered he omitted, by a clerical mistake, the name of the defendant who is now here petitioner. The record, on its face, clearly shows the mistake, and it could have been amended at any time so as to express the decision and direction of the court. This the petitioner is presumed to have known; and, with this knowledge, he, with the other defendants, appealed from the judgment, and on the appeal presented and argued the entire merits of the case as if the clerk had already entered the judgment as he should have entered it, and as he could at any moment have been compelled to enter it. Petitioner assumed that to have been done which should have been done. The record showed that the judgment was substantially a judgment against him; for it was always, on its face, subject to the amendment which would make the judgment express the decision. The judgment, therefore, even as it stood, was a menace to petitioner, and he was a party aggrieved thereby, with the right of appeal; and, having appealed once, he had no right to the same appeal the second time. I think that the petition for the writ should be denied.

133 Cal. 556

MABB et ux. v. STEWART et al. (L. A. 827.)¹
(Supreme Court of California. Aug. 7, 1901.)

VERDICT—EVIDENCE—IRRIGATION—DIVERTING WATER—PRINCIPAL AND AGENT—NOTICE—DAMAGES—PUNITIVE—CHARGES.

1. Where, in an action for damages, the evidence is conflicting, the verdict should not be disturbed.

2. Plaintiffs owned certain land and certain shares in an irrigating company, entitling them to water at specified times. They mortgaged the land and pledged the shares to defendant, and the shares appeared on the company's books as owned by defendant. Plaintiffs failed to pay interest, and refused to pay the water rates on the ground that the shares belonged to defendant. Defendant directed his agent, if the disclaimer of ownership and refusal to pay was persisted in, to notify the company to turn off the water, which was done. The court charged that, in turning off the water under defendant's direction, the company was his agent, and if plaintiffs, before the water was turned off, notified the company that they claimed ownership of the shares, the knowledge so received by such agent of their retraction of the disclaimer of ownership was notice to defendant, and that such a notice would put defendant on inquiry. *Held*, that such charge was erroneous, since the company was not the agent of defendant.

3. In an action to recover for wrongfully diverting water from plaintiff's land, defendant requested a charge that if, prior to the diversion of the water, plaintiff knew there were assessments due and unpaid, and refused to pay them, and disclaimed ownership of the stock,

and that defendant in good faith, acting on such disclaimer of ownership, directed the irrigating company to divert the water, then plaintiff cannot recover. *Held* erroneously refused.

4. Where, in an action to recover for wrongfully diverting water from plaintiff's land, the complaint asked for punitive damages, and several instructions given at plaintiff's request contain intimations looking towards punitive damages, but the case did not justify such allowance, it was error to refuse to charge expressly that such damages could not be allowed, and the error was not cured by a charge that only compensatory damages should be awarded.

Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by J. J. Mabb and wife against Lyman Stewart and another. From a judgment for plaintiffs against defendant Stewart, and from an order denying a new trial, he appeals. Reversed.

Otis & Gregg and E. H. Jolliffe, for appellant. J. L. Murphy, for respondents.

HENSHAW, J. Plaintiffs, husband and wife, allege that they were the owners of ten acres of land in the Ontario colony, and the owners of ten shares of water stock of the San Antonio Water Company; that by virtue of their ownership of this water stock they were entitled for use upon their land, to a certain amount of water, supplied by the San Antonio Water Company. This water was divided among the shareholders of the San Antonio Water Company in proportion to the number of their shares, and to the amount of water which from time to time the company had available for the purposes of distribution. They allege that they had complied with all the rules and regulations of the company, and were not in default with the company in any particular. In August, when the orchard of fruit-bearing trees upon their land was greatly in need of water, and upon a day in August when plaintiffs were of right entitled to use water, the defendants, without right, for the purpose of injuring plaintiffs and of destroying their orchard, shut off the water and prevented it from flowing upon their lands, and diverted it and used it upon other lands below. Plaintiffs, though making diligent inquiry, were unable to procure any other supply of water until some time afterwards; but before they were able so to do, by reason of the unlawful acts of defendants, their orchard, trees, and premises were injured to the amount of \$5,000. The second count charges upon the same facts, but avers additionally that plaintiffs were also obliged to borrow water for domestic use; that defendants well knew that this would be the result of their acts, and at the time intended and expected that plaintiffs would suffer inconvenience, loss, and humiliation thereby, which in fact they did suffer; and that the acts of the defendants so committed without right were done willfully and maliciously and with intent to injure. Judgment was prayed

¹ Rehearing denied September 7, 1901.

for in the sum of \$5,215. The case was tried before a jury. A nonsuit was granted in favor of the San Antonio Water Company, defendant, and verdict by the jury in favor of plaintiffs against the defendant Lyman Stewart was rendered in the sum of \$2,500. From the judgment which followed, and from the order of the court denying defendant Stewart's motion for a new trial, he appeals.

His first contention here is upon the insufficiency of the evidence to sustain the judgment. Upon this proposition it is argued that plaintiffs were not damaged at all, or, if damaged at all, damaged to a trifling amount, and that whatever damage might have resulted to them was not occasioned by any wrongful act of defendant. The San Antonio Water Company, as has been said, issued its stock to owners of land, who thereby became entitled to the use of a certain amount of water, depending upon their number of shares and the amount of the water supply. With the plaintiffs' land went ten shares of this water stock, one share per acre. Plaintiffs had mortgaged their land and this water stock to defendant Stewart. Upon the books of the corporation Stewart appeared as the owner of the stock. Differences arose between Stewart and his mortgagors over payments of interest upon the mortgage and assessments of water stock, which differences involved the question of the ownership of the water stock itself. These differences resulted in Stewart giving instructions to the water company to cut off the supply of water from plaintiffs' land. Plaintiffs had been accustomed to receive about the 7th day of each month, for a space of 12 hours, a head of water amounting to about 20 inches measured under a 4-inch pressure. Upon the 7th day of August the water was turned upon their land, and flowed thereon for the period of 4 hours and 45 minutes, when the supply was shut off. Plaintiffs were unable to procure any water until the 18th day of August, when they purchased the right of one of the lower users for 6 hours. They could not procure any more water until the 18th day of September, when their turn to use water came around again, and they were permitted to enjoy the usual flow. Upon the proposition that plaintiffs suffered no damage, it is contended that, if they had received the full supply to which they plead they were entitled, it is shown that this supply would have been wholly inadequate to protect the orchard during the exceptionally hot and dry month of August. Moreover, that upon the 7th day of August defendant deprived them of only 7 hours and 15 minutes of their flow, and that upon the 18th day of August they obtained a 6-hour flow, at a cost of \$15. The fact that the orchard suffered, notwithstanding this later flow, shows that the supply was inadequate, even if it had not been interfered with. It is further contended that the evidence showed that there was water available to plaintiffs for irrigating purposes, that they did not display diligence in seeking to ac-

quire water to avert the threatened damage, and that their recovery, therefore, must be limited to the amount they would have been called upon to expend in procuring the needed supply. But, as against this, there is still sufficient evidence in the case to show that the plaintiffs' trees and premises were injured to the amount found by the jury; that if the usual flow of August had been permitted there was reasonable prospect and probability of a good crop; that plaintiffs did display diligence in seeking to purchase other water, but were unable to do so; and, finally, that the 4 hours' flow permitted upon the 7th day of August, and the 6 hours' flow obtained upon the 18th day of August, were of little or no value to the land, because the first few hours' run thus turned in went practically to waste in saturating the ditches and runways, and it was only the flow of the later hours which would have been valuable for irrigating and preserving the trees. This evidence, therefore, is sufficient to support the verdict of the jury upon the question of damage.

The more important question yet remaining is that of defendant's responsibility for the damage and the instructions of the court bearing thereon. The matters in controversy between the parties, which led to the order given by Stewart to the water company to shut off the water from plaintiffs' lands, are in evidence without substantial conflict. The plaintiffs, as has been said, were in arrears upon their mortgage interest, and were owing Stewart for assessments upon their hypothecated water stock which assessments he had paid. Of course he was within his right in making these payments to protect his security. In July, 1898, the amount of the assessments upon the stock, so paid by Stewart, was \$70. In the February preceding Mr. Murphy, attorney for the plaintiffs, received from J. S. Torrance, on behalf of defendant Stewart, a letter, in answer to one from him of February 11th, inclosing a check for \$82.73. In his letter to Torrance, Murphy stated that this was the sum "which Mrs. Mabb claims is the amount due upon the note." Replying, Torrance returned the check, explaining by dates and figures that there was due for interest upon the mortgage a sum considerably in excess of \$100, and stating further: "I am advised by Mr. Stewart that Mrs. Mabb has not paid the mortgage taxes, nor the water taxes, either this year or last. He writes me that the mortgage, for some reason, this year was assessed to H. H. Merriman, and that he personally paid the taxes. I neglected to mention that these securities were held by Mr. McCulloch as collateral to secure a loan, but the duty has fallen upon the estate of Mr. McCulloch to collect this matter. * * * When you advise me that you have the proper sum of money to pay, although it is putting me to unnecessary trouble, I will show you the note and make the proper indorsement." The contents of this letter were communicated by Mr. Murphy to the Mabbs,

and shortly following it, upon February 18th, the plaintiff Mrs. Mabb, who was the owner of the property, wrote to Mr. Murphy to the effect that Mr. Torrance made contradictory statements regarding assessments and taxes, both of which she made bold to state were false. She sets forth the payments of interest which she says that she had made, and proceeds: "I know nothing whatever about the mortgage tax which Mr. Torrance states I had assessed. * * * The water-tax assessments he has nothing whatever to do with. At the time of the exchange Mr. Merriman told Mr. Mabb that, as Mr. Lyman Stewart still owned the water stock, he (Mr. Stewart) would have to pay all assessments, and he has never demanded a cent from me; neither do I expect he will, as it is customary here in the colony for party owning stock to pay the same, and can cite to others who can testify to the same." Here it may be said that Mrs. Mabb's statement to the effect that Mr. Merriman told Mr. Mabb that Mr. Stewart would have to pay all assessments upon the water stock is denied, and it is further shown by Merriman's testimony, and by that of others, that Merriman himself always paid the assessments upon the water stock. Merriman, it should be added, was the grantor of the Mabbs to the land which they owned, and while he owned it had mortgaged it to Stewart, upon precisely the same mortgage, affecting the water stock as well as the land, as that which the Mabbs gave when they acquired title. On February 24th, Murphy, after receipt of Mrs. Mabb's letter, writes again to Torrance, setting forth the contents of his client's letter, and saying: "The water-tax assessments she has nothing to do with, and she stated that at the time of the exchange Mr. Merriman told Mr. Mabb, as Mr. Stewart still owned the water stock, he (Stewart) would pay all assessments, and that he has never demanded a cent from her, and that it is customary in the colony for parties owning stock to pay the same, and that she can cite to others who can testify to the same." This letter was forwarded by Torrance to defendant Stewart. In reply to it he wrote to Torrance as follows: "As to the water assessments, it is the invariable rule that the party owning the water stock pays the assessments on it, whether pledged or unpledged. If Mrs. Mabb refuses to pay the assessments, she should be refused the use of water, and the secretary of the San Antonio Water Company should be notified that Mrs. Mabb, through her attorney, had disclaimed ownership of the stock, and refuses to pay the assessments, and hence should not be allowed to use the water. This stock being held by the estate for which you are acting, I would suggest that you act in the matter in such a way as to fully protect its interests." Stewart's letter was written on February 28, 1898. Thus in February of that year the Mabbs were informed that there were assessments upon the water stock which they had not paid, and which Stewart had

paid. They disclaimed ownership of the stock. This disclaimer was made known to their attorney, and, though in argument he seems to think that it was a preposterous idea that the Mabbs should thus disclaim ownership of valuable property, which was merely pledged at that time, he manifestly sees nothing in their declaration to excite his surprise; for he formally notifies Torrance that his clients refuse to pay the water assessments, because they are not the owners of the stock. On July 6th Stewart wrote Mr. Shepherd, the secretary of the water company, to divert the water represented by the ten shares of water stock, under which plaintiffs' land had been supplied, to other lands until the assessments upon the stock had been paid. Repeatedly, in July and in August, after the receipt of this letter, the secretary notified the Mabbs that the water would be turned off if the water assessments were not paid. He further testifies that, as secretary of the company, he would have received the assessment money, but that the Mabbs never offered to pay him. Under these circumstances it was that the water was turned off from plaintiffs' land. Later Mr. Murphy, attorney for plaintiffs, told Mr. Stewart that his clients would pay the water assessments, and upon this statement Stewart immediately gave directions to the secretary of the water company to permit the usual flow, and this they received the following month. Upon the trial of the case Mrs. Mabb gives evidence radically at variance with the contents of her letter. While her letter contains the flat refusal to pay water assessments and an absolute disclaimer of ownership in the stock, in her testimony she says that she did not understand that the water assessments were to be paid by her till the mortgage was due, and that she did not know it was claimed that she should pay the water-tax assessments. It is certainly not easy to harmonize these statements with the declarations in her letter. Against all this evidence the claim is made that Stewart never made any formal demand upon the Mabbs for the water-stock assessments; that, as appears by Mrs. Mabb's testimony, she had never given up her right to the ten shares of stock; that her letter to her attorney related solely to the payment of interest upon the mortgage note; that she did not know what right Torrance had to ask her about water assessments; that he did not ask her to pay them, nor did she understand by the letter that he claimed that she should pay them; that she expected to pay everything, taxes and all assessments, when the mortgage became due; and much ridicule is here cast upon the testimony of Stewart when he says, "The real controversy between us was their disclaiming ownership," and that he wanted to settle the question before it was too late. But, considering the disclaimer of ownership communicated by plaintiffs' attorney, we see small occasion for ridiculing or belittling this testimony, and where the conduct of defend-

ant shows "malice, recklessness, oppression, and utter disregard of the plaintiffs' rights in the premises," as plaintiffs' counsel repeatedly assert, we are utterly at a loss to perceive.

But, passing this point, we proceed to a consideration of the instructions. The court instructed the jury as follows: "The jury are instructed that in law a person can act by others, and the act of the agent in carrying out the orders of the principal, is the act of the principal, and notice or knowledge conveyed to an agent in the matter which is being or about to be undertaken by the agent for the principal is notice and knowledge of the principal; and if you find from the evidence that the defendant Lyman Stewart requested the defendant San Antonio Water Company, or any of its officers, to shut off the water to which the plaintiff J. W. Mabb was entitled, if you find that she was so entitled, and you find from the evidence that prior to the time of the shutting off of the water, and some time either in the month of July or August, 1898, the plaintiff notified the San Antonio Water Company and the defendant B. C. Shepherd that she claimed the right to the use of the water in question, because of her ownership of the said ten shares of stock, and notified the agents of the defendant Stewart that she had not given up or abandoned her rights to the said stock to said Stewart, or any other person, and that she then protested against said water being shut off when her turn to use the same should come on the 7th day of August, 1898, or thereabouts, then as a matter of law the notice and knowledge of the agent or agents of the said defendant in the said matter was also notice and knowledge to him; and if you find from the evidence that, notwithstanding such notice and protest, said agents of said defendant shut off the water, then in such shutting off of said water said defendant acted at his peril, and assumed all the consequences which would naturally or reasonably flow from his act in shutting off the water; and, if you so find, then the defendant is responsible to the plaintiff for all damages which she sustained by reason of having been deprived of said water, and which was the proximate result of said act." As to this instruction it is sufficient to say that by the records of the corporation Stewart appeared as the owner of ten shares of stock. It was the corporation's duty to obey the directions of Stewart, therefore, as to the use of the water represented by that stock. But to distort out of this an agency of the water company, or of the secretary of the water company, with Stewart as principal, so as to bind Stewart by such notification as the Mabb might give the company, is wholly unpermissible, and could have served but to lead the jury into the belief that there was some evidence establishing an agency for the indicated purpose, whereas in fact there was none at all.

If the vice of this instruction needs be made more apparent, it will be seen in considering an instruction proposed by the defendant and refused by the court, and the reasons assigned by the plaintiffs' attorney in justification of that refusal. The instruction is addressed wholly to the evidence within the case, and is unimpeachable in its declaration of the law. It is as follows: "If you find that, prior to the diversion of the water from plaintiffs' land, plaintiffs knew that there were assessments due and unpaid on the water stock in controversy, and refused to pay said assessments, and through their attorney, or otherwise, disclaimed ownership of said stock, and that the defendant Stewart in good faith acted on such disclaimer of ownership in directing the San Antonio Water Company to divert the water, then the plaintiffs cannot recover in this action." Defendant's attorney declares that he experienced difficulty in understanding why this instruction was refused. In justification it is said merely: "This instruction could not be given in this case because it was undisputed that Mrs. Mabb and her husband, before the water was turned off, notified the agent of Stewart, who is presumed to have notified him (Stewart), there being no evidence to the contrary, that she did claim to own the stock and the right to use it. Therefore there could be no good faith on the part of Stewart, and there was no disclaimer of the ownership of the stock in any manner." The inaccuracies of this statement are too apparent to require even an enunciation of them.

Of the instructions generally it may be said that they are strongly argumentative in favor of plaintiffs. For example, in the eleventh instruction it is said: "The jury are further instructed that if you find from the evidence that the plaintiff was entitled to the use of the water complained of at the time in question, and further find that the defendant seeks to excuse himself in the premises on the ground that the plaintiff abandoned or gave up her right to the use of the water in question, then the burden is upon the defendant to show such abandonment." It might be said by plaintiffs' attorney, and indeed is said, that Stewart is seeking to excuse himself; but it is scarcely a phrase proper for an instruction by a court to a jury, under a defense of disclaimer of ownership, made out by the written declarations of plaintiffs, accompanied by the written declaration of plaintiffs' attorney. Still further in the same instruction it is said: "If you find from the evidence that the defendant, or any of those acting for him, had been notified by said plaintiff that she had not abandoned her right or claim to use said water, just prior to the cutting off of the said water by said defendant, such notice would put the defendant upon inquiry," etc. Here the defendant is charged with the knowledge of anybody "acting for him," without regard to the capacity in

which they were acting or the limitation of their agency. The water company was "acting for him,"—that is to say, was obeying his direction, as it was their duty to do in the matter of turning off the water; but it does not follow therefrom they were instituted his agents for the purpose of receiving a notification, or that Stewart became any more chargeable, because of the claim which they may have served upon the water company, than he would have been chargeable with knowledge of their claim if they had asserted it to his cook. We need not discuss the argumentative nature of these instructions further. It is sufficient to refer to the cases of *Morris v. Lachman*, 68 Cal. 111, 8 Pac. 799, *People v. McNamara*, 94 Cal. 513, 29 Pac. 953, and *People v. Vereneseneckockockhoff* (Cal.) 58 Pac. 157.

The court further refused the following instruction: "The jury are further instructed that this is not a case for punitive or exemplary damages, and that the plaintiffs can in no event recover more than such damages as were actually suffered by them in the taking of the water from their land." Why this instruction was not given we are not enlightened in respondents' brief, further than that it is said that it should not have been given, "because there was evidence of both malice and oppression on the part of Stewart toward the Mabbs." This was not a case for punitive damages, as the trial court concluded. Yet the complaint sought damages upon that theory, and the instructions proposed by plaintiffs and given by the court contain many intimations looking towards punitive damages; and, finally, the refusal to give instruction is here upheld by plaintiffs' attorney upon the ground that it was a case for punitive damages. The refusal to give an instruction when requested, and when it is pertinent to the case, is undoubted error; and it is not cured by an instruction that the jury should award compensatory damages only. The defendant has the right to a positive instruction that they must not award punitive damages. *Sloane v. Railway Co.*, 111 Cal. 687, 44 Pac. 320, 32 L. R. A. 193; 2 *Thomp. Neg.* § 1264; 11 *Enc. Pl. & Prac.* p. 213. In *Railway Co. v. Scurr*, 42 Am. Rep. 377, it is said: "We are prepared to go a step further and say that in any and all actions for damages, where the proof fails to show anything that will warrant an imputation of willfulness, recklessness, or rudeness, it is the duty of the court to inform the jury, when requested so to do, that they cannot inflict punitive damages. Not to do so in a case free from doubt would be an abdication of judicial authority, and a permission to the jury to violate the settled principles of law."

For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

CAVE et al. v. TYLER et al. (L. A. 740.)

(Supreme Court of California. Aug. 7, 1901.)

WATERS—IRRIGATION—DIVERTING STREAM—PRESCRIPTIVE RIGHT—STATUTORY RIGHT.

1. 14 Stat. 253, § 9, recognizing and confirming possessory rights to the diversion of waters, and 16 Stat. 218, § 17, amendatory thereof, apply only to diversion made on the public domain of the United States; and one claiming the right to divert water under such acts must show that his rights vested while the land on which the diversion occurs was a part of such domain.

2. Plaintiff for 40 years claimed and exercised the right to divert all the waters of a certain stream from a certain point thereon for irrigation, but did not own any land on the stream. Defendant diverted a reasonable amount of water to irrigate her land from tributaries of such stream on government land five miles above the point where plaintiff diverted the stream. *Held*, that plaintiff had no prescriptive or other right to have all the waters entering the stream or its tributaries flow to the point where he diverted them, and had no right to interfere with such use of water by defendant.

Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Ben W. Cave and others against George W. Tyler and others. Judgment for plaintiffs. From an order denying a new trial, defendant Hannah S. Skinner appeals. Reversed.

H. V. Reardan and T. R. Archer, for appellant. Otis & Gregg, for respondents.

McFARLAND, J. This is an action to quiet plaintiffs' title to the right to the use, and a diversion through a ditch called the "Mill Creek Zanje," of all the water of a natural stream called "Mill Creek" and its tributaries. Judgment went for plaintiffs, and defendant Hannah S. Skinner appeals from an order denying her motion for a new trial. Under our views of the case it is not necessary to examine all of the questions presented, and the facts essential to the point of the decision may be briefly stated. Mountain Home creek is a tributary of Mill creek, and Snow creek is a tributary of Mountain Home creek. Appellant owns land through which the two latter streams run and which is riparian to the same. She acquired her right to this land in 1871 from the Southern Pacific Railroad Company, who acquired it in the same year from the United States government. Since 1888 she has used about 15 inches of water from Mountain Home creek and about 2 inches from Snow creek for the necessary irrigation of her land, upon which she grows trees, vines, and vegetables, and for domestic purposes; and this was not an unreasonable amount of water, as the court finds, for such purposes. At this point the land through which these streams run was part of the public domain of the United States. On Mill creek, about five miles below appellant's land, the respondents and their prede-

cessors have by means of said Mill Creek Zanje continuously since about the year 1853 diverted all the water flowing in said Mill creek for irrigation and other purposes; and their diversion of the water has been open, notorious, and under a claim of right. They claim that by reason of such diversion they have the right to prevent appellant from using any of the water of the tributaries for her purposes as above stated, and the court so decreed.

Respondents do not claim any rights as riparian proprietors. It is not found that they own any land whatever on Mill creek. They claim solely as appropriators. Of course, under the general law, they acquired no rights by prescription as against appellant or her predecessors, who were upper riparian proprietors; for a diversion of the water after it had passed her land, which did not in any way interfere with its natural flow over her land, was not an invasion of her right which she was called upon to notice. *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442. It is contended, however, that the right of respondents to continue to divert all of the water, and to prevent appellant from using any of it as a riparian owner, is guaranteed to them by section 9 of the act of congress of July 26, 1866 (14 Stat. 253), and section 17 of the act amendatory thereof passed July 9, 1870 (16 Stat. 218). We do not think that this contention can be maintained. There is no finding that the diversion was made on the public domain of the United States. There are some things in the record which seem to indicate that the diversion was on private land acquired under a Mexican grant in which the government never had any estate or interest; but there is no finding on the subject. The burden of showing that the diversion was made on the public domain was upon respondents, if that fact was essential to respondents' asserted right under said laws of congress, as we think it was. In *City of Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197, the defendant claimed as an appropriator of water, and the court said: "It is claimed that the court erred in instructing the jury that the defendant could not acquire any right in the waters of the creek by mere appropriation. This contention cannot be sustained. *Water Co. v. Hancock*, 85 Cal. 222, 24 Pac. 645, 20 Am. St. Rep. 217. It does not appear whether the lands through which the stream ran at the time defendant claims to have acquired his right of appropriation were private or public property. If they were public lands of the United States at that time, we think it devolved upon the defendant to show that fact." In the case at bar, therefore, the respondents are not in the position of one who has invaded the public domain and attempted to acquire any possessory rights thereon.

The ninth section of the act of 1866 merely provides "that whenever, by priority of possession, rights to the use of water for mining,

agricultural, manufacturing, or other useful purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same" (14 Stat. 253); and the seventeenth section of the act of 1870 merely provides that "all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights * * * as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory." It is clear that these provisions refer only to the interest of those who have gone upon the public domain and done acts of ownership there which the government, as proprietor, could have prevented, but in which it acquiesced. For a long period the general government stood silently by and allowed its citizens to occupy a great part of its public domain in California, and to locate and hold mining claims, water rights, etc., according to such rules as could be made applicable to the peculiar situation; and, when there were contests between hostile claimants, the courts were compelled to decide them without reference to the ownership of the government, as it was not urged or presented. In this way, from 1849 to 1866, a system had grown up under which the rights of locators on the public domain, as between themselves, were determined, which left out of view the paramount title of the government. The acts of 1866 and 1870 were intended merely to expressly recognize and ratify this system. Where they speak of "vested and accrued" rights, they mean, of course, vested and accrued as between the locators; for mere general locators have no vested right as against the government. The government could have ousted these locators by legal proceedings, or, perhaps, by the direct exercise of sovereign force. But it did not do so. It acquiesced in their possession. And by the congressional acts above noted the government merely said that whenever it had acquiesced in asserted possessory rights on the public domain which were upheld by local customs and laws and decisions of the courts, as between the possessors themselves, it would treat those possessors as though they had acquired prescriptive rights against the government, and would recognize such rights whenever afterwards granting patents to any part of its land. When a person went upon the public domain and there diverted the water of a stream running thereon, he invaded the rights of the government to its own land; and the government could either resist the invasion or acquiesce in it. If it adopted the latter course, then the kind of vested and accrued right grew up which the government by the said acts of congress promised to protect. But when a party on private land to which the government had no title diverts water from a stream, what vested right does he acquire in the water in the upper part of

the stream where it flows through the government land? Such diversion does not interfere in any way with the flow of the stream in the land of the upper proprietor. It does him no injury. It is no invasion of his right. It gives him no cause of action. It leaves no field for the play of consent or acquiescence. It never ripens into title by prescription. Under what local custom or law, under what "decisions of the courts," was there "a vested and accrued" right of respondents to all the water of the stream up through the public domain to its source, thus draining a large section of country above of its source of fertility? We know of none. In all the cases to which we have been referred the diversion was upon the public domain. It may be well to say, although the case is not referred to in the briefs, that there is nothing in *Healy v. Woodruff*, 97 Cal. 464, 32 Pac. 528, at all conflicting with the views above expressed. It was merely held there that the plaintiff was not prevented from enlarging his ditch by the fact that since its original construction he had obtained title from the government to "a piece of land through a small portion of which the said Cedar creek [the stream diverted] runs." There was no contention that the diversion and the ditch were not on the public domain.

Under the above view it is not necessary to notice other points made by appellant. What the rights of the respondents would have been, if it had been shown that the diversion had been made on the public domain and acquiesced in by the government, need not here be considered. The order appealed from is reversed and a new trial ordered.

We concur: HENSHAW, J.; TEMPLE, J.

133 Cal. 1

DOBBS v. PURINGTON et al. (Sac. 793.)
(Supreme Court of California. Aug. 8, 1901.)

ACTION ON JOINT CONTRACT—FINDING—
AMENDMENT OF COMPLAINT—APPEAL.

1. Where the complaint alleges an indebtedness for goods sold to two defendants jointly, and on separate answers the court finds the goods were sold to one defendant, such finding does not authorize a judgment for plaintiff against such defendant, since it does not support the cause of action set up by plaintiff.

2. Where, in an action to recover for goods alleged to have been sold to two defendants jointly, the court finds that the sale was made to one only, the trial court may permit an amendment of the complaint to conform to the facts found, under Code Civ. Proc. § 469, even after the cause is remanded from the supreme court, but the issues cannot be changed in the appellate court.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by Gilbert Dobbs against C. E. Purington and Isaac Trumbo. From a judgment for plaintiff against defendant Trumbo, he appeals. Reversed.

Shortridge & Beatty, for appellant. White & Seymour and Lardner & Burns, for respondent.

SMITH, C. The suit was brought to recover the sum of \$1,170.36, alleged to be due to the plaintiff for goods sold to the defendants by the plaintiff's assignees, Knight & Co. The defendants answered separately, each denying the allegations of the complaint. The court found that the goods were sold to the defendant Trumbo, and rendered judgment accordingly. The appeal is from the judgment by the defendant named.

The sole point made is that there are no findings on the issues made by the answer of the defendant Purington. But the complaint counts on a joint contract of the defendants with plaintiff's assignees, and the denials of the several answers of the defendants relate to this contract and to this contract only. Hence, if the finding on this issue is sufficient as to one defendant, it must be so as to the other. The question, then, is whether the finding that plaintiff's assignees sold goods to the defendant Trumbo is in effect a finding that he did not sell goods to the two defendants jointly. We hardly think it is. But, if so, it is a finding against the plaintiff on the only issue raised by the pleadings, and the appellant has no reason to complain of it.

But either there is no finding on the issue as to the joint contract alleged, or the finding is against it, and in either case there is nothing to support the judgment against the defendant Trumbo. The finding as to his separate liability is altogether outside of the issues, and on the pleadings as they stand the judgment against him cannot be sustained. 1 Chit. Pl. 51, 52, and cases collected in notes; Bliss, Code Pl. § 92. The complaint might have been amended on the trial to make it conform to the evidence (Code Civ. Proc. § 469); and on the case being remanded such amendments may be allowed as the court may deem just, but the issues cannot be changed in this court. I advise that the judgment be reversed, and the cause remanded for further proceedings.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for further proceedings.

133 Cal. 544

YREKA MIN. & MILL. CO. v. KNIGHT.
(Sac. 804.)

(Supreme Court of California. Aug. 6, 1901.)

MINES AND MINING—LOCATION OF CLAIM—
BOUNDARIES—EVIDENCE—ABANDONMENT—
POSSESSION—PROTECTION—GROUP OF
CLAIMS—WORK ON A PART.

1. Where, on relocating a well-known mine, notices of claim containing explicit descriptions of monuments and boundaries are posted and

filed, and six years afterwards a sufficient number of the monuments are found, so that by following the descriptions in the notices the boundaries are traced, a finding that the claims had been marked so that the boundaries could be readily traced is justified.

2. Where plaintiff is in possession of a mine as successor in interest of the locator, prima facie evidence of the location is sufficient to justify a verdict against one who, knowing of such location, relocated the mine on the claim that the mine had been abandoned and no work done thereon during the preceding year.

3. Where plaintiff produced deeds for mining claims from the persons who located the mines more than six years before the trial, and showed its actual possession for the last two years, a verdict that it and its predecessors had been in possession for six years was justified as against a defendant claiming the mines as abandoned.

4. Where plaintiff, owning three contiguous mining claims, did no work on one claim, but did sufficient on the other two to have protected all, the question whether the work so done was for the benefit of the group of claims and tended to develop the one not worked on was for the jury.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by the Yreka Mining & Milling Company against Luke Knight. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Warren E. Taylor, for appellant. O'Neil & Butler, for respondent.

CHIPMAN, C. Injunction. Plaintiff alleges in its complaint that it is, and for six years last past has been, the owner, in possession and entitled to the possession of certain three quartz-mining claims situated in Siskiyou county, to wit, the Ada, Flora Blanche, and Ohio; that the mines are contiguous, extending in the same direction, forming one continuous mining claim 4,500 feet in length and 600 feet in width, all containing valuable quartz rock bearing gold; that, on January 2, 1899, defendant wrongfully entered upon a part of the Ada and a part of the Flora Blanche claims, and made excavations, and carried away and converted to his own use a large amount of valuable ore, and that he threatens to continue to remove ores from said mines. Defendant denies the averments of the complaint and alleges that he entered upon the lands January 2, 1899, "with the intention to take up and locate a portion thereof as a mine, and did stake out and mark said land," and "ever since said 2d day of January, 1899, has been the owner and entitled to the possession of said mining land, * * * known as the 'Mary Ann Quartz Mine.'" A jury was called, and certain 25 specific questions were submitted to and passed upon by them, and all were answered in favor of plaintiff. Thereupon the court made its conclusions of law: (1) That plaintiff is the owner and entitled to the possession, subject to the paramount title of the United States, of all lands embraced within the boundaries of the claims

set forth in plaintiff's complaint; (2) that defendant's location is invalid and void "for the reason that the same was not subject to location"; (3) that plaintiff is entitled to a decree enjoining defendant from entering upon the land embraced within the boundaries of plaintiff's said claims. Judgment was accordingly entered, from which and from the order denying his motion for a new trial defendant appeals.

It appeared that on January 29, 1892, written notices of location of the three claims in question, to wit, the Ada, Flora Blanche, and Ohio, were filed in the recorder's office, in the order named, by W. P. Sheffield, John Travers, and Harvey Ax, respectively, and said claims at that time had thereon a vein of gold-bearing quartz in place; that these locations as a whole constituted a relocation of what had theretofore been known as the "Klamath Quartz Mine," and were contiguous, as alleged in the complaint; that a local custom, which had been in force over seven years, required that in making locations "a notice be posted on the location, and also a copy recorded in the office of the county recorder"; that plaintiff deraigned title from these locators, and expended in 1898 on the Ohio \$400 and on the Flora Blanche \$150 in work and improvements; that "on January 1, 1899, and prior to the time at which defendant claims to have located the Mary Ann quartz mine, plaintiff had resumed work, and continued the same thereafter uninterruptedly, and until the full amount of \$300 had been expended as assessment work for the year 1898." The foregoing facts, mainly found by the jury, are not challenged and stand as admitted. The jury found that John Travers distinctly marked upon the ground his location of the Flora Blanche "in such manner as that its boundaries could be readily traced." The jury were asked, if they found as above, then to find whether the markings "were made according to the calls in his notice of location, which has been introduced in evidence, in whole or in part, and, if in part only, then what part." The jury answered: "(1) Yes. (2) In part. (3) On the southwest end center line and S. W. corner, and N. W. corner." Similarly the jury found as to the Ada that Sheffield's location was by him distinctly marked, and "in such manner as that its boundaries could be readily traced," and that such markings were in part according to the calls of the written location, namely, "On the N. E. end center line and S. W. corner." Likewise it was found that the Ohio was distinctly traced on the ground by Harvey Ax, and that his location was marked according to the written location in part by "N. E. end center line and N. W. corner."

1. These findings are challenged as unsupported by any evidence. The witness Ball, superintendent of the property, testified that the claims joined end to end, the Ohio being on the southwest and the highest of the three up on the mountain; that the croppings on all

three mark about the center of each, the croppings running from end to end of the group in a N. E. and S. W. direction; that these mines were formerly called the "Klamath Mines," of which plaintiff's claims are relocations; that the dividing line between the Ohio and Flora is marked by a red fir tree six or eight inches in diameter at the center of this dividing line; that a chip was cut out in witness' presence showing the marking "T1" or "T2," he could not remember which, grown over, indicating about seven years' growth, and at the point called for in the notices of location; that there was a wagon road along the claims close to the center line about on the cropping of the vein; that there are tunnels all along the road, and the road was built to haul timber for the mines, which showed that there had been workings on the ground at an earlier date and showed the course of the vein. The witness Neal lived on the Ohio claim and helped to do the assessment work on the group. He was present when the chip was cut out of the fir tree in the center end tree of the Ohio and Flora, and he testified that the appearance showed that the original marking had grown over, and when the chip was removed was plainly marked "T1," as though it had been cut by some instrument. This was on the side of the tree next the Travers or Flora claim, and on the other side was a blaze and markings which he did not cut into. He also found the cedar stump referred to in the location of Travers on the northwestern line at the corner common to the Ohio and Flora, "marked 'T2' on one side, and 'H,' or something, on the other side." He also found a fir tree 1,500 feet from the cedar stump, marked "'A' on one side, 'T' on the other. I didn't chip it to see what it was." This was the corner common to the Ada and Flora on the northwestern boundary line. He testified: "The ledge on which we worked is easily traced on the surface by croppings and old works." He was asked whether much work had been done along the ledge of the Flora and Ada especially, and answered: "You can easily see that much work has been done there. * * * There are piles of debris and waste thrown out there,—very large dumps. I have seen them two miles away. * * * The road runs along near the works all the way. It crosses the ledge in several places. From the road you can see the old works and croppings in most places." The work alluded to cost many thousands of dollars. The witness Reed also found the monuments referred to by the witness Neal. He also testified that he knew where the northwestern corner of the Ada claim is, and that the marks are plain to be seen; but on cross-examination he testified that he had never seen this corner. He found the northwestern corner of the Ohio, which is the southwestern corner of the Flora, and he also saw the northeastern corner of the Flora, being also the southwestern corner of the Ada. Defend-

ant testified on cross-examination that he owned the Rhode Island claim adjoining the Ada on the southwest; that he knew that plaintiff had a claim where the Ada is claimed to be situated, but he did not know its name; that no work was done on it in 1898, and he supposed the ground was abandoned and was open for location, and that he would not have located the ground if plaintiff had done any work on it; that there was some work done there in 1897 by plaintiff's grantor, the Gold Ball Mining Company; and that he knew in 1897 that this company or whoever succeeded to it was claiming the ground. Witness Boyle testified for defendant that he made a plat of the three mines in question and that defendant pointed out the ground to him in March. This map was used at the trial, but is not before us.

It would seem altogether reasonable to assume that, if defendant could find the boundaries in March, he could have found them, had he wished to do so, in January before making his location. We think there was sufficient evidence to support the verdict. The locations were made in 1892, and the notices, copies of which were introduced in evidence, contained such specific calls and references to monuments that a surveyor would have no difficulty in locating the boundaries with knowledge of the location of these monuments testified to by the witnesses. It is true the witnesses, with the location notices in their hands, were at the time unable to find all of the particular monuments referred to in the notices; but it does not follow from that fact that the monuments were never placed there, or that the boundaries of the locations could not be ascertained. These notices were filed in 1892, and in six years many changes might take place along the boundary lines, which would account for the witnesses not being able to discover all the particular monuments referred to. It is true, as claimed by appellant, that it would be insufficient marking of boundaries of a mining claim to place thereon only such monuments as were found by the witnesses and make no other markings of boundaries. The question here is not dependent alone on the evidence as to particular monuments which were found. Notices were filed as early as 1892, claiming ground therefore well known as the "Klamath Mines." These notices were accessible, and presumably were known to defendant, and with them, as we have said, the boundaries could be traced, for they were so specific in their directions that, with the monuments testified to being found, the boundaries could be defined. The jury found that the claims had been marked out by the locators, so that the boundaries could be readily traced, and it is urged that there was no evidence to support such finding. There was no evidence of this fact, except the location notices and the discovery of the monuments already referred to. The locators were not called as witnesses, nor was any person called who assisted in making the

locations. The jury must have reached the conclusion that the locators in fact did what the evidence showed they might have done; i. e. they found that the notices of location definitely described the boundaries and that sufficient monuments were found, corresponding with those mentioned in the notices, to enable these boundaries to be traced at this time, and hence concluded that the locators originally marked the boundaries so as that they might be readily traced. Plaintiff was in possession under title deraigned from these locators. As against a relocation by a person having knowledge of the former locations and of plaintiff's possession as successor in interest, there was evidence sufficient *prima facie* to support the verdict. Defendant went into possession and made his relocation, not because there had never been a valid location, but, as he himself testified, because he thought the claims had been abandoned and were open to location and because no work had been done on the claims for the year 1898.

2. The jury found that plaintiff at the commencement of the suit, February 13, 1899, was in possession, and for six years prior thereto it and its predecessors had been in possession. Plaintiff's right to possession was evidenced by deeds from the original locators and their grantees to plaintiff, and there was evidence of actual possession in 1897 and in 1898. This was sufficient as against defendant.

3. The remaining question relates to the finding that there was "\$400 worth of work done on the Ohio claim and \$150 on the Flora Blanche, being \$550 in all for the benefit of all three claims" for the year 1898. There was no work done on the Ada that year. Plaintiff claims that the work done on the Ohio and Flora Blanche was for the benefit of the group. It was held in *De Noon v. Morrison*, 83 Cal. 163, 23 Pac. 374, following *Smelting Co. v. Kemp*, 104 U. S. 654, 26 L. Ed. 875, that "as a matter of law the plaintiff had the right to do the work necessary for the protection of both claims or one of them, both being held by her in common." It was further held that it is for the jury to determine as a question of fact whether work done on one of two contiguous claims owned by the same person is for the benefit of both claims. See, also, *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.*, 114 Cal. 100, 45 Pac. 1047. There was evidence tending to show that the work consisted of running a tunnel, stoping from it on both sides, building ore chutes, tracks, blacksmith shop, and a house, and getting out timbers amounting in value to nearly \$1,000, and that the amount of work done was about equal on these two claims. The tunnel was run partly on the Ohio and partly on the Flora Blanche, at a point near the dividing line of the two claims and about the center, or along the ledge. The superintendent testified that the work was intended to develop the whole group of mines, and he gave his reasons for believ-

ing that the work tended to develop the Ada. There was some evidence corroborative of this testimony. Defendant introduced witnesses who testified in effect that the work done could not, in their opinion, be of the slightest benefit to the Ada claim, nor in any way tend to develop it. The jury might well have taken this view of the evidence; but we cannot say that the evidence was insufficient to warrant the conclusion to which the jury came. The evidence on the point was in conflict, and under the well-settled rule we cannot interfere with the verdict. It is advised that the judgment and order be affirmed.

We concur: GRAY, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

133 Cal. 574

YULE v. BISHOP et al. (S. F. 1,364.)

(Supreme Court of California. Aug. 7, 1901.)
CORPORATIONS—STOCKHOLDERS—LIABILITY—
NOTE PAID BY SURETY—APPEAL—COSTS.

1. Where a note given by a corporation is paid by a surety thereon, such surety may recover the amount paid from the stockholders at the time the payment was made, but not from the stockholders at the time the note was given who had parted with their stock, since the debt is not on the note, but for money paid for the corporation's benefit.

2. Where, on an appeal from an order granting a new trial, the order is at first reversed, but finally affirmed on a ground first suggested on the rehearing, costs of the appeal should be allowed to appellant.

Beatty, C. J., and Harrison and Van Dyke, JJ., dissenting in part.

In bank. On rehearing. Opinion in department (62 Pac. 68) reversed, and judgment of superior court affirmed.

HENSHAW, J. Upon the rehearing of this cause the court has been urged to reconsider the views above expressed. Under our system of pleading, where all the facts of the transaction are set out, it can make little difference in the generality of cases whether it be said that an accommodation maker or indorser who has been compelled to meet the obligation of his principal is entitled to sue upon the note, with a recovery limited to the amount which he has expended, with legal interest, or whether it be said that his action is in assumpsit for money laid out on behalf of his principal, and that his recovery is measured by the amount he has so expended, with legal interest. But in this case the question becomes of consequence for the following reason: Plaintiff is seeking to enforce the stockholders' liability for the debt of the corporation against those who were stockholders at the time when the note in question was executed. If it be held that only these stockholders are liable, the next case to come before us may be one in which the statute of limitations has run against such stockholders,

and where the surety will urge with unanswerable force that when, and only when, he paid the debt of the corporation, did a liability upon the part of the corporation to him arise, and insist upon his right of action against those who were stockholders at the time when the corporation became indebted to him. We think, therefore, that the law and the logic of the case can lead but to one conclusion,—that the surety's right of action is in strictness not upon the note, but is in implied assumpsit for moneys paid out and expended, and that, as to the stockholders, the surety's right of action is against those who were stockholders at the time when the corporation's liability to the surety was incurred.

Upon the rehearing for the first time it was pressed upon the court's notice that all the facts were set up in the complaint, and that as to the stockholders it was pleaded, not only that they were stockholders at the time the corporation gave its note to the bank, but that they continued to be such afterwards, and that in the absence of a special demurrer here is a sufficient averment by implication that they were stockholders at the time when Mrs. Blair paid the corporation's debt (*Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595; *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466; *Truman v. Young*, 121 Cal. 490, 53 Pac. 1073), and, consequently, that the court's action in granting a new trial should be sustained under this view. This we incline to think is a tenable construction; but, upon the other hand, as it is a consideration newly injected into the case, it seems but just that the order of the trial court should be affirmed, with costs to appellant upon their appeal. It is therefore ordered that the order appealed from be affirmed, with leave to the respective parties to amend their pleadings, if they shall be so advised; the appellants to have their costs upon this appeal.

We concur: TEMPLE, J.; McFARLAND, J.; GAROUTTE, J.

BEATTY, C. J. I concur in the judgment, except as to the costs.

HARRISON, J. I concur in the judgment, and in much of the opinion of Mr. Justice HENSHAW. I do not, however, assent to that portion of the opinion in which it is held that upon the payment of the note to the bank by Mrs. Blair the obligation of the maker of the note was extinguished, nor to the construction given to section 1473, Civ. Code. That section is as follows: "Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it." In order that an obligation may be extinguished, under the provisions of this section, there must be a full performance of it by the party "whose duty it is to perform it," or such performance, if by any other person, must be

"on his behalf and with his assent," and the obligation which is thus extinguished is that of the person whose duty it was to perform it. In the present case it is not shown or claimed that the payment of the note to the bank by Mrs. Blair was either at the request or with the assent of the corporation; and it is equally manifest, from the terms of the note and the character of the transaction, that the "duty" of paying the note rested upon the corporation, and not upon Mrs. Blair. The note was by its terms the obligation of the corporation, and the entire consideration therefor was received by it. As an indorser of the note, Mrs. Blair became liable to the bank for its payment, in case the corporation should fail to pay it and she should be properly and legally charged therefor. This conditional obligation was the only one which it was the duty of Mrs. Blair to perform, and upon her payment to the bank the only obligation which was extinguished was this conditional obligation. As payment of the note has never been made by the corporation, or by any one on its behalf, or with its assent, its obligation created by the note has never been extinguished. The obligation of the corporation was not extinguished by the payment to the bank by Mrs. Blair, but she thereby became subrogated to all the rights for the enforcement against the corporation of its obligation that had existed in favor of the bank, or, as was said in *Waldrup v. Black*, 74 Cal. 409, 16 Pac. 226, "she became the equitable assignee of the note, and entitled to enforce its payment, according to its tenor and effect, as holder thereof." In *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40, it was held that the payment of the corporation's note by one of its stockholders did not have the effect to extinguish the indebtedness of the corporation so paid by him, but that such indebtedness could be enforced against the stockholders. The ground upon which it was held, in *James v. Yaeger*, 86 Cal. 184, 24 Pac. 1005, that the obligation of the note had been extinguished, was that the payment thereof had been made by one of its makers. Whether an accommodation indorser, upon being compelled to pay the note, becomes entitled to the note, and may maintain an action thereon against the maker, according to its tenor, or an action merely in assumpsit for the amount paid by him, has been the subject of much controversy. That he may maintain an action in assumpsit has never been controverted; the principal dispute being whether, in an action upon the note, he can recover the full amount thereof, as was held in *Fowler v. Strickland*, 107 Mass. 552, or only the amount paid by him, as is perhaps the rule under the weight of authority. In either case the statute of limitations would begin to run from the time of such payment by the indorser. In *Burton v. Slaughter*, 26 Grat. 914, the rule is stated to be well settled "that the holder, when the note has been paid or taken up by an indorser, is not compelled to sue in assumpsit, but may

sue directly on the note as holder, taking care to confine his recovery to the actual value paid by him for the note." See, also, *Fenn v. Dugdale*, 40 Mo. 63; *Pinney v. Gregory*, 102 Mass. 186; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Wadsworth v. Lyon*, 93 N. Y. 214, 45 Am. Rep. 190. The question is not material in the present case, as the right of action against the stockholders is in no case upon the note (*Bank of San Luis Obispo v. Pacific Coast S. S. Co.*, 103 Cal. 594, 37 Pac. 499; *Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077), but is for their proportion of the corporate liability; and it is incumbent upon the plaintiff to establish the fact that at the time the liability was incurred by the corporation to Mrs. Blair the defendants were stockholders (*Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611). The liability of the corporation in behalf of Mrs. Blair did not arise until she took up the note; and, as her payment of the money at that time may be regarded as if it had then been received from her by the corporation upon the note previously executed by it, only those persons who were stockholders at that time would be liable for the corporate indebtedness. Whether the action be regarded as for the indebtedness then created by virtue of the note, or in assumpsit for money then advanced for the benefit of the corporation, the statute would begin to run from that time.

I concur: VAN DYKE, J.

133 Cal. 539

SHERMAN v. WRIGHT, Surveyor General.
(Sac. 746.)

(Supreme Court of California. Aug. 5, 1901.)

STATE LANDS—PURCHASERS—CONTEST—DEMAND FOR REFERENCE—FEE
—MANDAMUS.

Pending the issuance of patents to purchasers of state lands, plaintiff applied to purchase a portion of the land, and filed a protest and a demand that the contest be referred to the proper court. After six months his application and protest were canceled and patents issued to the first applicants. Six months thereafter he tendered a fee to the surveyor general and brought mandamus to compel him to certify the contest. *Held*, under Pol. Code, § 501, requiring the register to collect a fee of \$3 on certifying a contest; *Id.*, § 3414, requiring him on demand to make an order referring a contest; and *Id.* § 3498, providing that all unapproved applications on file over six months, wherein the contest has not been referred or demand made for an order of reference, shall be void,—that the defendant was not required to enter the order of reference until the fee was paid, and plaintiff's demand after six months was invalid, and the tender of the fee was of no effect.

Department 1. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by L. S. Sherman against M. J. Wright, surveyor general. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Tirey L. Ford, Atty. Gen., W. E. F. Deal, and Deal, Tauszky & Wells, for appellant. Leon Samuels, for respondent.

GAROUTTE, J. This is an appeal by defendant from a judgment of the superior court of Sacramento county awarding plaintiff a writ of mandate, and from an order denying defendant's motion for a new trial. Applications to purchase state lands were made to the register of the state land office, respectively, by Mrs. Wrinkle and Samuel Levy. These applications were approved, and some two years thereafter, and pending the issuance of patents, this plaintiff filed an application to purchase certain portions of the lands covered by the previous applications. Accompanying his application was a protest directed against the issuance of patents to the first applicants, and a demand that the trial of the contest thus raised be referred to the proper court. Nothing further was done in the premises by plaintiff, and six months thereafter his application and protest were canceled, and patents issued to Wrinkle and Levy. About six months subsequent to this time plaintiff tendered a \$3 fee to defendant, and thereupon brought this proceeding for a writ of mandate, asking that the defendant be compelled to certify the contest created by the cross applications and protest to the superior court of Inyo county.

Various questions are raised by defendant upon this appeal; but the court will devote its attention to one of them alone, as the conclusion arrived at upon its consideration is decisive of the case, and that conclusion is: No valid demand was made upon defendant by plaintiff that the contest be referred to the superior court for trial, and the weakness in the demand is found in the fact that no offer or tender of the fee of three dollars provided for by the statute was made to defendant when plaintiff's demand for reference was made. For reasons hereafter stated, the court attaches no importance to the fact that the fee was tendered about the time this proceeding was inaugurated. Under the facts of this case, at least, that tender came too late and availed nothing. The case stands exactly as though no tender of the fee had ever been made.

Fees collected for services performed by the register of the state land office are moneys belonging to the state, and section 501 of the Political Code provides: "The register must charge and collect fees as follows: For each certificate of purchase, duplicate, or patent, three dollars; for certifying a contested case to district court, three dollars." Section 3414 of the same Code provides: "When a contest arises concerning the approval of a survey or location before the surveyor general, or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, * * * or when either party demands a trial in the courts of the state he must, make an order referring the contest to the district court of the county in which the land is situated, and must enter such order in a record book in his office." The words

here quoted found in section 501, "for certifying a contested case to the district court," mean the same as the following words found in section 3414: "He must make an order referring the contest to the district court of the county in which the land is situated, and must enter such order in a record book in his office." When this order is made and entered, the superior court of the proper county has jurisdiction for trial purposes. It is said in *Lane v. Pferdner*, 56 Cal. 122: "The jurisdiction of the district court under the late constitution to try and determine a contest arising in the surveyor general's office was special, and depended upon the fact that the surveyor general had made an order 'referring the contest.' It was necessary, therefore, when an action was brought to try the rights of the contestants to purchase the lands, for the plaintiffs to allege and prove (by the production of the certified copy of the entry) that the surveyor general made the order of reference. * * * The district court passed upon the fact which gave it jurisdiction, which fact could be proved by the certified copy. The complaint need not, however, aver that the certified copy or the order referring the contest had been filed in the district court before the action was commenced. It was sufficient to allege that the order had been made."

Section 3415 of the Political Code provides: "After such order is made either party may bring an action in the superior court of the county in which the land in question is situated to determine the conflict, and the production of a certified copy of the entry, made by either the surveyor general or the register, gives the court full and complete jurisdiction to hear and determine the action." This section simply provides a rule of evidence. Plaintiff claims that the making by defendant of the certified copy of the entry of the order is in effect "certifying a contested case to the district court," and therefore the fee of three dollars provided by the statute is to be charged for that service. But not so; for, as we have seen, the contest is referred to the court,—that is, certified to the court,—when the order of the register is made and entered in the record book. When that is done the parties may file their pleadings and prepare for trial. The case cited declares that the pleading is perfect when it alleges that an order has been made referring the contest. The certified copy of the entry of the order may not be made until the very moment when the trial is progressing; for that paper, as suggested, is simply a piece of evidence, nothing more. Surely the contest has been certified to the court for trial before it is actually there upon trial. Hence it is plain that the order of reference and the entry thereof constitute the certifying of the contest to the district court.

There can be no question but that, when the contestant demands a reference of the contest to the courts, it is then his duty to

pay the fee of three dollars for the service demanded. Neither is there any question but that it is his duty to pay the fee before the service is rendered. It may be said that in every case where fees are fixed by the statute for the performance of service by a public officer—certainly so where those fees are moneys belonging to the state, county, or municipality—it is the duty of the party demanding the service to tender the lawful fee in advance; and this is true, even though the statute does not so declare in terms. Plaintiff here demanded the performance of an official duty. The state was entitled to a fee of three dollars from plaintiff for the performance of that duty by defendant. Defendant was not called upon by the law to perform that duty until the fee was paid. The fee was not paid, and hence plaintiff cannot assert a failure of performance upon the part of defendant. Aside from the question of tender of the fee at a subsequent date, to which reference has been made, it may be said that, if plaintiff is entitled to the writ now, he was entitled to it the day after the demand for the reference was made. Yet a complete answer to the issuance of the writ at that time may be found in the fact that the fee had not been paid. Indeed, the very fact that plaintiff tendered the fee before bringing this proceeding shows that he considered its payment a condition precedent to the order of reference, and therefore necessary prior to the issuance of the writ; and it might be further suggested that, if there had been no tender of the fee in this case at all, that fact of itself would have been fatal to the issuance of the writ.

Plaintiff insists that defendant waived his right to charge the fee in advance when he filed the protest and demand without demanding the fee of three dollars. He declares that thereafter it was too late to raise the question; but this cannot be so. If defendant had made the order of reference and entered it in the record book without the payment of the fee, then clearly, in the absence of fraud, any question of the validity of the order of reference would be foreclosed. But here the service for which the fee is to be paid has not been performed. Necessarily there is no waiver of the payment of the fee in advance. There can be no implied waiver of the payment of the fee in advance until the act has been done for which the fee is to be paid.

Section 3498 of the Political Code, among other matters, provides: "All applications, under whatsoever act, filed in the office of the surveyor general, must be retained ninety days before approval, * * * and all unapproved applications, which have been on file over six months, wherein the approval has not been demanded, and wherein the contest has not been referred to court, or a demand made for an order of reference, as provided in section 3414 of the Political Code, shall be null and void." Under the authority of this section defendant, six months after the filing of plaintiff's application, protest,

and demand, canceled the same and issued patents to the first applicants. By virtue of this section plaintiff's application and protest were null and void at the time patents were issued, unless there had been a previous valid demand for a reference. If plaintiff had tendered a fee at any time previous to the expiration of the six-months period, his demand would have ripened into a valid demand; but this he failed to do. A necessary element to the validity of the demand was a payment of the statutory fee. Before that was done the demand was inchoate and substantially incomplete. As already stated, mandate at any time prior to the issuance of the patents would not have run to compel a reference of the contest. If a demand made prior to that time was too weak to support a writ of mandate commanding defendant to order a reference of the contest, it was too weak to act as a bar to the issuance of the patents. When the statute (section 3498) speaks of "a demand made for an order of reference," it means a demand which the register should obey. It follows that the patents were properly issued, and necessarily a tender of the fee made thereafter came too late. For the foregoing reasons this proceeding must fail, and the judgment and order are reversed, and the cause remanded.

We concur: VAN DYKE, J.; HARRISON, J.

133 Cal. 571

LIEBRANDT v. SORG. (S. F. 2,241.)

(Supreme Court of California. Aug. 7, 1901.)
MARRIAGE CONTRACT—ACTION FOR BREACH
—EVIDENCE—CREDIBILITY—QUESTION
FOR JURY—INSTRUCTIONS.

1. Where, in an action for breach of a contract of marriage, plaintiff and another witness testify positively to the contract, and they are corroborated by other unimpeached witnesses, the court should not reject their testimony, unless so improbable as not to be entitled to belief, but should leave its weight to the jury.

2. After prima facie evidence of the contract is received, evidence that plaintiff told others of the contract is admissible, not as proof of the agreement to marry, but to show humiliation and damage to plaintiff.

3. Where evidence that plaintiff had told of her agreement to marry defendant was received in an action for breach of such contract, the verdict should not be set aside because the court failed, in the charge, to limit the effect of such evidence to the question of damages, unless defendant requested such limitation.

In bank. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Bertha Liebrandt against Jean Sorg. From a judgment for plaintiff, and from an order refusing a new trial, defendant appeals. Affirmed.

Jackson Hatch and E. M. Rosenthal, for appellant. Sargent & Wyatt, for respondent.

GAROUTTE, J. Plaintiff recovered judgment in the sum of \$4,500 damages for a

breach of a contract of marriage, and defendant has appealed from both the judgment and order denying his motion for a new trial. It is first contended that the evidence tending to show an agreement to marry is insufficient to support the verdict. The statement of the plaintiff was directly to the point that such a contract was agreed upon. The evidence of the witness Mrs. Wenks was also to the same effect, and there was other evidence corroborating strongly the statements of the aforesaid witnesses. The veracity of these witnesses is attacked, not by other evidence, but by the briefs of counsel alone. It is urged that their testimony is improbable, and therefore should be rejected. While cases might arise where this court would declare the evidence of a witness so improbable as not entitled to belief, yet a case of that character would be most exceptional, and it is not presented by this record. Under the evidence here disclosed, it was essentially for the jury to decide the fact as to the existence or non-existence of an agreement to marry.

Plaintiff, under objection by defendant, answered affirmatively the following question: "Did you ever tell anybody about your contemplated marriage with Sorg?" A second witness, under objection by defendant, answered affirmatively the following question: "Did Mrs. Liebrandt at that time say to you that she was to marry Mr. Sorg?" It is elementary law that evidence of this character is inadmissible as tending to prove the agreement to marry. But this character of evidence is admissible as tending to increase plaintiff's damages occasioned by a breach of the contract, and it was upon this theory that it was offered and admitted before the jury. This is apparent from the declaration made by the court in overruling the first objection, wherein the judge said: "It is not admitted for the purpose of proving a promise of marriage on the part of the defendant, but it is admissible to show the humiliation on the part of plaintiff." This character of evidence is always admitted after a prima facie showing of the existence of the agreement to marry and a breach thereof. It is admitted as tending to establish an element of damage, to wit, humiliation to plaintiff's feelings. *Reed v. Clark*, 47 Cal. 194. This principle of law is recognized and approved by all text writers. In *Abb. Tr. Ev.* p. 678, it is said: "In enhancement of damages, the pecuniary circumstances of the defendant, the announcement of the engagement, the advanced preparation for the wedding at the time of the breach, are competent." Some point is made that these people to whom plaintiff communicated the fact of her intended marriage were not intimate acquaintances or friends. This objection goes to the weight of the evidence rather than to its admissibility.

The evidence under consideration being admissible for certain particular purposes, the rulings of the court in admitting it were correct, and no exception taken to those rulings

can avail defendant here. It is insisted that the court should have limited the effect of the evidence before the jury. This is true, but it was the duty of defendant, if he desired the limitation to be placed upon the evidence, to have asked the court for an instruction to that effect. This he failed to do, and it is too late now to make complaint for the first time. *San Luis Obispo Co. v. White*, 91 Cal. 438, 24 Pac. 864, 27 Pac. 756. The question addressed to plaintiff, as tending to show her efforts to sell her furniture, etc., is of the same general character as those the court has just considered, and it was a proper question. The court has carefully examined the instructions given to the jury and finds no substantial merit in any of the objections made to them. Neither is the court prepared to say that the verdict is excessive. For the foregoing reasons, the judgment and order are affirmed.

We concur: BEATTY, C. J.; VAN DYKE, J.; HARRISON, J.; HENSHAW, J.; TEMPLE, J.; McFARLAND, J.

(133 Cal. 534)

CUSSEN v. SOUTHERN CALIFORNIA SAV. BANK. (L. A. 859, 860.)¹

(Supreme Court of California, Aug. 5, 1901.)

SAFE DEPOSIT—CONSTRUCTION OF CONTRACT—NEGLIGENCE—BURDEN OF PROOF.

1. Plaintiff rented a safe in defendant's safe-deposit vaults, and money placed therein was abstracted. The contract provided that the lessor should use diligence that no unauthorized person should be admitted to any rented safe, and beyond this the lessor should not be responsible for the contents of any safe rented from it. *Held*, that such contract relates to the degree of care required of defendant in the identification of parties claiming to be its customers, and does not relieve it of its duty, as a bailee for hire, to guard the property placed in its charge.

2. Where plaintiff, on renting a safe in defendant's vaults, received only one of the two keys, and money was abstracted from the safe while the vault was in charge of boys who were paid small salaries, and as to whose honesty defendant was ignorant, a finding that defendant was negligent in guarding the money was justified.

3. Where plaintiff proved that money was abstracted from a safe in defendant's deposit vaults, which he had rented, the burden was on defendant to show that it had exercised proper care.

4. Civ. Code, § 1840, providing that the liability of a depository for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth, has no application to the loss of money from a safe rented of defendant in its deposit vaults.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Action by James Cussen against the Southern California Savings Bank. From a judgment for plaintiff, defendant appeals. Affirmed.

A. B. McCutcheon and Goodrich & McCutcheon (John S. Chapman, of counsel), for

appellant. W. A. Anderson, Anderson & Anderson, and Joseph Scott, for respondent.

GAROUTTE, J. Defendant carried on a safe-deposit business. Plaintiff rented a safe in the deposit vaults for the period of one year, and deposited therein a sum of money. Upon a subsequent visit to the vaults he discovered that \$560 of his money had been abstracted. He has recovered judgment against defendant for that amount, and this appeal is taken from that judgment.

The relation between these parties was that of bailor and bailee. The defendant was a depository for hire. *Roberts v. Safe-Deposit Co.*, 123 N. Y. 57, 25 N. E. 294, 20 Am. St. Rep. 718, 9 L. R. A. 438; *Lockwood v. Storage Co.* (Sup.) 50 N. Y. Supp. 974. The relationship of bailment for hire existing, it devolved upon defendant to use even more than ordinary care in the safeguarding of plaintiff's property. The law demands the exercise of that degree of care by defendant in the preservation of this property, unless by some special agreement it has been waived. We find nothing in this contract pointing in that direction.

It is insisted that subdivision 7 of the agreement entered into between these parties amounted to a waiver of liability. That provision declares: "The lessor shall use diligence that no unauthorized person shall be admitted to any rented safe, and beyond this the lessor shall not be responsible for the contents of any safe rented from it." In considering this clause of the contract, appellant declares its construction to be: "The word 'admitted,' therefore, defined by the facts and circumstances attendant upon the making of this contract, and in connection with the contract itself, refers to such persons as might be admitted to the safe-deposit vaults in the usual course of the business, and under the rules and regulations of the bank; and the admission of any 'unauthorized' person, therefore, refers to a person gaining access to the box in the usual course of business, when in fact he had no right to do so. And the diligence to be exercised by the bank was to guard against false impersonation and forgery by a person claiming to be a renter or a deputy." Adopting this construction of the contract as the correct one, then the court is assured that the balance of the clause, "and beyond this the lessor shall not be responsible for the contents of any safe rented from it," only refers to its liability as to those persons "admitted" to the safe, as the word "persons" is defined by appellant's construction of this clause. Under the construction of this clause as contended for by defendant, it could open wide the doors of its vaults, leave the building without any protection whatever, and thereafter, by invoking this provision of the contract, relieve itself of liability for the property of depositors stolen therefrom by thieves. This position is not maintainable in law, and the aforesaid clause was only intended to fix

¹ Rehearing denied August 30, 1901.

the degree of care required to be exercised by defendant, not in guarding the property placed in its charge, but in the identification of parties claiming to be its customers. It follows, therefore, in this case, that the defendant was called upon by the law to use that degree of care in the safe-keeping of this property which is demanded from a bailee for hire in the keeping of valuable property. He was required to use that degree of care in the protection of this property from thieves without and thieves within, and he was required to use that same degree of care in the selection of his employes, and the supervision of their conduct after they were employed. It is said in *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788: "Persons, therefore, depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, * * * and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor." See, also, *Gray v. Merriam*, 148 Ill. 190, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172. In this case it was established by plaintiff's evidence that his money was abstracted from the vaults of defendant while on deposit. Under these circumstances the burden was cast upon defendant of showing that it used proper care in the safe-keeping of the plaintiff's property. In the *Storage Company Case*, supra, it is said: "The ordinary rule established by numerous authorities is that, when plaintiff had proved the deposit of his goods, and a failure of the defendant to produce the same on demand, he has established a prima facie case, and the defendant must excuse his failure to produce, by bringing himself within one of the recognized exceptions." See, also, *Clafin v. Meyer*, 75 N. Y. 262, 31 Am. Rep. 467. If plaintiff made a prima facie case by showing a deposit of the money and its subsequent loss, then, as to the facts, the only question remaining is, was the jury justified in declaring that defendant failed to use the care demanded by the law in the protection of plaintiff's property? Clearly, as matter of law, this court cannot say that defendant used that degree of care. And the finding of fact by the jury as to want of care cannot be set aside by this court as being without support in the evidence. The jury was fully justified in declaring defendant wanting in the exercise of proper care when it failed to deliver to plaintiff both of the keys which unlocked his box, thus leaving outstanding in the hands of some one of its employes a key to the box. In addition to this fact, the evidence discloses that these safety-deposit vaults for a long period of time were left in charge of one Burdwald,

a lad about 17 years of age, whose salary was \$30 per month. It was developed that he had been in the employ of defendant but three months, when he was placed in charge of the deposit vaults. It was further shown that he left the employment of defendant before plaintiff's loss was discovered, and that no inquiry was ever made by defendant prior to or during his employment as to his honesty or integrity. The jury might well say that proper care was not exercised in the selection and retention of this employe. A second lad, who was working for a salary of \$25 per month, also had charge of these vaults a portion of the time, and substantially all that has been said as to Burdwald may be said of this second employe. Upon this character of evidence we are satisfied with the verdict of the jury as to the facts involved in the case.

Section 1840 of the Civil Code declares: "The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth." Defendant relies upon this section of the Code, but in its provisions we see no relief for him. Here plaintiff did not inform defendant as to the value of the deposit. Neither does defendant claim that it had reason to suppose the thing deposited was of less value than it was in fact. Indeed, the very manner of conducting this somewhat peculiar line of business contemplates that the bailee shall not know the value of the thing deposited. In substance, he closes his eye to the value and character of the deposit; and this fact seems to be one of the controlling features in the transaction of this character of business. Under the circumstances it is apparent that section 1840 of the Civil Code can have no application to the facts of this case.

In view of what has been said upon the various questions discussed, it follows that the action of the trial court, of which complaint is here made, in the giving and refusing certain instructions, was correct. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(133 Cal. 550)

WILLIAMS v. SOUTHERN PAC. CO.

(S. F. 1,775.)¹

(Supreme Court of California. Aug. 6, 1901.)

RAILROADS—COLLISIONS—EVIDENCE—RES GESTÆ.

Conversation between an engineer injured in a collision, after he has been removed from the engine, and the division superintendent, as to the accident, is inadmissible as res gestæ in action by another employe to recover for injuries sustained in the collision.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by John H. Williams against the Southern Pacific Company. There was a

¹ Rehearing denied September 5, 1901.

judgment in favor of plaintiff, and from an order refusing a new trial defendant appeals. Reversed.

Foshay Walker (Mastick, Van Fleet & Mastick, of counsel), for appellant. Rodgers, Paterson & Slack (George A. Hurlbut, of counsel), for respondent.

TEMPLE, J. This is an action for damages for personal injuries alleged to have been received in a collision between two trains. Plaintiff recovered a verdict of \$14,000, and the appeal is by defendant from a refusal of a new trial. The collision was on the Coast Division, a little west of San Ardo station, between a pay train and a freight train. The latter was going north, or, in railroad vernacular, west, meaning towards San Francisco. The pay train was, of course, going east, or from San Francisco. The collision, according to plaintiff's evidence, was about 2,150 feet west of the station; according to defendant's evidence, 2,519 feet, and a little over 200 feet west of the west switch at the station. The freight train was scheduled to arrive at San Ardo at 7:24 a. m., and to leave that station at 7:35, and was forbidden by the rules of the company to arrive or leave sooner than at said times. On that morning the freight train did arrive at 7:05, and pulled out towards San Francisco at 7:23, 12 minutes earlier than it should have done. The pay train, being a special, had no time limit, but was bound to keep out of the way of the regulars, and to that end was required to be at the station and side-tracked five minutes before the time of departure of the regular train. It follows that, had the freight train waited its time, the pay train had ample time to comply with this rule before the freight, by the rules, was allowed to proceed. There was evidence tending to show, however, that the pay train was moving at an unwarranted speed, and was not "under control," as the rules required it should be, on entering the station yard, the limits of which extend from whistling post to whistling post on either side. The train had not yet reached the whistling post, and it is contended that the post was at least a quarter of a mile nearer the station than it ought to have been, and, as the morning was quite foggy, the engineer was misled by the unusual position of the post, and, therefore, not knowing that he was near the station, did not slow up. It is contended that, had he been properly informed by a proper location of the post, he would have put the train under control, and the accident would have been avoided. Weight is added to this point by the claim that the engineer was unacquainted with the road, and had to rely solely upon the signal posts along the line, especially on such an obscure morning. It is made an independent point here that, the engineer being strange to the road, no pilot was sent with him, as the rules expressly require in such cases. The engineer was in-

jured in the accident, and died before the trial. The witnesses for the plaintiff, who were train hands, only remembered seeing him once before on the line, and on this point the defense produced no evidence. The plaintiff also complains that the engine was defective, in that it had no driving-wheel brakes and the air pressure was insufficient; also that there were certain misleading marks upon certain culverts near the station. As the evidence appears in the transcript, I do not think these last points can help the plaintiff. That the premature departure of the freight train from the station was misconduct which contributed proximately to the injury of plaintiff may be considered as established beyond question. It is contended by the plaintiff that, admitting such to be the case, the reckless speed of the pay train, which he contends was caused by the neglect of the defendant, mainly in misplacing the whistling post, and in failing to provide a pilot for the engineer, contributed also proximately to the injury, and in such case the defendant is liable, even though gross negligence on the part of a fellow servant also contributed proximately. In its opening brief appellant contended that the engineers on both trains were at fault, and plaintiff cannot recover for the negligence of his fellow servants. The reply brief charges the fault upon the managers of the freight train alone. As to the absence of a whistling post, and the employment of an engineer who was unacquainted with the road, without a pilot, it is said, it is only the case of furnishing imperfect appliances. Whistling posts were not designed to serve any such purpose, and, if they were, yet the injury came directly from want of care on the part of the engineer of the freight train; and in such case the employer is not responsible, even though the accident might not have resulted if better appliances had been furnished. But I think the jury could have found on this evidence that the accident would not have occurred if either train had been run as required by the rules, and also that the reason why the pay train was not under control, as it ought to have been, was because of the misplacement of the whistling post, or that an engineer new to the road was in charge. The evidence is by no means as clear against the pay train as it is against the freight train, but the verdict is for plaintiff, and we must assume the facts to be as found, so far as possible. If this were so, there was no negligence on the part of the engineer of the pay train. His failure was caused entirely by the failure to furnish proper appliances. And, on the same supposition, the negligence of the defendant did contribute proximately to the injury. If the position of the appellant upon the above proposition were sustained, it would probably end the case. It has, therefore, been considered, but upon other points it is clear that the judgment must be reversed.

The witness Oakes was allowed, over the objection and exception of appellant, to tes-

tify that soon after the accident he had a conversation with Keyer, the engineer of the pay train. The witness, as conductor, was looking about to ascertain the facts, as he was required to report to the company. Keyer was badly injured, and had been removed from the engine, and was lying near the track. Witness asked him the cause of the accident and the engineer replied that he did not know he was coming into the station. He was lost. Did not see a whistling post. Did not know where he was. At this point Mr. Haydock, the division superintendent, came along, and a conversation between Haydock and the engineer was had to the same effect, in which Mr. Haydock remarked that there ought to have been a whistling post. The ruling admitting these declarations was clearly erroneous. It is contended that they were part of the *res gestæ*. This phrase seems clear enough in itself, and it is strange that it has been so diversely understood by the courts. The circumstances or parts of an event which is under proof may be shown. Statements are like other circumstances when they are part of it, and, if the whole affair cannot be rightly understood without them, they are competent. Expressions of persons who are actors, made during the occurrence, may generally, but not always, be proved. If spontaneous and caused by the event, they may nearly always be shown. But if afterwards, no matter how shortly afterwards, there is an attempt to explain what has happened, or to account for it, or to defend one's self, or the like, it is incompetent and inadmissible as *res gestæ*. A narrative, even if given during the occurrence, is inadmissible. *Heckle v. Southern Pac. Co.*, 123 Cal. 441, 56 Pac. 56. There the declaration attempted to be shown was made by the injured person while under the car wheels. This court remarked that the occurrence had not been ended, and yet, if it should appear that the remark was a narration of what had occurred, rather than a spontaneous expression, an outgrowth of the occurrence, it was not competent. See, also, *Lissak v. Estate Co.*, 119 Cal. 442, 51 Pac. 688; 1 Greenl. Ev. § 113. It is suggested that Haydock represented the principal, and therefore the statement to him was competent. Had there been a personal principal present, a remark made to him under the circumstances would not have been competent. It is contended that the evidence was not injurious, but clearly it was upon a vital point, to wit, whether the engineer was misled by the lack of a whistling post, since he was a new man on the road,—whether he was “lost.” It was calculated to aid the case of the plaintiff upon the most doubtful question for him in the case.

I do not think it of advantage to review the many instructions excepted to, or other alleged erroneous rulings. The questions as to the instructions do not involve the right of plaintiff to maintain the action, but minor matters as to the degree of care required, and

points of like character. Counsel agree upon what the instructions should have been, but differ in their understanding of what was given. Probably upon another trial such supposed defects will be obviated. The order is reversed, and a new trial ordered.

We concur: HENSHAW, J.; McFARLAND, J.

133 Cal. 593

REIS v. STATE. (Sac. 525.)

(Supreme Court of California. Aug. 2, 1901.)

STATES—INDIAN WAR BONDS—STATE'S LIABILITY—CONDITION—FEDERAL APPROPRIATION—CONSTITUTIONAL LAW—STATUTES—STATE DEBT.

1. Act May 3, 1852 (St. 1852, p. 59), authorized the issuance of bonds to pay the expenses of military expeditions against the Indians; such bonds to be payable from funds to be appropriated by congress for that purpose, with the condition that if such appropriation was insufficient the bonds should be a valid claim against the state. By Act 1854 (10 Stat. 576) congress appropriated an unapportioned amount for the purpose of paying the military expenses of the state of California incurred under the act of May 3, 1852, not exceeding \$924,259.65; but by such act no interest accruing after January 1, 1854, was payable out of such fund, nor did congress ever appropriate any money to pay such interest. At the time suit was brought against the state on coupons detached from bonds issued under the act, there remained from the fund appropriated by congress for the payment of the bonds, and not applied, about \$10,000, and the amount of the coupons sued on aggregated \$33,900. *Held*, that such facts showed that the condition on which the state's liability on the bonds was to accrue had happened, and that plaintiff was entitled to recover.

2. The fact that it was through no fault of the state or its officers that congress had not appropriated sufficient money to pay the bonds or the interest accruing after January 1, 1854, was no defense to the state's liability to fulfill its contract with the bondholders.

3. Const. 1849, art. 8, provides that the legislature shall not create any debt exceeding the sum of \$300,000, “except in case of war, to repel invasions or suppress insurrections.” Act May 3, 1852 (St. 1852, p. 59), known as the “Indian War Bond Act,” was entitled “An act authorizing the treasurer of the state to issue bonds for the payment of the expenses of” certain expeditions against the Indians, and authorized the issuance of bonds to a sum not exceeding \$600,000, payable in 10 years. *Held* that, in view of Code Civ. Proc. § 1903, declaring that the recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect, the state, in an action on the coupons attached to such bonds, was estopped from urging as a defense that the statute was violative of the constitutional provision limiting the indebtedness of the state; the recitals of the act clearly showing it to be within the exception provided by the constitution.

In bank. On rehearing. Judgment in department (59 Pac. 298) reversed. Judgment of superior court affirmed.

HENSHAW, J. This action was prosecuted to recover against the state a judgment for the amount of certain coupons detached from bonds issued under the act of May 3, 1852

(St. 1852, p. 59), and known as the "Indian War Bonds." The act is entitled "An act authorizing the treasurer of the state to issue bonds for the payment of the expenses of the Mariposa, Second El Dorado, Utah, Los Angeles, Clear Lake, Klamath and Trinity, and Monterey expeditions against the Indians." By the first section it is provided: "A sum not exceeding six hundred thousand dollars is hereby appropriated and set apart as an additional war fund, payable in ten years, out of any moneys which may be appropriated by congress to defray the expenses incurred by the state of California, and interest thereon at the rate of seven per cent. per annum, in the suppression of Indian hostilities, or out of the proceeds of the sale of any public lands which may be donated or set aside by congress for that purpose; and should no such appropriation or donation be made, or if an amount sufficient should not be appropriated or donated within the said ten years, then the bonds authorized to be issued by this act shall be good and valid claims against the state, and shall be paid out of any moneys in the treasury, not otherwise appropriated, to pay the expenses of the expeditions mentioned in this act." The findings of the court set forth with clearness the history of the matter, and are here quoted at length:

"That pursuant to the act of the legislature of the state of California approved May 3, 1852, this state did issue its bonds for the sum of six hundred thousand dollars, as therein provided, which bonds were in liquidation of the indebtedness owing by this state for expenses it had necessarily incurred in certain expeditions undertaken by it against the Indians, which expeditions were named in said act. That all of the bonds and coupons described in plaintiff's complaint are part of the bonds issued as aforesaid. That on August 5, 1854, the congress of the United States passed an act, which was approved on that day, wherein and whereby the secretary of war was authorized and directed to examine into and ascertain the amount of expenses incurred and now actually paid by the state of California in the suppression of Indian hostilities within said state prior to January 1, 1854, and that amount, when so ascertained, should be paid into the treasury of the state of California, provided said sum should not exceed nine hundred and twenty-four thousand two hundred and fifty-nine and $\frac{65}{100}$ dollars. That the secretary of war refused to accept the state records of this state, showing the bonds issued by it in liquidation of claims growing out of Indian hostilities, as sufficient evidence of the demands, and refused to pay into the state treasury of this state said sum of nine hundred and twenty-four thousand two hundred and fifty-nine $\frac{65}{100}$ dollars, or any part thereof, until he had received, examined, and approved the original vouchers and demands for which the bonds were issued. That the amount of bonds issued by the state of California in liquida-

tion of valid claims existing against it for expenses it had incurred in the suppression of Indian hostilities within this state is and was as follows:

Bonds issued under act of February 15, 1851	\$200,000
Bonds issued under act of May 3, 1852	600,000
Bonds issued under act of April 16, 1853	23,000
Bonds issued under act of April 16, 1853	2,500
Bonds issued under act of May 18, 1853	23,000
	\$848,500

"These bonds bore interest as follows: The two hundred thousand dollars of bonds issued under the act of 1851, aforesaid, bore interest at the rate of twelve per cent. per annum from September 1, 1851. All the other bonds bore interest from January 1, 1852, at the rate of seven per cent. per annum. The amount owing and unpaid by this state on January 1, 1854, on account of its Indian war debts aforesaid, with interest to said date, was the sum of nine hundred and ninety-five thousand two hundred and ninety dollars. The amount of the same debt owing and unpaid on August 5, 1854, with interest to that date, was the sum of one million thirty-six thousand six hundred and thirty-four and $\frac{13}{100}$ dollars. The amount of the same debt owing and unpaid on September 1, 1856, with interest to that date, was the sum of one million one hundred and eighty thousand two hundred and forty-three and $\frac{82}{100}$ dollars. That on August 18, 1856, the congress of the United States passed an act, approved on that date, wherein and whereby the secretary of war was authorized and directed to pay to the holders of the war bonds of the state of California the amount of the congressional appropriation of August 5, 1854, as such bonded indebtedness existed on January 1, 1854, and to return to the bondholders such overdue coupons as were not paid by the United States. That said payments were to be made subject to certain provisions in said act provided, and all of said provisions were complied with. That pursuant to said act of congress there was on or about September 1, 1856, presented to the secretary of war, and paid by him, state bonds dated prior to January 1, 1854, all issued on account of Indian war indebtedness of this state, under the acts of its legislature hereinbefore mentioned, to the amount of nine hundred and fourteen thousand seventy-six and $\frac{2}{100}$ dollars, and said payment left in the treasury of the United States an unexpected balance of said appropriation of ten thousand one hundred and eighty-three and $\frac{63}{100}$ dollars. That thereafter congress passed the following acts, re-appropriating in whole or in part the unexpended balance of said appropriation: Act approved June 23, 1860; act approved July 25, 1862. That no part of the congressional appropriation aforesaid was made for, nor applicable to, the payment of any coupons set

forth in plaintiff's complaint herein. That congress never made any appropriation for the payment of the indebtedness incurred by this state in the suppression of Indian hostilities in this state, other than the appropriation of nine hundred and twenty-four thousand two hundred and fifty-nine and $\frac{65}{100}$ dollars made by the act of congress of August 5, 1854, except that it at various times, as set forth in defendant's answer, reappropriated lapsed portions of said original appropriations. That the amount of said congressional appropriation was not sufficient, when made, nor at any subsequent time, to pay the bonds created by the state act of May 3, 1852, and the prior act of February 15, 1851, with the interest accruing on the same."

The amount of coupons sued upon in this action aggregates some \$33,900. Plaintiff was awarded judgment in the sum of \$33,552, from which judgment, and from the order denying its motion for a new trial, the state appealed. As to the foregoing findings, it is sufficient to say that they derive full support from the evidence.

The principal reliance of defendant in support of its appeal is upon the case of *Sawyer v. Colgan*, 102 Cal. 283, 36 Pac. 580, or rather upon the application which it seeks to make of the decision in that case to the facts in the case at bar. *Sawyer v. Colgan* was a petition for a writ of mandate to compel the controller of the state to issue his warrant for the amount claimed to be due upon certain coupons, detached, as were these in the case at bar, from Indian war bonds. The coupons there, like those in the present case, were for interest subsequent to January 1, 1854. In the *Colgan* Case it was shown that there was about \$10,000 of the appropriation made by the United States government still remaining in the fund. The amount of the coupons in suit in the *Colgan* Case was very considerably less than this sum of \$10,000, and in denying to the petitioner the extraordinary remedy of mandate this court said: "It is not sufficient answer to say that this balance was insufficient to pay all the outstanding bonds and coupons. It is enough to know that petitioner's bonds and coupons would have been paid if they had been presented at the proper time." The conclusion was reached and expressed, therefore, that the state of California never became liable to pay on any of the coupons in suit. This conclusion is predicated upon the reasoning that it was shown that there was money appropriated by the United States available for the purpose of the payment of the coupons in suit, and sufficient for that purpose, and that therefore the condition upon which the liability of the state to pay these debts became fixed had never arisen. In the case at bar it is shown that the United States never appropriated an amount sufficient to pay the whole of the debt of the state evidenced by these bonds, and that the amount in suit is threefold greater than the unexpended sum that at one time re-

mained in the treasury of the United States. Accepting, then, to its fullest extent, the determination of the *Colgan* Case as to when and under what circumstances the state became liable for the payment of these debts, the fact is established in this case that the contingency had arisen. The facts of the matter are simply these: The state's contract with its bondholders was to pay them the face of their bonds and the face of the interest coupons within or at the expiration of 10 years, if during that period the United States did not itself discharge the state from its liability by making full payment in its behalf. The bondholders' contract was with the state, not with the United States, and the state was to be exonerated from its liability to them only in the event that the United States made full payment. The contract of the state with its bondholders was not that it would pay interest upon these bonds until 1854 or until 1855 or until 1856, but that it would pay them interest (not exceeding 10 years) up to the time when the bonds themselves were extinguished by payment. When the United States came to lift the burden of the state, it did not undertake to do so in accordance with the terms of the state's contract with its bondholders. The United States said, as it had a perfect right to say: "We will pay, not the whole debt of the state of California, but we will pay a sum not to exceed nine hundred and twenty-four thousand two hundred and fifty-nine and $\frac{65}{100}$ dollars towards the extinguishment of this debt. Moreover, we will not turn this money into the treasury of the state of California, and make the state our disbursing agent. We shall investigate the claims against the state, and pay such as we consider just, and, notwithstanding the fact that no dollar of this money which we have thus appropriated is available for the payment of these debts until the year 1856, we will decline to allow or to pay any interest upon the debts of the state accruing after January 1, 1854." This, as I have said, was what the United States government determined to do and did do. It had a perfect right so to decree, precisely as it had the right to refuse to pay anything at all, or to pay as much or as little as suited its view. But, if the United States had in fact refused to appropriate any money, or had only appropriated a grossly inadequate sum, no one, I take it, would question that the liability of the state to make full payment, in accordance with the terms of its contract with its bondholders, had become absolute. And so here, if the United States did not by payment extinguish the liability of the state to its bondholders, in accordance with the state's contract with them, by every consideration of equity, as well as of strict law, the state is bound so to do. The fact that the United States said that it would pay no interest after 1854 did not and could not operate to effect, modify, vary, or change in the slightest the contract of the state with its bondholders,

and by that contract the state obligated itself to pay principal and interest upon these bonds unless the United States did so in its place. The facts found in the Colgan Case, to the effect that there was a surplus in the treasury of the United States available for the payment of the coupons there in suit, justified the court in refusing the extraordinary remedy of mandate upon this showing, that moneys from another source, for the extinguishment of petitioner's claim, were first to be made use of; but appellant would here seek to extend that declaration, and apply it as the defense to any and every bond and coupon now due, owing, and unpaid. In other words, defendant's proposition is this: "There were ten thousand dollars not drawn from the funds appropriated by the United States. It makes no difference that the United States would have refused payment upon any of these bonds or coupons out of that fund, because they were issued or accrued after January 1, 1854. It makes no difference, therefore, whether the state's creditor could have obtained a dollar of this money. It makes no difference that the aggregate liability of the state was several hundred thousand dollars, and there was at the most but ten thousand dollars with which to pay it. The fact is, and this court should so declare it, that, because each one of these coupons and each one of these bonds was for a sum vastly less than ten thousand dollars, any one of these individual holders of them might have been paid, and therefore the state is exonerated." This amounts to saying that some two or three hundred thousand dollars of indebtedness could legally be extinguished by a treasury fund of ten thousand dollars, and this without the expenditure of a dollar of that fund. This certainly is a most startling new way to pay old debts. But, to the contrary, we hold, upon every principle of strict law, as well as of justice, that the state is bound by its own contract with its own bondholders, according to the terms and tenor of its contract, and that upon a showing, such as here made, that the United States did not appropriate enough money to pay the state's bondholders, in accordance with the terms of their contract with the state, the state's liability has become absolute. It is urged that it was through no fault on the part of the state or its officers that the federal appropriation was tied up for more than two years, and that therefore the state should not be held for the interest accruing after January 1, 1854. To this it may be answered, if answer is needed, that it would have been no fault of the state or its officers if the United States had never appropriated a dollar. Yet would any one contend under such circumstances that the state was to go free? It was surely no fault of the bondholders. They, no more than the state, could control the machinery of the United States government, and they have the right to demand that the state shall fulfill its contract with them, whether

in the matter of the federal appropriation the state be in fault or not.

It is further urged against this judgment that the act of May, 1852, under which these bonds were issued, was itself unconstitutional, in attempting to create an indebtedness against the state in excess of \$300,000. In this, reliance is had upon article 8 of the constitution of 1849. By that article the legislature is forbidden to create any debt exceeding the sum of \$300,000, "except in case of war, to repel invasion, or suppress insurrection," but the very act in its recitals declared in effect that a state of war or insurrection existed when the expeditions against the Indians were sent out, and the state is estopped from urging this defense, by its solemn declaration in the act itself. Section 1903 of the Code of Civil Procedure declares that "the recitals in a public statute are conclusive evidence of the facts recited, for the purpose of carrying it into effect."

Some of the rulings are complained of, in the improper admission of evidence. It is unnecessary to consider them, for the admitted evidence merely made against the defense which the state advanced, and which we have declared to be untenable, viz. that the \$10,000 surplus extinguished the state's liability for the whole debt. The admission of this evidence, therefore, could not have injured appellant. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.

BALDWIN v. STATE.

MEAD v. SAME. (Sac. 526, 527.)

(Supreme Court of California. Aug. 2, 1901.)

In bank. Judgment in department (59 Pac. 1112) reversed. Judgment of superior court affirmed.

PER CURIAM. These cases were submitted, to follow the decision of this court in *Reis v. State* (this day decided) 65 Pac. 1102. Upon the authority of the last-named case, the judgments and orders appealed from are affirmed.

133 Cal. 640

WOODMEN OF THE WORLD v. RUT-

LEDGE et al. (L. A. 912.)

(Supreme Court of California. Aug. 12, 1901.)

APPEAL — ATTORNEY OF RECORD — LIFE INSURANCE — BENEFIT SOCIETY — CERTIFICATE — FIANCÉE — INTERPLEADER — DESERTED WIFE — FRAUD — WAIVER BY SOCIETY.

1. Where appellant's attorney is one of the firm who were his attorneys of record in the trial court, a motion to dismiss the appeal on the ground that such attorney is not the attorney of record should be denied.

2. Where a plaintiff brings an action against conflicting claimants of a fund in its hands,

to determine such claims, as provided in Code Civ. Proc. § 386, and, without demurring, such claimants interplead and try the issues raised, they cannot afterwards object that it is not a case for interpleader.

3. A member of a fraternal society took a certificate of life insurance payable to B., "as his fiancée." On his death the fund was claimed by B. and also by his deserted wife. The society deposited the fund in court, and claimants interpleaded. *Held* that, the society having waived all question of fraud and claim to the money, the wife cannot object that B. was not entitled to it because deceased was incapable of contracting marriage at the time of engagement to B.

In bank. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action of interpleader by the Woodmen of the World against Laura Rutledge and others. From a judgment for defendant Mary E. Buzzard, defendant Laura Rutledge appeals. Affirmed.

John H. Foley, for appellant. Will D. Gould, for respondents.

VAN DYKE, J. By stipulation of the parties a motion to dismiss the appeal and the hearing on the merits of the appeal have been submitted together. The motion to dismiss the appeal is based upon the ground that the appellant's attorney is not the attorney of record in the case, but a member of the firm of attorneys who appeared in the court below as attorneys of record. There is nothing in the motion, and no authority has been cited in support of this contention.

The action was brought to compel the defendants to come into court and interplead and litigate their several conflicting claims to a benefit fund of \$2,000 paid into court by the plaintiff at the time of bringing the suit. The plaintiff is a corporation existing as a fraternal organization, and for life insurance purposes and benefit of its members and their beneficiaries. It appears that one William Rutledge in October, 1896, joined and became a member of Victor Camp, Woodmen of the World, located at Victor, Colo., and through such membership obtained a certificate of life insurance for the sum of \$2,000, payable on his death to the defendants Fred, Harry, and Jessie May Rutledge, his minor children; that thereafter, in April, 1899, said William Rutledge, by appropriate proceedings, secured a transfer from said Victor Camp, and on the 20th of the same month deposited said transfer card with the Los Angeles Camp of the Pacific Jurisdiction of the Woodmen of the World, located at Los Angeles, and through his membership with said Los Angeles Camp said William Rutledge canceled and surrendered his said certificate obtained from Victor Camp, and thereupon, May 15, 1899, there was issued to him a new benefit certificate for the sum of \$2,000, made payable to the defendant "Mary E. Buzzard, as his fiancée." The said William E. Rutledge died in Los Angeles in June, 1899. An answer to the complaint was filed on behalf

of defendants Laura Rutledge and the minors, Fred, Harry, and Jessie May Rutledge, in which it was asked that it may be ordered by the court that said sum so deposited in court be paid over to them. An answer and cross complaint was also filed by the defendant Mary E. Buzzard, setting forth the facts already stated, and claiming said benefit fund under the provisions of the benefit certificate last issued to said William Rutledge. The court found that on July 4, 1895, the said William Rutledge and defendant Laura Rutledge intermarried, and remained husband and wife up to the time of the death of said William Rutledge, but that for several years prior to his death they lived separate and apart, she residing in Colorado, and he in Montana and California; that defendants Fred Rutledge, Harry Rutledge, and Jessie Mamie Rutledge, or Jessie May Rutledge, were the children of said William Rutledge by a former wife; that defendant Mary E. Buzzard was, at the date that said benefit certificate was issued to William Rutledge by the Los Angeles Camp, under engagement of marriage with said Rutledge in good faith, and that she had no knowledge or information whatever that said Rutledge was at that time or at any time a married man; and that she remained so engaged to be married to him up to the time of his death, and in such engagement she was wholly an innocent party. Judgment was accordingly rendered in favor of said defendant Mary E. Buzzard for the amount of said benefit certificate so deposited in court.

The appeal is by defendant Laura Rutledge alone, and comes up on the judgment roll. The appellant contends that this is not a case for interpleader. The Code provision in reference to the right to bring such action is very broad: "Whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves." Code Civ. Proc. § 386. This seems to have been the case here, as appears by the pleadings. Besides, the appellant failed to demur to the complaint, or raise any other objection in the court below to the nature of the proceeding. *Union v. Long*, 123 Cal. 107, 55 Pac. 708, was a case similar to this. That was an action of interpleader to compel the defendants to litigate their conflicting claims to the fund held by the plaintiff, and in reply to a like objection in that case to the action the court says: "But when, as here, all parties come in, and without objection make up their pleadings and litigate their claims, we feel warranted in holding that all consent to the remedy sought, and to the payment into court, and consequent dismissal as to plaintiff." In this case the plaintiff, having paid the money into court, and the parties having come in and interpleaded

among themselves, had no further interest in the case, and is not a party to the appeal. See, also, *Fox v. Sutton*, 127 Cal. 515, 59 Pac. 939, where the right of the plaintiff, a mere stakeholder, to compel conflicting claimants to come in and litigate their several claims, was upheld.

It is contended on the part of the appellant that, Rutledge being at the time a married man, the said Mary E. Buzzard could not become engaged to marry him, and therefore was not a fiancée; that such a relationship would be against good morals, and therefore illegal. But the court also finds that the cancellation of the first certificate of life insurance, and the issuance of the said second certificate of life insurance, payable to the said Mary E. Buzzard, was formally made in accordance with the constitution of the plaintiff corporation, and the same was in full force and effect at the time of the death of said William Rutledge; thereupon the same became due and payable to said Mary E. Buzzard, and is now due and payable to her, in the said sum of \$2,000, and that the said \$2,000 deposited and paid into court by the plaintiff corporation in the action is the money described in said certificate of life insurance; that the plaintiff has disclaimed all right, title, and interest in and to said money. These findings are conclusive, as the evidence is not brought up. If any fraud or deception had been used in procuring the issuance of said certificate in reference to the designation of Mary E. Buzzard as fiancée or otherwise, such certificate might have been declared void, and the sum specified therein forfeited, at the instance of the plaintiff company; but, as found by the court, and as appears by the record, the company makes no complaint, and disclaims any right to the fund. The term employed may be considered as merely *descriptio personæ*. "It may be stated that, where a policy of life insurance expressly designates a person as entitled to receive the insurance money, such designation is conclusive, in the absence of some question as to the rights of the creditors. The receipt of the person designated will discharge the insurer, and he may sue and recover the amount due at the maturity of the policy. In such cases the legal representative of the insured has no claim upon the money, and cannot maintain an action therefor. It forms no part of the assets of the estate of the insured." *Winterhalter v. Association*, 75 Cal. 248, 17 Pac. 1. And in that case it was suggested that the policy might lapse for want of a beneficiary, and the court replies: "Such a contingency cannot arise in any event here, for the defendant admits its liability, has paid the money into court, and only asks that the question as to the right of the two claimants may be determined so as to absolve it from liability." It has also been held: "Where a person makes an insurance on his life, he may make any one he pleases the beneficiary, and the latter is not obliged to

show an interest in his life in order to recover." 5 *Lawson, Rights, Rem. & Prac.* p. 3636.

Pending the appeal in this court, the respondent Mary E. Buzzard died, and Will D. Gould, executor of her last will and testament, upon suggestion of her death and upon motion, has been substituted in the place and stead of Mary E. Buzzard as defendant and respondent herein. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; McFARLAND, J.

HENSHAW, J. I concur in the judgment. If it were shown that the by-laws of the association limited the beneficiaries to those having an insurable interest in the life of the member, a different question would be presented. But no such showing is made, and the finding of the court is to the effect that the certificate was duly issued in accordance with the constitution and by-laws. The provision limiting the beneficiaries of a policy to those having an interest in the life of the insured is primarily designed to protect the insurance company, and may therefore be waived by it, as was done in this case, by its payment of the money into court.

133 Cal. 516

TUOHY v. MOORE. (Sac. 806.)

(Supreme Court of California. Aug. 3, 1901.)

CONTRACT—RESCISSION—EQUITY.

Plaintiff, purchaser at foreclosure, 41 days before the time of redemption expired contracted with defendant, whereby defendant leased the land, with the privilege of purchasing part thereof on specified terms, from time to time, and agreed to immediately plant 100 acres to orange trees and make other improvements; and, if the land was redeemed, he was to be reimbursed by plaintiff for the expenses. Defendant purchased the trees and machinery required, and went on the land, when he was ordered off by the receiver in the foreclosure suit. Plaintiff, without making any effort to obtain the equity of redemption, or consent of the receiver to the improvements, sued, 7 days before the time to redeem expired, to rescind the contract, on the ground that, because of the receiver's refusal to permit it, it was impossible to perform the contract. *Held*, that rescission should be refused, since plaintiff had not tried to perform, and defendant was not at fault, but had incurred great expense in attempting to perform.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; W. B. Wallace, Judge.

Action by John Tuohy against A. D. Moore. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Hannah & Miller and Van Ness & Redman, for appellant. G. W. Zartman, for respondent.

CHIPMAN, C. Action to rescind an agreement for the sale of land. Plaintiff had judgment, from which, and from the order deny-

ing his motion for a new trial, defendant appeals. The land in question was part of a much larger tract belonging to one Vaughan, who had mortgaged it to plaintiff. Foreclosure suit was begun September 8, 1896, and the land was sold under decree on March 20, 1897, plaintiff becoming the purchaser, a certificate of sale was issued to plaintiff, reciting, among other things, that if no redemption was made he would be entitled to a deed in twelve months from date of sale, and a deed was made to plaintiff on March 20, 1898. The Vaughan mortgage was made prior to the amendment to section 702, Code Civ. Proc., extending the period of redemption from six months to one year, and, as matter of law Tuohy, plaintiff, was entitled to a deed September 20, 1897. *Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914; *Benson v. Bunting*, 127 Cal. 532, 59 Pac. 991; *Haynes v. Treadway* (Cal.) 65 Pac. 892; *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93. This present action was commenced September 13, 1897, seven days before plaintiff's right to a deed accrued. The contract sought to be rescinded was dated August 12, 1897, one month before the action was commenced. At this time Vaughan's right of redemption had only a month and seven days to run. On August 30, 1896, a week before complaint on foreclosure was filed, and in anticipation of foreclosure, Vaughan executed to plaintiff Tuohy, an agreement in writing authorizing Tuohy, mortgagee, to take possession of the mortgaged premises, "and during the proceedings about to be commenced by said John Tuohy to foreclose the mortgage held by him on said property, and during the period of redemption from the sale of the property from such foreclosure sale, * * * to farm said lands, * * * to rent the same to others as he may deem best, * * * to collect and receive all rents * * * during the period from the commencement of said suit until the said period of redemption shall have expired, and to pay said rents * * * to the person * * * purchasing said property at foreclosure sale." Notwithstanding plaintiff had this privilege, he asked for the appointment of a receiver, on filing his complaint in foreclosure, with power to do what by the mortgagor's agreement he was himself empowered to do; and a receiver was appointed to take control of said mortgaged property, and "to rent the said lands, and collect and receive the rents, issues, and profits thereof." The receiver was plaintiff's nephew, and plaintiff was one of his bondsmen. Pursuant to the order of his appointment, the receiver took control of the lands, and the court found that at the time the agreement in question was executed he had leased all the farming lands mentioned in the agreement "to be farmed to grain for the next ensuing cropping season." There was no evidence that defendant had actual knowledge that these leases had been made, and there was no evidence that he had actual knowledge of the appointment of a re-

ceiver when the agreement was executed, or that he would interfere in any way with the parties in carrying it out; but there was evidence offered that the parties talked the matter over after the agreement was executed, which latter evidence the court apparently disregarded as irrelevant and inadmissible. The court found, however, as was alleged in the complaint, "that at the time of making the aforesaid agreement said John Tuohy believed that said receiver would make no opposition to the carrying out of the terms and conditions of said agreement by either party thereto, and believed that, as the purchaser of said property at the foreclosure sale thereof, he had the right to contract to convey said lands, and to lease the same according to the terms of said agreement." The agreement showed that both parties had in mind the foreclosure sale, for it was provided, inasmuch as plaintiff had purchased the land at foreclosure sale, and the right of redemption had not elapsed, that in case of redemption defendant should be paid by plaintiff for his improvements made under the agreement. Adjoining the land in question were other lands sold to plaintiff, on which was a basin excavated to contain water for irrigation, and a cut or trench had been opened on this adjoining land to develop water; and in the agreement defendant had undertaken within 30 days, to begin an extension of the trench, and run it 1,500 feet by August 1, 1898, to the land embraced in his contract. He had the right also to dig certain wells on these latter lands near said trench for the purpose of developing water. The agreement is very lengthy, and sets forth with considerable minuteness of detail the mutual covenants of the parties, a large part of which may be omitted from consideration as not bearing upon the issues presented. It recited, however, that defendant believed that parts of the land described were suitable for citrus culture, and, on the conditions named, plaintiff agreed to sell to defendant "during and for six years to come, * * * whenever and from time to time he is requested by him to do so, any of said lands heretofore described in T. 20 S., R. 27 E., lying below the line of the flume or ditch which said Moore proposes to construct from said basin to said land, * * *" and, "when said Moore asks it, said Tuohy will put him in the immediate possession of any land thus required by him, and said Moore shall have the option to pay for such land," etc., stating terms; and the agreement also contained a plan of rental to defendant instead of sale. It was recited that, although the water already developed was insufficient for the purpose, defendant was to at once locate and take on the rental plan, and plant to orange trees, the greater part of 100 acres, and "proceed at once, as before stated to extend said cut, and within the time fixed to sink at least one well."

The contract recited a consideration of one dollar as paid and received, but the evidence

was that it was not in fact paid or received, and the complaint alleged that plaintiff has never received any consideration. The complaint alleges what has heretofore been stated as to plaintiff's belief that the receiver would not make opposition; alleges the agreement to take on the rental plan 100 acres, and at once plant the greater part to orange trees; alleges the refusal of the receiver "to permit either plaintiff or defendant to enter upon said land to carry out the conditions of said agreement; that plaintiff cannot give defendant any title to said lands that will be free from reasonable doubt, until the time to redeem said lands shall have expired; nor can it be ascertained, until a deed shall issue to said lands, whether plaintiff will ever have the legal right to any of said lands"; alleges that, as soon as plaintiff discovered "that said receiver would not permit said agreement to be carried out, * * * he immediately communicated such fact to defendant, and requested of him that said contract be rescinded." The findings are that plaintiff's allegations are true. The court found, in its third finding, that the receiver was appointed to take charge of the property, rent it, etc., "during the pendency of the action, and until a deed should issue to said lands, and until the same had been redeemed as required by law." This finding is challenged as unsupported by the evidence. The order of appointment contains no such provision, and no tenure of the receiver's office is stated in it. The fact is, perhaps, not important, as the receiver holds subject to removal at any time by the court on cause shown.

It is claimed by appellant also that the fourth finding, as to plaintiff's belief that the receiver would not oppose the carrying out of the terms of the agreement, is not supported by the evidence. Under the view we take of the case, as will presently appear, this finding furnished no ground for rescission, and its consideration may for the moment be deferred. The fifth finding is that defendant "has not located or taken on the rental plan, or any other plan, any portion of said lands, or planted the same to orange trees, or proceeded to extend said cut, or to perform any of the other conditions of said agreement." This finding is challenged as unsupported, and will also be noticed later. The sixth finding is that the receiver refused to permit either plaintiff or defendant to enter on the lands to carry out their agreement, and that plaintiff could not give defendant any title free from doubt until redemption had expired, and, until a deed should issue, plaintiff could not know he had any title. This finding is also challenged as unsupported. Finding 7 is that plaintiff communicated the receiver's refusal to permit the agreement to be performed immediately on learning the fact, and at once requested rescission, and this finding is challenged for like reasons. There was a general demurrer to the complaint, which was overruled, and

defendant answered; and there was a motion for nonsuit at the close of plaintiff's evidence, which was denied. We will dispose of the case, however, on its merits, as disclosed by the evidence.

There seems to me an utter want of equity in the case made by the record. The uncontradicted evidence was that, immediately following the execution of the agreement, defendant made preparations to carry out its provisions on his part. He contracted for 12,000 orange trees, which he had to pay for, he made a contract for teams to do the ditch work; he made arrangements for an engine to pump water, he engaged a surveyor and helper to locate the cut which he had agreed to make, and he went with them to the land to assist in the survey. He testified: "Mr. Tuohy [the receiver] approached on a horse and said: 'What are you doing here?' I said: 'Laying out a ditch, and we are going over there to open a cut.' 'Well,' said he, 'you can't do that. You must leave this ranch. I don't wish you to do any work of any kind here.' I said: 'This is Mr. Tuohy's contract that we have.' He says: 'It don't make any difference. You must not do any work here,'—or words to that effect. I could scarcely believe it, and I said: 'Do you mean it?' He said: 'Yes.'" Defendant then left with his men. He further testified: "I have been at all times since this contract was entered into ready and willing and able to carry out all the covenants on my part contained therein. I wrote to Mr. Tuohy, the plaintiff. I tried to get to see him, and couldn't. I sent twice to his house. I sent a special messenger with a letter, and nobody would receive it. I wrote him a letter, and mailed it to him. Because I was in a terrible position, with twelve thousand orange trees on hand." It appears that plaintiff wrote a letter to defendant informing the latter that the contract "cannot be carried out, on account of the refusal of the receiver in charge of said property to permit entry on said lands prior to the time a deed to said lands will issue, which he is advised will be one year from the time of the issuance of the certificate of sale"; adding, "As it will be impossible for either of us to carry out the terms of said agreement, I ask that you consent that said contract be rescinded, and hereby offer to rescind the same." This letter was dated August 19, 1897, 16 days after the contract was signed, but the letter was not posted until August 26th, as the postmark on the envelope showed. Defendant replied to it September 4, 1897, refusing to rescind, calling attention to the steps he had taken to comply with the contract, and stating his readiness, ability, and willingness to comply with the contract, and insisting on compliance by plaintiff. This letter was properly directed to plaintiff and posted, and postage prepaid, but he testified that he did not receive it. There is no evidence that plaintiff made any effort to induce the re-

ceiver to permit the defendant to do the work contemplated by the parties. Plaintiff took no steps to obtain instructions, or authority of the court for the receiver to permit the work to be done. There is no evidence that the contemplated work would have interfered with any leases made by the receiver. Foreclosure was commenced in September, 1896. The leases for that cropping year ran until the latter part of the year 1897. There was no evidence that plaintiff sought to have the leases so made in renewal as not to interfere with his own or defendant's performance. He had it in his power to do this, and is himself at fault for not having done it. Nor is the evidence clear that the leased lands embraced all the lands which might have been planted to orange trees. There is no evidence that plaintiff made any effort to purchase Vaughan's equity of redemption. In short, there is no evidence that plaintiff made the slightest effort to remove the impediments to performance of the contract, and, with the exception of the refusal of the receiver to allow the work to be done by defendant, there is no ground for rescission shown. Whether the refusal of the receiver to allow defendant to proceed under his contract, of which plaintiff had instant if not previous knowledge, operated as a release of defendant, need not be decided, for he is not asking to be released. It did not release plaintiff, and he should not be permitted to rescind, since he failed to show that it was impossible for him to perform. The rule is that "the impossibility of performance must be shown to attach to the thing to be done, and not to him alone who has contracted to do it. It must be an impossibilitas rei, as distinguished from an impossibilitas facti." *Fresno Milling Co. v. Fresno Canal & Irrigation Co.*, 126 Cal. 640, 59 Pac. 140, citing *Klauber v. Car Co.*, 95 Cal. 353, 30 Pac. 555, where the rule is quite fully discussed. Plaintiff not only made no effort to render performance possible, but he made haste to notify defendant of rescission, not even going to him personally to see what could be done to enable each to perform. The ground alleged in the complaint for relief is that the receiver "refused to permit either plaintiff or defendant to enter upon said land to carry out the conditions of said agreement." When plaintiff learned this fact he should have gone at once to the receiver and made an effort to remove his opposition, failing in which he should have gone to the court and had the receiver removed, or instructed to permit the work to go forward, which was manifestly for the benefit of the land. There was in fact no occasion for a receiver, and, had the defendant in the foreclosure suit objected on the ground that he had given plaintiff authority to go into possession and do the very things the receiver was appointed to do, the court would probably not have appointed a receiver. Furthermore, there

were but a few days remaining in which redemption could be made, and plaintiff would be entitled to a deed. Plaintiff should have made some effort to acquire this equity, or arrange with the holder of it; and, if unsuccessful, he should have waited these few days, taken his deed, which would have discharged the receiver and there would have been no further obstruction to his performing. It would be inequitable to allow plaintiff to rescind under the facts of this case, all of which point to his own delinquency, rather than that of defendant; and especially should he not be permitted to rescind as defendant suffered considerable damage, which plaintiff made no offer to compensate. It is advised that the judgment and order be reversed.

We concur: SMITH, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

133 Cal. 681

MEYER v. WEBER et al. (Sac. 872.)

(Supreme Court of California. Aug. 13, 1901.)

MORTGAGES—FORECLOSURE — TIME — NOTES
—NEGOTIABILITY—ASSIGNMENT—EFFECT.

1. Under Civ. Code, § 1642, providing that several contracts relating to the same matter, between the same parties, and as parts of substantially one transaction, are to be taken together, a note and a mortgage given to secure the same, delivered at the same time, must be taken and considered together.

2. Where the mortgage given to secure a note provided that on default in interest the principal and interest should be due, at the payee's option, and that the mortgagee might immediately bring suit, though the principal were not yet due, a suit to foreclose the mortgage commenced after default in interest, but before the principal was due, is not prematurely brought.

3. Under Civ. Code, § 3088, providing that a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment, and section 3093, declaring that a negotiable instrument must not contain any other contract than such as is specified in such article, a provision in a mortgage given to secure a note for attorney's fees in case of foreclosure renders the note nonnegotiable.

4. Under Civ. Code, § 1459, providing that the indorsement of a nonnegotiable written contract shall transfer all the rights of the assignor to the assignee, subject to all equities and defenses existing in favor of the maker at the time of indorsement, the assignment of a nonnegotiable note and mortgage is without prejudice to any set-off or other defense existing in favor of the maker.

Beatty, C. J., and McFarland and Henshaw, JJ., dissenting.

In bank. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by Margaretha Meyer against C. M. Weber and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Nicol, Orr & Nutter, for appellant. J. R. Hall, for respondents.

VAN DYKE, J. The Woodbridge Canal & Irrigation Company, a corporation, being indebted to the plaintiff in the sum of \$3,280, on July 28, 1894, executed to the plaintiff its promissory note for that amount, and, to secure the same, at the same time executed its mortgage upon a tract of land in San Joaquin county, and also at the same time, as further security, indorsed and assigned to the plaintiff the note and mortgage in suit. The note reads as follows: "\$1,963.66. Woodbridge, Cal., May 28, 1894. Ten years after date we promise to pay to the Woodbridge Canal and Irrigation Company, or order, the sum of nineteen hundred sixty-three $\frac{66}{100}$ dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon in like gold coin at the rate of six per cent. per annum from date until paid. Interest payable annually on the first day of September of each year, and in default of payment at said times the same to be then added to the principal and form a part thereof, bearing interest at the same rate. This note is secured by mortgage of even date herewith. Helen Weber. C. M. Weber. Julia H. Weber." Although the note is dated May 28th, it was not delivered until June 15th, at which time the mortgage to secure the same, and referred to in the note, was executed and delivered to the said corporation, the Woodbridge Canal & Irrigation Company. The plaintiff subsequently brought an action to foreclose the mortgage executed to her by the Woodbridge Canal & Irrigation Company, and such proceedings were therein had that a decree of foreclosure and sale was rendered, and thereupon the property mortgaged sold and applied on the judgment, leaving a deficiency of \$2,639.49. Thereupon plaintiff brought the present action to foreclose the mortgage assigned to her. The defense is that the consideration for the note and mortgage was an agreement in writing entered into between the makers and the payee, the Woodbridge Canal & Irrigation Company, that said company should construct a ditch from the main canal or branch thereof to the line of the land of the Webers, being the same described in the mortgage, of sufficient size and elevation to allow the irrigation of said land, and flow the water to said land for the purposes of irrigation, and that said company never at any time constructed a ditch or branch canal to the land for which the water was to have been furnished, and that no water has at any time been brought to the said land; that said Woodbridge Canal & Irrigation Company became insolvent on or about October 5, 1895, and was thereafter deprived of the possession of all of its works, canals, and property, by reason whereof the said company was, and ever since has been, rendered incapable of performing its contract with said defendants Weber; and that in consequence the consideration of said note and mortgage has totally

failed. The court finds the facts as set up in the answer of defendants Weber,—that the note and mortgage in suit were made and delivered to said company in pursuance of the terms and conditions of said agreement; that the company never at any time constructed a ditch or branch of any size to the land in question, and no water has at any time since the making of said agreement been brought to said land by said company; and that the consideration of said note and mortgage has failed. Upon the findings of fact the court entered judgment in favor of said defendants.

The appeal is on the judgment roll, and the only question presented is whether the instrument in suit is a negotiable promissory note, within the meaning of the Civil Code. The appellant contends that it is, and that it must be considered separate from and independent of the mortgage given to secure the same; that the clause, "this note is secured by mortgage of even date herewith," may be disregarded, as forming no part of the obligation to pay as specified in the note. But the mortgage was delivered at the same time as the note, relates to the same subject-matter, and they form substantially one transaction. They must therefore be taken and considered together. Civ. Code, § 1642. The plaintiff recognizes this to be so, from the very fact of bringing the action. By the note on its face it had 10 years to run, and the only consequence of the failure to pay the interest annually was that it should be "added to the principal, and form a part thereof, bearing interest at the same rate." But by the mortgage given to secure the note it is provided, in case default be made in the payment of "any installment of interest as provided in said note, then the whole sum of principal and interest shall be due, at the option of the said party of the second part, its successors or assigns; and suit may be immediately brought, * * * although the time for payment of said principal sum may not have expired"; and it is provided that costs and charges may be included in the decree of foreclosure, "including reasonable counsel fees." Counting upon the terms of the mortgage, and not of the note, as distinguished therefrom, the plaintiff alleges a failure to pay the interest, and an election to consider the whole amount due, and further alleges the employment of an attorney to secure its foreclosure, and asks for a reasonable sum to be fixed as his fee. In *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048, the defense was that the suit was prematurely brought, on the ground that the note in suit did not provide that the principal debt should be due on default in payment of interest, and that hence a foreclosure for both principal and interest was unwarranted. That contention is answered as follows by this court: "The note and mortgage, however, must be construed together. Interest on the note is payable semiannually, and the mort-

gage is clear that upon default in the payment of the interest, equally with default in the payment of the principal, the mortgagee may cause the premises to be sold, and retain from the proceeds 'the said principal and interest.' There is scarcely room for interpretation in these provisions." See, also, *Nagle v. Macy*, 9 Cal. 426; *Hyde v. Mangan*, 88 Cal. 320, 26 Pac. 180. An independent action on a promissory note secured by mortgage is prohibited in this state. "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter" (Code Civ. Proc. § 726); that is, by a suit to foreclose and a sale of the mortgaged premises, and ascertainment of the deficiency, if there be any. *Toby v. Railroad Co.*, 98 Cal. 494, 33 Pac. 550; *Society v. Thornton*, 123 Cal. 62, 55 Pac. 702. Whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until the decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency which shall appear on the sheriff's return. The liability is therefore contingent and dependent upon the fact whether upon the sale of the mortgaged premises there shall be a deficiency. The plaintiff in this case, in bringing the suit, recognized the fact that the mortgage was inseparably connected with the note. As already stated, according to the terms of the note, independent of the mortgage, the action would have been prematurely brought; and at the time it was brought it could only be sustained by reference to the clause in the mortgage giving an option to the owner, in case of default in the payment of interest at the time specified, to consider the whole debt due. Being inseparably connected with the mortgage, and affected by the conditions contained therein, the note is not negotiable, within the law merchant or Civil Code. Kent, under the head of "The Essential Qualities of Negotiable Paper," says that, to constitute a negotiable note or bill, "it is essential that it carry with it a personal credit given to the drawer or indorser, and that it be not confined to credit upon any future or contingent event." 3 Kent, Comm. "A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment." Civ. Code, § 3088. "A negotiable instrument must not contain any other contract than such as is specified in this article." Civ. Code, § 3093. In *Adams v. Seaman*, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 224, in commenting upon these provisions of the Civil Code, it is said, "An instrument is not negotiable if it have 'any condition not certain of fulfillment.'" And it was held that a provision for the payment of an attorney's fee in case of foreclosure was a contingency rendering the note non-

negotiable. The assignment and transfer of the note and mortgage in question, therefore, was without prejudice to any set-off or other defense existing in favor of the defendants Weber, the same as though there had been no assignment, and the action had been brought by the company to whom they were given. Civ. Code, § 1459; Code Civ. Proc. § 368. As the findings of the court show an utter failure of consideration as between the original parties, judgment properly followed in favor of the defendants. Judgment affirmed.

We concur: TEMPLE, J.; GAROUTTE, J.; HARRISON, J.

We dissent: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.

MEMORANDUM DECISIONS.

BALFOUR-GUTHRIE INVESTMENT CO. v. GRAVES et al. (L. A. 822.)¹ (Supreme Court of California. June 12, 1901.) Department 2. Appeal from superior court, San Diego county; J. W. Hughes, Judge. Action by the Balfour-Guthrie Investment Company against Mariah Graves and others. From an order, on motion of defendant F. R. Sawday, setting aside the default of the defendant, and vacating the findings and judgment against defendant, and permitting defendant to file his answer in the action, plaintiff appeals. Affirmed. W. T. McNealy and Andrews & O'Farrell, for appellant. G. H. P. Shaw and Mills & Higar, for respondents.

HENSHAW, J. This is an appeal by the plaintiff from the order of the court, made on motion of defendant F. R. Sawday, setting aside the default of the defendant, vacating the findings and judgment against defendant, and permitting defendant to file his answer in the action. The cause is identical in all respects with that of *Investment Co. v. Sawday* (L. A. 852; this day filed) 65 Pac. 400, saving, however, that here the judge of the trial court granted defendant's motion. For the reasons given in L. A. 852, the order of the court is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

DURHAM v. UNION SAV. BANK OF SAN JOSE. (S. F. 2482.) (Supreme Court of California. May 31, 1901.) Department 1. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge. Action by J. Durham against the Union Savings Bank of San José. From a judgment for plaintiff, defendant appeals. Reversed. Jackson Hatch, for appellant. O. O. Felkner, for respondent.

PER CURIAM. The case is substantially similar to that of *Arques v. Same Defendant*, 65 Pac. 307, and is submitted on the briefs on file on that appeal. On the authority of that case the judgment should be reversed, and the cause remanded, with directions to dismiss the complaint; and it is so ordered.

¹ Rehearing denied July 10, 1901.

FARMING & FRUIT LAND CO. v. SOUTHERN PAC. R. CO. (L. A. 867.) (Supreme Court of California. July 25, 1901.) Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge. Action by the Farming & Fruit Land Company against the Southern Pacific Railroad Company. From a judgment in favor of the defendant, plaintiff appeals. Affirmed. Anderson & Anderson, for appellant. Wm. Singer, Jr., and H. V. Reardan, for respondent.

PER CURIAM. This case is similar to *Anderson v. Railroad Co.* (L. A. 866; decision this day filed) 65 Pac. 950, and upon the authority of that case the judgment is affirmed.

GREEN et ux. v. GRIDER et al. (L. A. 870.) (Supreme Court of California. July 24, 1901.) Department 1. Appeal from superior court, Los Angeles county; John L. Campbell, Judge. Action by R. Henry Green and wife against L. M. Grider and others. From a judgment for plaintiffs, defendant Enola Myers, executrix of the will of John Myers, deceased, appeals. Affirmed. Walter F. Haas, Chas. Cassat Davis, Cole & Cole, and S. O. Houghton, for appellant. J. L. Murphy, for respondents.

PER CURIAM. This appeal is from the same judgment as that involved in the case of the same title (L. A. 856) in 65 Pac. 975, and the questions involved are the same. On the authority of that case, therefore, the judgment must be affirmed; and it is so ordered.

PEOPLE ex rel. ATTORNEY GENERAL v. STOCKTON ELECTRIC R. CO. (Sac. 769.) (Supreme Court of California. Aug. 10, 1901.) Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge. Action by the people of the state of California, on information of the attorney general, against the Stockton Electric Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed. Tirey L. Ford, Atty. Gen., and J. F. Ramage, for appellant. Woods & Levinsky, for respondent.

PER CURIAM. As disclosed by the record, the questions presented upon this appeal are identical with those considered and decided this day in the cause entitled *People ex rel. Attorney General v. Stockton Savings & Loan Soc.* (No. 768) 65 Pac. 1078. Upon the authority of that case the judgment is affirmed.

READ v. SAN DIEGO UNION CO. et al. (L. A. 885.) (Supreme Court of California. June 26, 1901.) Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge. Action by T. J. Read against the San Diego Union Company and others. From an order denying a motion for a change of venue from Los Angeles to San Diego county, defendant San Diego Union Company appeals. Reversed. Titus & Shaw, for appellant. W. H. Shinn and Byron L. Oliver, for respondents.

PER CURIAM. This is a companion case to *L. A. No. 884* (this day decided) 65 Pac. 567, and like it involves a motion for a change of the place of trial from Los Angeles county to San Diego, the place of residence of the defendant San Diego Union Company, a corporation. The motion in the former case was made after the answer of defendants Bowker and Chandler was filed, but afterwards said defendants filed a cross complaint therein, and this motion was made for the purpose of including said cross complaint in the order for a change of the place of trial. No facts appear, in the cross complaint or otherwise, affecting the conclusion reached in No. 884, and for the

reasons stated in the opinion in that case it is ordered that the order appealed from herein be reversed, with a like direction.

SOUTHERN PAC. CO. et al. v. SUPERIOR COURT et al. (S. F. 2,408.) (Supreme Court of California. May 23, 1901.) In bank. Petition by the Southern Pacific Company, a corporation, and others, for a writ of prohibition against the superior court and George H. Bahrs, judge thereof, to restrain certain proceedings. Dismissed. J. E. Foulds (John Garber, of counsel), for petitioners. Tirey L. Ford, Atty. Gen., for respondents.

PER CURIAM. This is a petition for a writ of prohibition to restrain certain proceedings pending the appeal in this court in the case of *Edson v. Southern Pac. Co.* (S. F. 2,433; this day decided) 65 Pac. 15. A temporary restraining order was issued, and afterwards, on request of the parties, the *Edson Case* was advanced, and it was agreed by counsel that this petition should be submitted at the same time as the main case. As the *Edson Case* has been decided, this proceeding is of no further consequence, and it is dismissed, without costs to either party.

SOUTHERN PAC. R. CO. v. LAMB. (L. A. 907.) (Supreme Court of California. Aug. 1, 1901.) Department 1. Appeal from superior court, Orange county; J. W. Ballard, Judge. Action by the Southern Pacific Railroad Company against Anson D. Lamb. From a judgment for defendant, plaintiff appeals. Affirmed. Wm. Singer, Jr., and H. V. Reardan, for appellant. F. O. Daniel, for respondent.

PER CURIAM. A demurrer to the complaint was sustained in this action, and, the plaintiff failing to amend its complaint, the defendant had judgment, from which the plaintiff appeals. In appellant's brief herein it is conceded that "the action is precisely similar in all respects to the action of *Railroad Co. v. Bell* (S. F. 1,720) 125 Cal. xix., 58 Pac. 1116, recently decided by this court, on the authority of *Same v. Wood*, 124 Cal. 475, 57 Pac. 388, against the appellant here." It appears from an examination and comparison of the several cases referred to that the above concession is in strict accordance with the facts, and for that reason it will be unnecessary to do more than affirm the judgment appealed from herein, basing our action upon the authority of the cases supra. The respondent makes several points not discussed in the opinion of the principal case of *Railroad Co. v. Wood*, supra, but for the reasons there stated they need not be considered here. The judgment is affirmed.

VAN EVERY v. SOUTHERN PAC. R. CO. (L. A. 865.) (Supreme Court of California. July 25, 1901.) Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge. Action by C. B. Van Every against the Southern Pacific Railroad Company. From a judgment in favor of the defendant, the plaintiff appeals. Affirmed. Anderson & Anderson, for appellant. Wm. Singer, Jr., and H. V. Reardan, for respondent.

PER CURIAM. This is a companion case to *Anderson v. Railroad Co.* (L. A. 863; decision this day filed) 65 Pac. 950, and upon the authority of that case the judgment here is affirmed.

